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CODE OF FEDERAL REGULATIONS

Title 22
Foreign Relations

Parts 1 to 299

Revised as of April 1, 2014

Containing a codification of documents
of general applicability and future effect

As of April 1, 2014

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Table of Contents

	Page
Explanation	v
Title 22:	
Chapter I—Department of State	3
Chapter II—Agency for International Development	847
Finding Aids:	
Table of CFR Titles and Chapters	1139
Alphabetical List of Agencies Appearing in the CFR	1159
List of CFR Sections Affected	1169

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Title 17 through Title 27.....as of April 1
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CHARLES A. BARTH,
Director,
Office of the Federal Register.
April 1, 2014.

THIS TITLE

Title 22—FOREIGN RELATIONS is composed of two volumes. The first volume, parts 1—299 contains Chapter I—Department of State regulations and Chapter II—Agency for International Development regulations. The second volume, part 300 to End is composed of Chapter III—Peace Corps; Chapter IV—International Joint Commission, United States and Canada; Chapter V—Broadcasting Board of Governors; Chapter VII—Overseas Private Investment Corporation; Chapter IX—Foreign Service Grievance Board; Chapter X—Inter-American Foundation; Chapter XI—International Boundary and Water Commission, United States and Mexico, United States Section; Chapter XII—United States International Development Cooperation Agency; Chapter XIII—Millennium Challenge Board; Chapter XIV—Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel; Chapter XV—African Development Foundation; Chapter XVI—Japan-United States Friendship Commission; and Chapter XVII—United States Institute of Peace. The contents of these volumes represent all current regulations codified under this title of the CFR as of April 1, 2014.

For this volume, Cheryl E. Sirofchuck was Chief Editor. The Code of Federal Regulations publication program is under the direction of the Managing Editor, assisted by Ann Worley.

Title 22—Foreign Relations

(This book contains parts 1 to 299)

Part

CHAPTER I—Department of State 1

CHAPTER II—Agency for International Development 200

CHAPTER I—DEPARTMENT OF STATE

SUBCHAPTER A—GENERAL

Part		*Page*
1	Insignia of rank	9
2	Protection of foreign dignitaries and other official personnel	9
3	Gifts and decorations from foreign governments	11
3a	Acceptance of employment from foreign governments by members of the uniformed services	17
4	Notification of foreign official status	19
5	Organization	20
7	[Reserved]	
9	Security information regulations	22
9a	Security information regulations applicable to certain international energy programs; related material	25
9b	Regulations governing Department of State press building passes	27

SUBCHAPTER B—PERSONNEL

11	Appointment of Foreign Service officers	32
12	Complaints against employees by alleged creditors	50
13	Personnel	50
16	Foreign Service grievance system	51
17	Overpayments from the Foreign Service Retirement and Disability Fund under the Foreign Service Retirement and Disability System (FSRDS) and the Foreign Service Pension System (FSPS)	59
18	Regulations concerning post employment conflict of interest	62
19	Benefits for spouses and former spouses of participants in the Foreign Service retirement and disability system	66
20	Benefits for certain former spouses	87

Part		Page
21	Indemnification of employees	90
	SUBCHAPTER C—FEES AND FUNDS	
22	Schedule of fees for consular services—Department of State and Foreign Service	92
23	Finance and accounting	97
	SUBCHAPTER D—CLAIMS AND STOLEN PROPERTY	
33	Fishermen's Protective Act Guaranty Fund procedures under section 7	99
34	Debt collection	103
35	Program fraud civil remedies	114
	SUBCHAPTER E—VISAS	
40	Regulations pertaining to both nonimmigrants and immigrants under the Immigration and Nationality Act, as amended	130
41	Visas: Documentation of nonimmigrants under the Immigration and Nationality Act, as amended	143
42	Visas: Documentation of immigrants under the Immigration and Nationality Act, as amended	188
43–45	[Reserved]	
46	Control of aliens departing from the United States	215
47	[Reserved]	
	SUBCHAPTER F—NATIONALITY AND PASSPORTS	
50	Nationality procedures	221
51	Passports	226
53	Passport requirement and exceptions	241
	SUBCHAPTER G—PUBLIC DIPLOMACY AND EXCHANGES	
61	World-wide free flow of audio-visual materials	244
62	Exchange visitor program	247
63	Payments to and on behalf of participants in the international educational and cultural exchange program	311
64	Participation by Federal employees in cultural exchange programs of foreign countries	316
65	Foreign students	318
66	Availability of the records of the National Endowment for Democracy	319

Part		Page
67	Organization of the National Endowment for Democracy	327

SUBCHAPTER H—PROTECTION AND WELFARE OF AMERICANS, THEIR PROPERTY AND ESTATES

71	Protection and welfare of citizens and their property	333
72	Deaths and estates	336

SUBCHAPTER I—SHIPPING AND SEAMEN

89	Prohibitions on longshore work by U.S. nationals	345

SUBCHAPTER J—LEGAL AND RELATED SERVICES

91	Import controls	354
92	Notarial and related services	354
93	Service on foreign state	383
94	International child abduction	384
95	Implementation of torture convention in extradition cases	387
96	Accreditation of agencies and approval of persons under the Intercountry Adoption Act of 2000 (IAA)	388
97	Issuance of adoption certificates and custody declarations in Hague Convention adoption cases	442
98	Intercountry adoption—Convention record preservation	445
99	Reporting on Convention and non-Convention adoptions of emigrating children	446

SUBCHAPTER K—ECONOMIC AND OTHER FUNCTIONS

101	Economic and commercial functions	448
102	Civil aviation	449
103	Regulations for implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998 on the taking of samples and on enforcement of requirements concerning recordkeeping and inspections	454
104	International trafficking in persons: Interagency coordination of activities and sharing of information	461

SUBCHAPTER L [RESERVED]

SUBCHAPTER M—INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

120	Purpose and definitions	463
121	The United States munitions list	476
122	Registration of manufacturers and exporters	517

Part		Page
123	Licenses for the export and temporary import of defense articles	520
124	Agreements, off-shore procurement, and other defense services	539
125	Licenses for the export of technical data and classified defense articles	551
126	General policies and provisions	557
127	Violations and penalties	597
128	Administrative procedures	605
129	Registration and licensing of brokers	611
130	Political contributions, fees and commissions	618
	SUBCHAPTER N—MISCELLANEOUS	
131	Certificates of authentication	625
132	Books, maps, newspapers, etc.	625
133	Governmentwide requirements for drug-free workplace (financial assistance)	625
134	Equal Access to Justice Act; implementation	631
135	Uniform administrative requirements for grants and cooperative agreements to state and local governments	637
136	Personal property disposition at posts abroad	664
138	New restrictions on lobbying	667
139	Irish peace process cultural and training program	679
140	Prohibition on assistance to drug traffickers	683
	SUBCHAPTER O—CIVIL RIGHTS	
141	Nondiscrimination in federally-assisted programs of the Department of State—effectuation of title VI of the Civil Rights Act of 1964	690
142	Nondiscrimination on the basis of handicap in programs or activities receiving Federal financial assistance	699
143	Nondiscrimination on the basis of age in programs or activities receiving Federal financial assistance	712
144	Enforcement of non-discrimination on the basis of handicap in programs or activities conducted by the United States Department of State	717
145	Grants and agreements with institutions of higher education, hospitals, and other non-profit organizations	723

Part		Page
146	Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance	751
	SUBCHAPTER P—DIPLOMATIC PRIVILEGES AND IMMUNITIES	
151	Compulsory liability insurance for diplomatic missions and personnel	768
	SUBCHAPTER Q—ENVIRONMENTAL PROTECTION	
161	Regulations for implementation of the National Environmental Policy Act (NEPA)	771
	SUBCHAPTER R—ACCESS TO INFORMATION	
171	Availability of information and records to the public	784
172	Service of process; production or disclosure of official information in response to court orders, subpoenas, notices of depositions, requests for admissions, interrogatories, or similar requests or demands in connection with Federal or State litigation; expert testimony	803
	SUBCHAPTER S—INTERNATIONAL AGREEMENTS	
181	Coordination, reporting and publication of international agreements	809
	SUBCHAPTER T—HOSTAGE RELIEF	
191	Hostage relief assistance	817
192	Victims of terrorism compensation	824
193	Benefits for hostages in Iraq, Kuwait, or Lebanon	835
	SUBCHAPTER U—INTERNATIONAL COMMERCIAL ARBITRATION	
194	Inter-American Commercial Arbitration Commission rules of procedure	837
196	Thomas R. Pickering Foreign Affairs/Graduate Foreign Affairs Fellowship Program	844
197–199	[Reserved]	

SUBCHAPTER A—GENERAL

PART 1—INSIGNIA OF RANK

Sec.
1.1 Office of the Secretary of State.
1.2 Office of the Deputy Secretary of State.
1.3 Office of the Under Secretaries of State.

AUTHORITY: Sec. 4, 63 Stat. 111, as amended; 22 U.S.C. 2658.

§ 1.1 Office of the Secretary of State.

The official flag indicative of the office of Secretary of State shall be as follows: On a blue rectangular field a white disk bearing the official coat of arms of the United States adopted by the act of June 20, 1782, in proper colors. In each of the four corners a white five-pointed star with one point upward. The colors and automobile flag to be the same design, adding a white fringe. For the colors a cord and tassel of blue and white to be added. The sizes to be in accordance with military and naval customs.

[22 FR 10788, Dec. 27, 1957]

§ 1.2 Office of the Deputy Secretary of State.

The official flag indicative of the office of the Deputy Secretary of State shall be as follows: On a white rectangular field a blue disk bearing the official coat of arms of the United States adopted by act of June 20, 1782, in proper colors. In each of the four corners a five-pointed star with one point upward. The colors and automobile flag to be the same design, adding a blue fringe. For the colors a cord and tassel of white in accordance with military and naval customs.

[38 FR 30258, Nov. 2, 1973]

§ 1.3 Office of the Under Secretaries of State.

The official flag indicative of the office of the Under Secretaries of State shall be as follows: On a red rectangular field a white disk bearing the official coat of arms of the United States adopted by act of June 20, 1782, in proper colors. In each of the four corners a white five-pointed star with one point upward. The colors and automobile flag to be the same design, adding a white fringe. For the colors a cord and tassel of white and red to be added. The sizes to be in accordance with military and naval customs.

[38 FR 30258, Nov. 2, 1973]

PART 2—PROTECTION OF FOREIGN DIGNITARIES AND OTHER OFFICIAL PERSONNEL

Sec.
2.1 Designation of personnel to carry firearms and exercise appropriate power of arrest.
2.2 Purpose.
2.3 Notification of foreign officials.
2.4 Designation of official guests.
2.5 Records.

§ 2.1 Designation of personnel to carry firearms and exercise appropriate power of arrest.

(a) The Deputy Assistant Secretary of State for Security is authorized to designate certain employees of the Department of State and the Foreign Service, as well as employees of other departments and agencies detailed to and under the supervision and control of the Department of State, as Security Officers, as follows.

(1) Persons so designated shall be authorized to carry firearms when engaged in the performance of the duties prescribed in section (1) of the act of June 28, 1955, 69 Stat. 188, as amended. No person shall be so designated unless he has either qualified in the use of firearms in accordance with standards established by the Deputy Assistant Secretary of State for Security, or in accordance with standards established by the department or agency from which he is detailed.

(2) Persons so designated shall also be authorized, when engaged in the performance of duties prescribed in section (1) of the act of June 28, 1955, 69 Stat. 188, as amended, to arrest without warrant and deliver into custody any person violating the provisions of section 111 or 112 of title 18, United States Code, in their presence or if they have reasonable grounds to believe that the person to be arrested has

committed or is committing such felony.

(b) When the Under Secretary of State for Management determines that it is necessary, persons designated under paragraph (a) of this section shall be authorized to provide protection to an individual who has been designated by the President to serve as Secretary of State, prior to his appointment, or to a departing Secretary of State. In providing such protection, they are authorized to exercise the authorities described in paragraphs (a) (1) and (2) of section. Such protection shall be for the period or periods determined necessary by the Under Secretary of State for Management, except that in the case of a departing Secretary of State, the period of protection under this paragraph shall in no event exceed 30 calendar days from the date of termination of that individual's incumbency as Secretary of State.

(c) When the Under Secretary of State for Management determines that it is necessary, persons designated under paragraph (a) of this section shall be authorized to provide protection to a departing United States Representative to the United Nations. In providing such protection, they are authorized to exercise the authorities described in paragraphs (a) (1) and (2) of this section. Such protection shall be for the period or periods determined necessary by the Under Secretary of State for Management, except that the period of protection under this paragraph shall in no event exceed 30 calendar days from the date of termination of that individual's incumbency as United States Representative to the United Nations.

(Sec. 4, 63 Stat. 111, as amended, sec. 1, 69 Stat. 188; 22 U.S.C. 2658, 2666)

[29 FR 15571, Nov. 20, 1964, as amended at 47 FR 30480, July 14, 1982; 50 FR 14379, Apr. 12, 1985]

§ 2.2 Purpose.

Section 1116(b)(2) of title 18 of the United States Code, as added by Pub. L. 92–539, An Act for the Protection of Foreign Officials and Official Guests of the United States (86 Stat. 1071), defines the term ''foreign official'' for purposes of that Act as ''any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.'' Section 1116(c)(4) of the same Act defines the term ''official guest'' for the purposes of that Act as ''a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State.'' It is the purpose of this regulation to specify the officer of the Department of State who shall be responsible for receiving notification of foreign officials under the Act and determining whether persons are ''duly notified'' to the United States and who shall be responsible for processing official guest designations by the Secretary of State.

(18 U.S.C. 1116(b)(2), 1116(c)(4); sec. 4 of the Act of May 26, 1949, as amended (22 U.S.C. 2658))

[37 FR 24817, Nov. 22, 1972]

§ 2.3 Notification of foreign officials.

(a) Any notification of a foreign official for purposes of section 1116(b)(2) of Title 18 of the United States Code shall be directed by the foreign government or international organization concerned to the Chief of Protocol, Department of State, Washington, DC 20520. For persons normally accredited to the United States in diplomatic or consular capacities and also for persons normally accredited to the United Nations and other international organizations and in turn notified to the Department of State, the procedure for placing a person in the statutory category of being ''duly notified to the United States'' shall be the current procedure for accreditation, with notification in turn when applicable. The Chief of the Office of Protocol will place on the roster of persons ''duly notified to the United States'' the names of all persons currently accredited and, when applicable, notified in turn, and will maintain the roster as part of the official files of the Department of State adding to and deleting therefrom as changes in accreditations occur.

(b) For those persons not normally accredited, the Chief of Protocol shall determine upon receipt of notification, by letter from the foreign government or international organization concerned, whether any person who is the subject of such a notification has been duly notified under the Act. Any inquiries by law enforcement officers or other persons as to whether a person has been duly notified shall be directed to the Chief of Protocol. The determination of the Chief of Protocol that a person has been duly notified is final.

(18 U.S.C. 1116(b)(2), 1116(c)(4); sec. 4 of the Act of May 26, 1949, as amended (22 U.S.C. 2658))

[37 FR 24818, Nov. 22, 1972]

§ 2.4 Designation of official guests.

The Chief of Protocol shall also maintain a roster of persons designated by the Secretary of State as official guests. Any inquiries by law enforcement officers or other persons as to whether a person has been so designated shall be directed to the Chief of Protocol. The designation of a person as an official guest is final. Pursuant to section 2658 of title 22 of the U.S.C., the authority of the Secretary of State to perform the function of designation of official guests is hereby delegated to the Chief of Protocol.

(22 U.S.C. 2658)

[45 FR 55716, Aug. 21, 1980]

§ 2.5 Records.

The Chief of Protocol shall maintain as a part of the official files of the Department of State a cumulative roster of all persons who have been duly notified as foreign officials or designated as official guests under this part. The roster will reflect the name, position, nationality, and foreign government or international organization concerned or purpose of visit as an official guest and reflect the date the person was accorded recognition as being ''duly notified to the United States'' or designated as an official guest and the date, if any, of termination of such status.

(18 U.S.C. 1116(b)(2), 1116(c)(4); sec. 4 of the Act of May 26, 1949, as amended (22 U.S.C. 2658))

[37 FR 24818, Nov. 22, 1972]

PART 3—GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS

Sec.
3.1 Purpose.
3.2 Authority.
3.3 Definitions.
3.4 Restriction on acceptance of gifts and decorations.
3.5 Designation of officials and offices responsible for administration of foreign gifts and decorations.
3.6 Procedure to be followed by employees in depositing gifts of more than minimal value and reporting acceptance of travel or travel expenses.
3.7 Decorations.
3.8 Approval of retention of gifts or decorations with employing agency for official use.
3.9 Disposal of gifts and decorations which become the property of the United States.
3.10 Enforcement.
3.11 Responsibility of chief of mission to inform host government of restrictions on employees' receipt of gifts and decorations.
3.12 Exemption of grants and other foreign government assistance in cultural exchange programs from coverage of foreign gifts and decorations legislation.

AUTHORITY: Sec. 515(a)(1), 91 Stat. 862, amending 5 U.S.C. 7342 (1976).

SOURCE: 45 FR 80819, Dec. 8, 1980, unless otherwise noted.

§ 3.1 Purpose.

These regulations provide basic standards for employees of the Department of State, the United States International Development Cooperation Agency (IDCA), the Agency for International Development (AID), and the International Communication Agency (USICA), their spouses (unless separated) and their dependents to accept and retain gifts and decorations from foreign governments.

§ 3.2 Authority.

(a) Section 515(a)(1) of the Foreign Relations Authorization Act of 1978 (91 Stat. 862–866), approved August 17, 1977, (hereafter referred to as ''the Act'') amended section 7342 of title 5, U.S.

Code (1976), making substantial changes in the law relating to the acceptance and retention of gifts and decorations from foreign governments.

(b) 5 U.S.C. 7342(g) authorizes each employing agency to prescribe regulations as necessary to carry out the new law.

§ 3.3 Definitions.

When used in this part, the following terms have the meanings indicated:

(a) *Employee* means (1) an officer or employee of the Department, AID, IDCA, or USICA, including an expert or consultant, however appointed, and (2) a spouse (unless separated) or a dependent of such a person, as defined in section 152 of the Internal Revenue Code of 1954 (26 U.S.C. 152).

(b) *Foreign government* means: (1) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government; (2) any international or multinational organization whose membership is composed of any unit of foreign government as described in paragraph (b)(1) of this section; (3) any agent or representative of any such unit or organization, while acting as such;

(c) *Gift* means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government;

(d) *Decoration* means an order, device, medal, badge, insignia, emblem or award tendered by, or received from, a foreign government;

(e) *Minimal value* means retail value in the United States at the time of acceptance of $100 or less, except that on January 1, 1981, and at 3-year intervals thereafter, ''minimal value'' is to be redefined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period.

§ 3.4 Restriction on acceptance of gifts and decorations.

(a) An employee is prohibited from requesting or otherwise encouraging the tender of a gift or decoration from a foreign government. An employee is also prohibited from accepting a gift or decoration from a foreign government, except in accordance with these regulations.

(b) An employee may accept and retain a gift of minimal value tendered and received as a souvenir or mark of courtesy, subject, however, to the following restrictions—

(1) Where more than one tangible item is included in a single presentation, the entire presentation shall be considered as one gift, and the aggregate value of all items taken together must not exceed ''minimal value''.

(2) The donee is responsible for determining that a gift is of minimal value in the United States at the time of acceptance. However, should any dispute result from a difference of opinion concerning the value of a gift, the employing agency will secure the services of an outside appraiser to establish whether the gift is one of ''minimal value''. If, after an appraisal has been made, it is established that the value of the gift in question is $200 or more at retail in the United States, the donee will bear the costs of the appraisal. If, however, the appraised value is established to be less than $200, the employing agency will bear the costs.

(c) An employee may accept a gift of more than minimal value when (1) such gift is in the nature of an educational scholarship or medical treatment, or (2) it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, except that a tangible gift of more than minimal value is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States.

(d) An employee may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than minimal value if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency. Except where the employing agency has specific interests which may be favorably affected by employee travel wholly outside the United States, even though it would not normally authorize its employees

to engage in such travel, the standards normally applied to determine when proposed travel will be in the best interests of the employing agency and of the United States Government shall be applied in approving acceptance of travel or travel expenses offered by a foreign government.

(1) There are two circumstances under which employees may accept gifts of travel or expenses:

(i) When the employee is issued official travel orders placing him or her in the position of accepting travel or travel expenses offered by a foreign government which are directly related to the authorized purpose of the travel; or

(ii) When the employee's travel orders specifically anticipate the acceptance of additional travel and travel expenses incident to the authorized travel.

(2) When an employee is traveling under circumstances described in paragraph (d)(1)(i) of this section, that is, without specific instructions authorizing acceptance of additional travel expenses from a foreign government, the employee must file a report with the employing angency under the procedures prescribed in §3.6.

(e) Since tangible gifts of more than minimal value may not lawfully become the personal property of the donee, all supervisory officials shall, in advising employees of their responsibilities under the regulations, impress upon them their obligation to decline acceptance of such gifts, whenever possible, at the time they are offered, or to return them if they have been sent or delivered without a prior offer. All practical measures, such as periodic briefings, shall be taken to minimize the number of gifts which employees must deposit and which thus become subject to disposal as provided by law and regulation. Employees should not accept gifts of more than minimal value on the assumption that refusal would be likely to ''cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States''. In many instances it should be possible, by explanation of the prohibition against an employee's retention of such gifts, to avoid consequences of acceptance, including possible return of the gift to the donor. Refusal of the gift at the inception should typically be regarded as in the interest both of the foreign government donor and the U.S. Government.

§3.5 Designation of officials and offices responsible for administration of foreign gifts and decorations.

(a) The Act effects a significant degree of decentralization of administration relative to the disposal of foreign gifts and decorations which become U.S. Government property. Each agency is now responsible for receiving from its employees deposits of foreign gifts of more than minimal value, as well as of foreign decorations not meeting the statutory criteria for retention by the recipient. The agency is also responsible for disposing of this property by return to the donor, for retaining it in the agency if official use of it is approved, for reporting to the General Services Administration within 30 calendar days after deposit items neither disposed of nor retained, and for assuming custody, proper care and handling of such property pending removal from that custody pursuant to disposal arrangements by the General Services Administration. The Secretary of State, however, is made responsible for providing guidance to other executive agencies in the development of their own regulations to implement the Act, as well as for the annual publication of lists of all gifts of more than minimal value deposited by Federal employees during the preceding year. [See §3.5(c).] Authority for the discharge of the Secretary's responsibilities is delegated by these regulations to the Chief of Protocol.

(b) The Office of the Chief of Protocol retains primary responsibility for administration of the Act within the Department of State. That Office will, however, serve as the depository only for those foreign gifts and decorations which are turned in by State Department employees. The Director of Personnel Services of the USICA will have responsibility for administration of the Act within that agency and will serve as the depository of foreign gifts and decorations. Employees of the other foreign affairs agencies must deposit with their respective agencies any gifts

or decorations deposit of which is required by law.

(c) Any questions concerning the implementation of these regulations or interpretation of the law should be directed to the following:

(1) For the Department of State, to the Office of Protocol or to the Office of the Assistant Legal Adviser for Management, as appropriate;

(2) For IDCA, to the Office of the General Counsel;

(3) For AID, to the Assistant General Counsel for Employee and Public Affairs; and

(4) For USICA, to the General Counsel.

§ 3.6 Procedure to be followed by employees in depositing gifts of more than minimal value and reporting acceptance of travel or travel expenses.

(a) An employee who has accepted a tangible gift of more than minimal value shall, within 60 days after acceptance, relinquish it to the designated depository office for the employing agency for disposal or, with the approval of that office, deposit it for official use at a designated location in the employing agency or at a specified Foreign Service post. The designated depository offices are:

(1) For the Department of State, the Office of Protocol;

(2) For IDCA, the General Services Division of the Office of Management Planning in AID;

(3) For AID, the General Services Division of the Office of Management Planning; and

(4) For USICA, the Office of Personnel Services.

(b) At the time that an employee deposits gifts of more than minimal value for disposal or for official use pursuant to paragraph (a) of this section, or within 30 days after accepting a gift of travel or travel expenses as provided in § 3.4(d) (unless the gift of such travel or travel expenses has been accepted in accordance with specific instructions from the Department or agency), the employee shall file a statement with the designated depository office with the following information:

(1) For each tangible gift reported:

(i) The name and position of the employee;

(ii) A brief description of the gift and the circumstances justifying acceptance;

(iii) The identity of the foreign government and the name and position of the individual who presented the gift;

(iv) The date of acceptance of the gift;

(v) The donee's best estimate in specific dollar terms of the value of the gift in the United States at the time of acceptance; and

(vi) Disposition or current location of the gift. (For State Department employees, forms for this purpose are available in the Office of Protocol.)

(2) For each gift of travel or travel expenses:

(i) The name and position of the employee;

(ii) A brief description of the gift and the circumstances justifying acceptance; and

(iii) The identity of the foregign government and the name and position of the individual who presented the gift.

(c) The information contained in the statements called for in paragraph (b) of this section is needed to comply with the statutory requirement that, not later than Janaury 31 of each year, the Secretary of State publish in the FEDERAL REGISTER a comprehensive listing of all such statements filed by Federal employees concerning gifts of more than minimal value received by them during the preceding year.

§ 3.7 Decorations.

(a) Decorations tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance may be accepted, retained, and worn by an employee, subject to the approval of the employing agency. Without such approval, the decoration is deemed to have been accepted on behalf of the United States and, like tangible gifts of more than minimal value, must be deposited by the employee with the designated depository office for the employing agency within sixty days after acceptance, for retention for official use or for disposal in accordance with § 3.9.

(b) The decision as to whether a decoration has been awarded for outstanding or unusually meritorious performance will be made:

(1) For the Department of State, by the supervising Assistant Secretary of State or comparable official, except that, in the case of a decoration awarded to an Assistant Secretary or other officer of comparable or higher rank, the decision shall be made by the Office of Protocol;

(2) For IDCA, by the Assistant Director for Administration;

(3) For AID, by the Director of Personnel Management; and

(4) For USICA, by the Supervising Associate Director, the General Counsel, or the Director of the Office of Congressional and Public Liaison (for domestic employees), and by the Director of Area Offices (for overseas employees).

(c) To justify an affirmative decision, a statement from the foreign government, preferably in the form of a citation which shows the specific basis for the tender of the award, should be supplied. An employee who has received or been tendered a decoration should forward to the designated depository office of the employing agency a request for review of the case. This request should contain a statement of circumstances of the award and such documentation from the foreign government as has accompanied it. The depository office will obtain the decision of the cognizant office as to whether the award meets the statutory criteria and thus whether the decoration may be retained and worn. Pending receipt of that decision, the decoration should remain in the custody of the recipient.

§3.8 Approval of retention of gifts or decorations with employing agency for official use.

(a) At the request of an overseas post or an office within the employing agency, a gift or decoration deemed to have been accepted on behalf of the United States may be retained for official use. Such retention should be approved:

(1) For the Department of State, by the Chief of Protocol;

(2) For IDCA, by AID's Director of Management Operations;

(3) For AID, by the Director of Management Operations; and

(4) For USICA, by the Associate Director for Management.

However, to qualify for such approval, the gift or decoration should be an item which can be used in the normal conduct of agency business, such as a rug or a tea service, or an art object meriting display, such as a painting or sculpture. Personal gift items, such as wristwatches, jewelry, or wearing apparel, should not be regarded as suitable for ''official use''. Only under unusual circumstances will retention of a decoration for official use be authorized. Every effort should be made to place each ''official use'' item in a location that will afford the largest number of employees, and, if feasible, members of the public, the maximum opportunity to receive the benefit of its display, provided the security of the location is adequate.

(b) Items approved for official use must be accounted for and safeguarded as Federal property at all times under standard Federal property management procedures. Within 30 days after the official use of a gift has been terminated, the gift or decoration shall be deposited with the designated depository office of the employing agency to be held pending completion of disposal arrangements by the General Services Administration.

§3.9 Disposal of gifts and decorations which become the property of the United States.

(a) Gifts and decorations which have been reported to an employing agency shall either be returned to the donor or kept in safe storage pending receipt of instructions from the General Services Administration for transfer, donation or other disposal under the provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, and the Federal Property Management Regulations (41 CFR part 101–49). The employing agency shall examine each gift or decoration and the circumstances surrounding its donation and assess whether any adverse effect upon the foreign relations of the United States might result from a return of the gift (or decoration) to the donor, which shall be the preferred

means of disposal. If this is not deemed feasible, the employing agency is required by GSA regulations to report deposit of the gift or decoration within 30 calendar days, using Standard Form 120, Report of Excess Personal Property and, as necessary, Standard Form 120A, Continuation Sheet, and citing section 7342 of title 5, U.S. Code (1976), on the reporting document. Such reports shall be submitted to the General Services Administration, Washington National Capital Region (WDPO), Attention: Federal Property Resources Service, Seventh and D Streets, SW., Washington, DC 20407.

(b) No gift or decoration deposited with the General Services Administration for disposal may be sold without the approval of the Secretary of State, upon a determination that the sale will not adversely affect the foreign relations of the United States. When depositing gifts or decorations with the designated depository office of their employing agency, employees may indicate their interest in participating in any subsequent sale of the items by the Government. Before gifts and decorations may be considered for sale by the General Services Administration, however, they must first have been offered for transfer to Federal agencies and for donation to the States. Consequently, employees should understand that there is no assurance that an item will be offered for sale, or, if so offered, that it will be feasible for an employee to participate in the sale. Employees are reminded in this connection that the primary aim of the Act is to discourage employees' acceptance of gifts of more than minimal value.

§ 3.10 Enforcement.

(a) Each employing agency is responsible under the Act for reporting to the Attorney General cases in which there is reason to believe that one of its employees has violated the Act. The Attorney General in turn may file a civil action in any United States District Court against any Federal employee who has knowingly solicited or accepted a gift from a foreign government in violation of the Act, or who has failed to deposit or report such gift, as an Act required by the Act. In such case, the court may assess a maximum penality of the retail value of a gift improperly solicited or received, plus $5,000.

(b) Supervisory officials at all levels within employing agencies shall be responsible for providing periodic reorientation of all employees under their supervision on the basic features of the Act and these regulations, and for ensuring that those employees observe the requirements for timely reporting and deposit of any gifts of more than minimal value they may have accepted.

(c) Employees are advised of the following actions which may result from failure to comply with the requirements of the Act and these regulations:

(1) Any supervisor who has substantial reason to believe that an employee under his or her supervision has violated the reporting or other compliance provisions of the Act shall report the facts and circumstances in writing to the senior official in charge of administration within the cognizant bureau or office or at the post abroad. If that official upon investigation decides that an employee who is the donee of a gift or is the recipient of travel or travel expenses has, through actions within the employee's control, failed to comply with the procedures established by the Act and these regulations, the case shall be referred to the Attorney General for appropriate action.

(2) In cases of confirmed evidence of a violation, whether or not such violation results in the taking of action by the Attorney General, the senior administrative official referred to in paragraph (c)(1) of this section as responsible for forwarding a violation report to the Attorney General shall institute appropriate disciplinary action against an employee who has failed to (i) Deposit tangible gifts within 60 days after acceptance, (ii) account properly for the acceptance of travel expenses or (iii) comply with the Act's requirements respecting disposal of gifts and decorations retained for official use.

(3) In cases where there is confirmed evidence of a violation, but no evidence that the violation was willful on the part of the employee, the senior administrative official referred to in paragraph (c)(1) of this section shall institute appropriate disciplinary action of a lesser degree than that called for in

paragraph (c)(2) of this section in order to deter future violations by the same or another employee.

§3.11 Responsibility of chief of mission to inform host government of restrictions on employees' receipt of gifts and decorations.

A special provision of the Act requires the President to direct every chief of a United States diplomatic mission to inform the host government that it is a general policy of the United States Government to prohibit its employees from receiving gifts of more than minimal value or decorations that have not been tendered ''in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance.'' Accordingly, all Chiefs of Mission shall in January of each year conduct a thorough and explicit program of orientation aimed at appropriate officials of the host government concerning the operation of the Act.

§3.12 Exemption of grants and other foreign government assistance in cultural exchange programs from coverage of foreign gifts and decorations legislation.

The Act specifically excludes from its application grants and other forms of assistance ''to which section 108A of the Mutual Educational and Cultural Exchange Act of 1961 applies''. See 22 U.S.C. 2558 (a) and (b) for the terms and conditions under which Congress consents to the acceptance by a Federal employee of grants and other forms of assistance provided by a foreign government to facilitate the participation of such employee in a cultural exchange.

PART 3a—ACCEPTANCE OF EMPLOYMENT FROM FOREIGN GOVERNMENTS BY MEMBERS OF THE UNIFORMED SERVICES

Sec.

3a.1 Definitions.
3a.2 Requirement for approval of foreign government employment.
3a.3 Authority to approve or disapprove proposed foreign government employment.
3a.4 Procedure for requesting approval.
3a.5 Basis for approval or disapproval.
3a.6 Notification of approval.
3a.7 Notification of disapproval and reconsideration.
3a.8 Change in status.

AUTHORITY: Sec. 509, 91 Stat. 859 (37 U.S.C. 801 Note); sec. 4, as amended, 63 Stat. 111 (22 U.S.C. 2658).

SOURCE: 43 FR 55393, Nov. 28, 1978, unless otherwise noted.

§3a.1 Definitions.

For purposes of this part—

(a) *Applicant* means any person who requests approval under this part to accept any civil employment (and compensation therefor) from a foreign government and who is: (1) Any retired member of the uniformed services;

(2) Any member of a Reserve component of the Armed Forces; or

(3) Any member of the commissioned Reserve Corps of the Public Health Service.

The term ''applicant'' also includes persons described in paragraph (a)(1), (2), or (3) of this section, who have already accepted foreign government employment and are requesting approval under this part to continue such employment.

(b) *Uniformed services* means the Armed Forces, the commissioned Regular and Reserve Corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

(c) *Armed Forces* means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(d) *Secretary concerned* means: (1) The Secretary of the Army, with respect to retired members of the Army and members of the Army Reserve;

(2) The Secretary of the Navy, with respect to retired members of the Navy and the Marine Corps, members of the Navy and Marine Corps Reserves, and retired members of the Coast Guard and members of the Coast Guard Reserve when the Coast Guard is operating as a service in the Navy;

(3) The Secretary of the Air Force, with respect to retired members of the Air Force and members of the Air Force Reserve;

(4) The Secretary of Transportation, with respect to retired members of the Coast Guard and members of the Coast

Guard Reserve when the Coast Guard is not operating as a service in the Navy;

(5) The Secretary of Commerce, with respect to retired members of the commissioned corps of the National Oceanic and Atmospheric Administration; and

(6) The Secretary of Health, Education, and Welfare, with respect to retired members of the commissioned Regular Corps of the Public Health Service and members of the commissioned Reserve Corps of the Public Health Service.

§ 3a.2 Requirement for approval of foreign government employment.

(a) The United States Constitution (Article I, section 9, clause 8) prohibits the acceptance of civil employment with a foreign government by an officer of the United States without the consent of Congress. Congress has consented to the acceptance of civil employment (and compensation therefor) by any person described in § 3a.1(b) subject to the approval of the Secretary concerned and the Secretary of State (37 U.S.C. 801, Note). Civil employment with a foreign government may not be accepted without such approval by any person so described.

(b) The Secretary of State has no authority to approve employment with a foreign government by any officer of the United States other than a person described in § 3a.1(a). The acceptance of employment with a foreign government by any other officer of the United States remains subject to the constitutional prohibition described in paragraph (a) of this section.

(c) Any person described in § 3a.1(a) who accepts employment with a foreign government without the approval required by this section or otherwise obtaining the consent of Congress is subject to forfeiture of retired pay to the extent of his or her compensation from the foreign government, according to the Comptroller General of the United States (44 Comp. Gen. 139 (1964)). This forfeiture is in addition to any other penalty which may be imposed under law or regulation.[1]

§ 3a.3 Authority to approve or disapprove proposed foreign government employment.

The Director, Bureau of Politico-Military Affairs, is authorized to approve or disapprove any request by an applicant for approval under this part to accept civil employment (and compensation therefor) from a foreign government. The Director may delegate this authority within the Bureau of Politico-Military Affairs, Department of State.

§ 3a.4 Procedure for requesting approval.

(a) An applicant must submit a request for approval of foreign government employment to the Secretary concerned, whose approval is also required by law for the applicant's acceptance of civil employment from a foreign government. The request must contain information concerning the applicant's status, the nature of the proposed employment in as much detail as possible, the identity of and relationship to the foreign government concerned, and other matters as may be required by the Secretary concerned.

(b) Requests approved by the Secretary concerned will be referred to the Director, Bureau of Politico-Military Affairs, for approval. Requests received by the Director, Bureau of Politico-Military Affairs, directly from an applicant will be initially forwarded to the Secretary concerned, or his designee, for approval of disapproval.

§ 3a.5 Basis for approval or disapproval.

Decisions by the Director, Bureau of Politico-Military Affairs, under this part shall be based on whether the applicant's proposed employment with a foreign government would adversely affect the foreign relations of the United States, in light of the applicant's official status as a retiree or reservist.

[1] Approval under this part does not constitute an exception to the provisions of the Immigration and Nationality Act concerning loss of United States citizenship, for example, by becoming a citizen of or taking an oath of allegiance to another country. See 8 U.S.C. 1481 *et seq*.

§3a.6 Notification of approval.

The Director, Bureau of Politico-Military Affairs, will notify the Secretary concerned when an applicant's proposed foreign government employment is approved. Notification of approval to the applicant will be made by the Secretary concerned or his designee.

§3a.7 Notification of disapproval and reconsideration.

(a) The Director, Bureau of Politico-Military Affairs, will notify the applicant directly when an applicant's proposed foreign employment is disapproved, and will inform the Secretary concerned.

(b) Each notification of disapproval under this section must include a statement of the reasons for the disapproval, with as much specificity as security and foreign policy considerations permit, together with a notice of the applicant's right to seek reconsideration of the disapproval under paragraph (c) of this section.

(c) Within 60 days after receipt of the notice of disapproval, an applicant whose request has been disapproved may submit a request for reconsideration by the Director, Bureau of Politico-Military Affairs. A request for reconsideration should provide information relevant to the reasons set forth in the notice of disapproval.

(d) The disapproval of a request by the Director, Bureau of Politico-Military Affairs, will be final, unless a timely request for reconsideration is received. In the event of a request for reconsideration, the Director, Bureau of Politico-Military Affairs, will make a final decision after reviewing the record of the request. A final decision after reconsideration to approve the applicant's proposed employment with a foreign government will be communicated to the Secretary concerned as provided in §3a.6. A final decision after reconsideration to disapprove the applicant's proposed employment with a foreign government will be communicated directly to the applicant as provided in paragraph (a) of this section and the Secretary concerned will be informed. The Director's authority to make a final decision after reconsideration may not be redelegated.

§3a.8 Change in status.

In the event that an applicant's foreign government employment approved under this part is to be materially changed, either by a substantial change in duties from those described in the request upon which the original approval was based, or by a change of employer, the applicant must obtain further approval in accordance with this part for such changed employment.

PART 4—NOTIFICATION OF FOREIGN OFFICIAL STATUS

Sec.
4.1 General.
4.2 Procedure.

AUTHORITY: 22 U.S.C. 2651a(a)(4).

SOURCE: 61 FR 32328, June 24, 1996, unless otherwise noted.

§4.1 General.

In accordance with Article 10 of the Vienna Convention on Diplomatic Relations and Article 24 of the Vienna Convention on Consular Relations, diplomatic missions must notify the Office of Protocol immediately upon the arrival, in the United States, of any foreign government officer or employee (including domestics and family members), who are serving at diplomatic missions, consular posts, or miscellaneous foreign government offices. If the employee is already in the United States in some other capacity, the notification should be made upon assumption of duties. This initial notification requirement also includes all U.S. citizens and permanent resident aliens who are employed by foreign missions.

§4.2 Procedure.

Notification and subsequent changes are made as follows:

(a) Diplomatic and career consular officers and their dependents: Form DSP–110, *Notification of Appointment of Foreign Diplomatic Officer and Career Consular Officer*;

(b) All other foreign government employees who are serving at diplomatic missions, consular posts, or miscellaneous foreign government offices and

their dependents: Form DSP–111, *Notification of Appointment of Foreign Government Employee*.

(c) Honorary consular officers: Form DSP–112, *Notification of Appointment of Honorary Consular Officer*.

(d) Missions should use Form DSP–113, *Notification of Change—Identification Card Request*, to promptly inform the Department of State of any change in the status of officers or employees of the missions and their family members originally reported to Protocol, or to apply for an identification card.

(e) Upon termination of employment of any diplomatic or consular officer, honorary consular officer, embassy or consular employee, or miscellaneous foreign government staff member, a Form DSP–115, *Notice of Termination of Diplomatic, Consular, or Foreign Government Employment*, must be submitted to the Office of Protocol.

PART 5—ORGANIZATION

Sec.

5.1 Introduction.
5.2 Central and field organization, established places at which, the officers from whom, and the methods whereby the public may secure information, make submittals, or request, or obtain decisions; and statements of the general course and method by which its functions are channeled and determined.
5.3 Rules of procedure, description of forms available or the places at which forms may be obtained, and instructions as to the scope and content of all papers, reports, or examinations.
5.4 Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency.

AUTHORITY: Sec. 4, 63 Stat. 111, as amended, sec. 501, 65 Stat. 290; 22 U.S.C. 2658, 31 U.S.C. 483a, 5 U.S.C. 552, E.O. 10501; 18 FR 7049; 3 CFR, 1949–1953 Comp., page 979.

SOURCE: 33 FR 7078, May 11, 1968, unless otherwise noted.

§ 5.1 Introduction.

The sections in this part 5 are issued pursuant to section 3 of the Administrative Procedure Act, 5 U.S.C. 552, effective July 4, 1967.

§ 5.2 Central and field organization, established places at which, the officers from whom, and the methods whereby the public may secure information, make submittals, or request, or obtain decisions; and statements of the general course and method by which its functions are channeled and determined.

(a) The following statements of the central and field organization of the Department of State and its Foreign Service posts are hereby prescribed:

(1) The central organization of the Department of State was issued as Public Notice No. 267, 32 FR 8923, June 22, 1967.

(2) The foreign field organization of the Department of State was issued as Public Notice No. 254, 32 FR 3712, March 3, 1967.

(3) The domestic field organization of the Department of State was issued as Public Notice No. 268, 32 FR 8925, June 22, 1967.

(b) As used in the following sections, the term ''Department of State'' includes all offices within the Department in Washington, its domestic field offices in the United States, all Foreign Service posts throughout the world, and U.S. missions to international organizations unless otherwise specified.

(c) Any person desiring information concerning a matter handled by the Department of State, or any person desiring to make a submittal or request in connection with such a matter, should communicate either orally or in writing with the appropriate office. If the office receiving the communication does not have jurisdiction to handle the matter, the communication, if written, will be forwarded to the proper office, or, if oral, the person will be advised how to proceed. When the submittal or request consists of a formal application for one of the documents, privileges, or other benefits provided for in the laws administered by the Department of State, or in the regulations implementing these laws, the instructions on the form as to preparation and place of submission should be followed. In such cases, the provisions of this part referring to the particular regulation concerned should be consulted.

§5.3 Rules of procedure, description of forms available or the places at which forms may be obtained, and instructions as to the scope and content of all papers, reports, or examinations.

Rules of procedure regarding the following listed matters may be consulted under the corresponding regulations referenced in §5.4, or obtained upon application to the offices listed below. Forms pertaining to the following listed matters, and instructions relating thereto may also be obtained at the offices indicated below:

Subject matter	Office	Address
Appointment of Foreign Service Officers.	Board of Examiners for the Foreign Service.	Department of State, Room 7314, 1800 N. Kent St., Arlington, Va. 22209.
Authentication and other services	Document and Reference Division.	Department of State, Room 2815, 22d and D Sts. NW., Washington, DC 20520.
Claims and stolen property	Legal Adviser	Department of State, 2201 C Street NW., Washington, DC 20520.
International educational and cultural exchange program.	Bureau of Educational and Cultural Affairs.	Department of State, 2201 C Street NW., Washington, DC 20520.
International traffic in arms	Office of Munitions Control	Department of State, Room 800, 1700 N. Lynn St., Arlington, Va. 22209.
Nationality and passports	Passport Office	Department of State, Room 362, 1425 K St., NW., Washington, DC 20524.
Protection and welfare of U.S. citizens, shipping and seamen, and other consular services abroad.	Office of Special Consular Services.	Department of State, 2201 C Street NW., Washington, DC 20520.
Visa issuance	Visa Office	Department of State, Annex 2, 515 22d Street NW., Washington, DC 20520.

§5.4 Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency.

(a) The regulations of the Department of State required to be published under the provisions of the Administrative Procedure Act are found in the Code of Federal Regulations and the FEDERAL REGISTER. Any person desiring information with respect to a particular procedure should examine the pertinent regulation cited hereafter.

(b) The following are citations to regulations within the scope of this section.

(1) Acceptance of Gifts and Decorations from Foreign Governments. 22 CFR part 3 *et seq*.

(2) Employee Responsibility and Conduct. 22 CFR part 10 *et seq*.

(3) Appointment of Foreign Service Officers. 22 CFR part 11 *et seq*.

(4) Fees for Services in the United States, fees and Charges, Foreign service. 22 CFR part 21 *et seq.;* 22 CFR part 22 *et seq*.

(5) Claims and Stolen Property. 22 CFR part 31 *et seq*.

(6) Issuance of Visas. 22 CFR parts 41–42 *et seq*.

(7) Nationality and Passports. 22 CFR part 50 *et seq*.

(8) International Educational and Cultural Exchanges. 22 CFR part 61 *et seq*.

(9) Protection and Welfare of Americans Abroad. 22 CFR part 71 *et seq*.

(10) Shipping and Seamen Abroad. 22 CFR part 81 *et seq*.

(11) Other Consular Services Abroad. 22 CFR part 91 *et seq*.

(12) Economic, Commercial and Civil Air Functions Abroad. 22 CFR part 101 *et seq*.

(13) International Traffic in Arms. 22 CFR part 121 *et seq*.

(14) Certificates of Authentication. 22 CFR part 131 *et seq*.

(15) Civil Rights. 22 CFR part 141 *et seq*.

(16) Department of State Procurement. 41 CFR part 6–1 *et seq*.

(c) These regulations are supplemented from time to time by amendments appearing initially in the FEDERAL REGISTER.

PART 7 [RESERVED]

PART 9—SECURITY INFORMATION REGULATIONS

Sec.
9.1 Basis.
9.2 Objective.
9.3 Senior agency official.
9.4 Original classification.
9.5 Original classification authority.
9.6 Derivative classification.
9.7 Identification and marking.
9.8 Classification challenges.
9.9 Declassification and downgrading.
9.10 Mandatory declassification review.
9.11 Systematic declassification review.
9.12 Access to classified information by historical researchers and certain former government personnel.
9.13 Safeguarding.

AUTHORITY: E.O. 12958 (60 FR 19825, April 20, 1995) as amended; Information Security Oversight Office Directive No. 1, 32 CFR 2001 (68 FR 55168, Sept. 22, 2003).

SOURCE: 72 FR 30972, June 5, 2007, unless otherwise noted.

§ 9.1 Basis.

These regulations, taken together with the Information Security Oversight Office Directive No. 1 dated September 22, 2003, and Volume 5 of the Department's Foreign Affairs Manual, provide the basis for the security classification program of the U.S. Department of State (''the Department'') implementing Executive Order 12958, ''Classified National Security Information'', as amended (''the Executive Order'').

§ 9.2 Objective.

The objective of the Department's classification program is to ensure that national security information is protected from unauthorized disclosure, but only to the extent and for such a period as is necessary.

§ 9.3 Senior agency official.

The Executive Order requires that each agency that originates or handles classified information designate a senior agency official to direct and administer its information security program. The Department's senior agency official is the Under Secretary of State for Management. The senior agency official is assisted in carrying out the provisions of the Executive Order and the Department's information security program by the Assistant Secretary for Diplomatic Security, the Assistant Secretary for Administration, and the Deputy Assistant Secretary for Information Sharing Services.

§ 9.4 Original classification.

(a) *Definition.* Original classification is the initial determination that certain information requires protection against unauthorized disclosure in the interest of national security (*i.e.*, national defense or foreign relations of the United States), together with a designation of the level of classification.

(b) *Classification levels.* (1) *Top Secret* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) *Secret* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) *Confidential* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(c) *Classification requirements and limitations.* (1) Information may not be considered for classification unless it concerns:

(i) Military plans, weapons systems, or operations;

(ii) Foreign government information;

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

(iv) Foreign relations or foreign activities of the United States, including confidential sources;

(v) Scientific, technological, or economic matters relating to the national security; which includes defense against transnational terrorism;

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

(vii) Vulnerabilities or capabilities of systems, installations, infrastructures,

projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or

(viii) Weapons of mass destruction.

(2) In classifying information, the public's interest in access to government information must be balanced against the need to protect national security information.

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

(4) A reference to classified documents that does not directly or indirectly disclose classified information may not be classified or used as a basis for classification.

(5) Only information owned by, produced by or for, or under the control of the U.S. Government may be classified.

(6) The unauthorized disclosure of foreign government information is presumed to cause damage to national security.

(d) *Duration of classification.* (1) Information shall be classified for as long as is required by national security considerations, subject to the limitations set forth in section 1.5 of the Executive Order. When it can be determined, a specific date or event for declassification in less than 10 years shall be set by the original classification authority at the time the information is originally classified. If a specific date or event for declassification cannot be determined, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years.

(2) An original classification authority may extend the duration of classification, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under the Executive Order are met.

(3) Information marked for an indefinite duration of classification under predecessor orders, such as ''Originating Agency's Determination Required'' (OADR) or containing no declassification instructions shall be subject to the declassification provisions of Part 3 of the Order, including the provisions of section 3.3 regarding automatic declassification of records older than 25 years.

§9.5 Original classification authority.

(a) Authority for original classification of information as *Top Secret* may be exercised by the Secretary and those officials delegated this authority in writing by the Secretary. Such authority has been delegated to the Deputy Secretary, the Under Secretaries, Assistant Secretaries and other Executive Level IV officials and their deputies; Chiefs of Mission, Charge d'Affaires, and Principal Officers at autonomous posts abroad; and to other officers within the Department as set forth in Department Notice dated May 26, 2000.

(b) Authority for original classification of information as *Secret or Confidential* may be exercised only by the Secretary, the Senior Agency Official, and those officials delegated this authority in writing by the Secretary or the Senior Agency Official. Such authority has been delegated to Office Directors and Division Chiefs in the Department, Section Heads in Embassies and Consulates abroad, and other officers within the Department as set forth in Department Notice dated May 26, 2000. In the absence of the Secret or Confidential classification authority, the person designated to act for that official may exercise that authority.

§9.6 Derivative classification.

(a) *Definition.* Derivative classification is the incorporating, paraphrasing, restating or generating in new form information that is already classified and the marking of the new material consistent with the classification of the source material. Duplication or reproduction of existing classified information is not derivative classification.

(b) *Responsibility.* Information classified derivatively from other classified information shall be classified and

marked in accordance with instructions from an authorized classifier or in accordance with an authorized classification guide and shall comply with the standards set forth in sections 2.1–2.2 of the Executive Order and the ISOO implementing directives in 32 CFR 2001.22.

(c) *Department of State Classification Guide*. The Department of State Classification Guide (DSCG) is the primary authority for the classification of information in documents created by Department of State personnel. The Guide is classified ''Confidential'' and is found on the Department of State's classified Web site.

§ 9.7 Identification and marking.

(a) Classified information shall be marked pursuant to the standards set forth in section 1.6 of the Executive Order; ISOO implementing directives in 32 CFR 2001, Subpart B; and internal Department guidance in 12 Foreign Affairs Manual (FAM).

(b) Foreign government information shall retain its original classification markings or be marked and classified at a U.S. classification level that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(c) Information assigned a level of classification under predecessor executive orders shall be considered as classified at that level of classification.

§ 9.8 Classification challenges.

(a) *Challenges*. Holders of information pertaining to the Department of State who believe that its classification status is improper are expected and encouraged to challenge the classification status of the information. Holders of information making challenges to the classification status of information shall not be subject to retribution for such action. Informal, usually oral, challenges are encouraged. Formal challenges to classification actions shall be in writing to an original classification authority (OCA) with jurisdiction over the information and a copy of the challenge shall be sent to the Office of Information Programs and Services (IPS) of the Department of State, SA–2, 515 22nd St. NW., Washington, DC 20522–6001. The Department (either the OCA or IPS) shall provide an initial response in writing within 60 days.

(b) *Appeal procedures and time limits*. A negative response may be appealed to the Department's Appeals Review Panel (ARP) and should be sent to: Chairman, Appeals Review Panel, c/o Information and Privacy Coordinator/Appeals Officer, at the IPS address given above. The appeal shall include a copy of the original challenge, the response, and any additional information the appellant believes would assist the ARP in reaching its decision. The ARP shall respond within 90 days of receipt of the appeal. A negative decision by the ARP may be appealed to the Interagency Security Classification Appeals Panel (ISCAP) referenced in section 5.3 of Executive Order 12958. If the Department fails to respond to a formal challenge within 120 days or if the ARP fails to respond to an appeal within 90 days, the challenge may be sent to the ISCAP.

§ 9.9 Declassification and downgrading.

(a) *Declassification processes*. Declassification of classified information may occur:

(1) After review of material in response to a Freedom of Information Act (FOIA) request, mandatory declassification review request, discovery request, subpoena, classification challenge, or other information access or declassification request;

(2) After review as part of the Department's systematic declassification review program;

(3) As a result of the elapse of the time or the occurrence of the event specified at the time of classification;

(4) By operation of the automatic declassification provisions of section 3.3 of the Executive Order with respect to material more than 25 years old.

(b) *Downgrading*. When material classified at the Top Secret level is reviewed for declassification and it is determined that classification continues to be warranted, a determination shall be made whether downgrading to a lower level of classification is appropriate. If downgrading is determined to be warranted, the classification level of the material shall be changed to the appropriate lower level.

(c) *Authority to downgrade and declassify*. (1) Classified information may be downgraded or declassified by the official who originally classified the information if that official is still serving in the same position, by a successor in that capacity, by a supervisory official of either, or by any other official specifically designated by the Secretary or the senior agency official.

(2) The Department shall maintain a record of Department officials specifically designated as declassification and downgrading authorities.

(d) *Declassification in the public interest*. Although information that continues to meet the classification criteria of the Executive Order or a predecessor order normally requires continued protection, in some exceptional cases the need to protect information may be outweighed by the public interest in disclosure of the information. When such a question arises, it shall be referred to the Secretary or the Senior Agency Official for decision on whether, as an exercise of discretion, the information should be declassified and disclosed. This provision does not amplify or modify the substantive criteria or procedures for classification or create any substantive or procedural right subject to judicial review.

(e) *Public dissemination of declassified information*. Declassification of information is not authorization for its public disclosure. Previously classified information that is declassified may be subject to withholding from public disclosure under the FOIA, the Privacy Act, and various statutory confidentiality provisions.

§ 9.10 Mandatory declassification review.

All requests to the Department by a member of the public, a government employee, or an agency to declassify and release information shall result in a prompt declassification review of the information in accordance with procedures set forth in 22 CFR 171.20–25. Mandatory declassification review requests should be directed to the Information and Privacy Coordinator, U.S. Department of State, SA–2, 515 22nd St., NW., Washington, DC 20522–6001.

§ 9.11 Systematic declassification review.

The Information and Privacy Coordinator shall be responsible for conducting a program for systematic declassification review of historically valuable records that were exempted from the automatic declassification provisions of section 3.3 of the Executive Order. The Information and Privacy Coordinator shall prioritize such review on the basis of researcher interest and the likelihood of declassification upon review.

§ 9.12 Access to classified information by historical researchers and certain former government personnel.

For Department procedures regarding the access to classified information by historical researchers and certain former government personnel, see Sec. 171.24 of this Title.

§ 9.13 Safeguarding.

Specific controls on the use, processing, storage, reproduction, and transmittal of classified information within the Department to provide protection for such information and to prevent access by unauthorized persons are contained in Volume 12 of the Department's Foreign Affairs Manual.

PART 9a—SECURITY INFORMATION REGULATIONS APPLICABLE TO CERTAIN INTERNATIONAL ENERGY PROGRAMS; RELATED MATERIAL

Sec.

9a.1 Security of certain information and material related to the International Energy Program.
9a.2 General policy.
9a.3 Scope.
9a.4 Classification.
9a.5 Declassification and downgrading.
9a.6 Marking.
9a.7 Access.

9a.8 Physical protection.

AUTHORITY: E.O. 11932 (41 FR 32691), E.O. 11652 (37 FR 5209, National Security Council Directive of May 17, 1972 (37 FR 10053).

SOURCE: 42 FR 46516, Sept. 16, 1977; 42 FR 57687, Nov. 4, 1977, unless otherwise noted.

§ 9a.1 Security of certain information and material related to the International Energy Program.

These regulations implement Executive Order 11932 dated August 4, 1976 (41 FR 32691, August 5, 1976) entitled ''Classification of Certain Information and Material Obtained from Advisory Bodies Created to Implement the International Energy Program.''

§ 9a.2 General policy.

(a) The United States has entered into the Agreement on an International Energy Program of November 18, 1974, which created the International Energy Agency (IEA). This program is a substantial factor in the conduct of our foreign relations and an important element of our national security. The effectiveness of the Agreement depends significantly upon the provision and exchange of information and material by participants in advisory bodies created by the IEA. Confidentiality is essential to assure the free and open discussion necessary to accomplish the tasks assigned to those bodies.

(b) These regulations establish procedures for the classification, declassification, storage, access, and dissemination of certain information related to the International Energy Program.

§ 9a.3 Scope.

These regulations apply to all information and material classified by the United States under the provisions of E.O. 11932, dated August 4, 1976 entitled ''Classification of Certain Information and Material Obtained From Advisory Bodies Created To Implement The International Energy Program.''

§ 9a.4 Classification.

(a) Section 1 of E.O. 11932, August 4, 1976 directs that information and material obtained pursuant to the International Energy Program and which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States shall be classified pursuant to Executive Order 11652.

(b) Information and material, including transcripts, records, and communications, in the possession of the United States Government which has been obtained pursuant to (1) section 252(c)(3), (d)(2) or (e)(3) of the Energy Policy and Conservation Act (89 Stat. 871, 42 U.S.C. 6272(c)(3), (d)(2), (e)(3)), or (2) The Voluntary Agreement and Program Relating to the International Energy Program (40 FR 16041, April 8, 1975), or (3) the Voluntary Agreement and Plan of Action to Implement the International Energy Program (41 FR 13998, April 1, 1976), or (4) Any similar Voluntary Agreement and Program entered into under the Energy Policy and Conservation Act shall be reviewed by an officer of the Department of State with classifying authority for the purpose of determining whether such information or material should be classified pursuant to E.O. 11652. If the officer determines that the information or material warrants classification, he shall assign it the appropriate classification. Such information or material may be exempted from the General Declassification Schedule established by section 5 of Executive Order No. 11652 if it was obtained by the United States on the understanding that it be kept in confidence, or if it might otherwise be exempted under section 5(B) of such Order.

(c) In classifying such information or material, officers of the Department of State shall follow the standards in E.O. 11652 and the provisions of 22 CFR 9.5 through 9.8.

§ 9a.5 Declassification and downgrading.

The provisions of E.O. 11652, 22 CFR 9.9 through 9.15, and 9a.4(b) shall govern declassification and downgrading of such information or material.

§ 9a.6 Marking.

(a) The provisions of 22 CFR 9.15 through 9.19 shall govern the marking of information or material classified under the provisions of these regulations, except that the following stamp shall be used as appropriate:

(Top Secret, Secret or Confidential)

Classified by: _____
Under Executive Order 11932
Exempt from General Declassification Schedule of E.O. 11652 Exemption Category section 5B (2), (3), or (4); or E.O. 11932
Automatically Declassified on _____
(effective date or event if any)

Exemption category ''E.O. 11932'' shall be used for information and material obtained by the United States on e understanding that it be kept in confidence and classified under E.O. 11932.

(b) If the information or material does not qualify for exemption from the General Declassification Schedule, ordinary stamps and marking may be used.

§9a.7 Access.

(a) Except as set forth in this section, access to information or material classified under the provisions of these regulations shall be governed by the provisions of 22 CFR 9.20 through 9.25.

(b) Classified information and material which was created by or in connection with an advisory body to the IEA may be made available to participants in such advisory body and their colleagues in accordance with the following subsections.

(c) Such information and material classified ''Confidential'' may be made available for review to participants in the meeting of the advisory body in which it was developed or discussed. Where participants are acting as representatives of companies or of the IEA Secretariat, such information and material may be made available for review to employees or other representatives of, or counsel for, such companies or Secretariat: *Provided*, That such person is determined by an appropriate officer of the Department to be trustworthy and to have a need for access to the particular classified information sought in connection with the performance of duties in furtherance of the purposes of the IEA, including the furnishing of legal advice to such participants.

(d) Such information and material classified ''Confidential'' may be left in the custody of such participants or other persons who may review it for reasonable period of time: *Provided*, That an appropriate officer of the Department determines that it will be protected from unauthorized disclosure by adequate security safeguards. Such information or material may not be reproduced by those permitted to review it pursuant to this section without the written consent of an officer of the Department with classifying authority.

(e) Such information and material classified other than ''Confidential'' under E.O. 11652 may be made available for review only to participants in the meeting in which it was developed or discussed; it must be reviewed in the presence of an official of the United States Government with an appropriate security clearance granted by the Department, and may not be left in the custody of such participants.

§9a.8 Physical protection.

Except as provided in §9a.7, the physical protection of information or material classified under this regulation shall be governed by the appropriate provisions of 22 CFR 9.45 through 9.49.

PART 9b—REGULATIONS GOVERNING DEPARTMENT OF STATE PRESS BUILDING PASSES

Sec.
9b.1 Press access to the Department of State.
9b.2 Press correspondents employed by United States media organizations.
9b.3 Press correspondents employed by foreign media organizations.
9b.4 Department of State building press pass for technical crews.
9b.5 Temporary Department of State press building passes.
9b.6 Grounds for denial, revocation, or non-renewal of Department of State press building passes.
9b.7 Procedures for denial, revocation, or non-renewal of Department of State press building passes.
9b.8 Term and renewal of Department of State press building passes.

AUTHORITY: 22 U.S.C. 2658.

SOURCE: 49 FR 4465, Feb. 7, 1984, unless otherwise noted.

§9b.1 Press access to the Department of State.

(a) Media correspondents without valid Department of State press building passes shall have access to the Main State building identical to that enjoyed by members of the public.

(b) Media correspondents holding valid Department of State press building passes:

(1) May enter and have access 24 hours a day, during regular working hours, outside regular working hours, on weekends and on holidays, without an appointment, to the reception area of the Diplomatic Lobby, C Street Mezzanine area, press booths (Room 2310), press briefing room (Room 2118), and when in operation, the Office of Press Relations (Room 2109).

(2) May enter and have access without an appointment, on the basement level or on the first and second floors, to the cafeteria, post office, banks, concessionaries, barber shop, dry cleaners and the Foreign Affairs Recreation Association offices for the purposes for which they are established and when they are in operation.

(3) May not escort non-passholders into the Department of State building.

(c) Media correspondents, with or without a Department of State press building pass, may enter areas above the second floor of the Main State building only if the correspondent is invited by a Department employee to attend a specific social or official function in an office located above the second floor. Permission to enter areas above the second floor is strictly limited to direct passage to and from the appointment location of the Department of State employee, or the office or reception room where the function takes place.

(d) Possession of State Department press building pass does not confer access to or other privileges at other Federal buildings. It is not to be construed as official United States Government recognition, approval or accreditation of a correspondent.

[54 FR 1686, Jan. 17, 1989]

§ 9b.2 Press correspondents employed by United States media organizations.

In order to obtain a Department of State press building pass, press correspondents employed by United States media organizations must:

(a) Present to the Office of Press Relations, Department of State, a letter from his or her organization stating:

(1) That the applicant is a bona fide, full-time media correspondent based permanently and residing in the Washington, DC, metropolitan area;

(2) That the applicant is employed by the certifying organization;

(3) That the organization and the applicant have regular and substantial assignments in connection with the Department of State as evidence by regular attendance at the daily press briefings.

(b) Submit to the Office of Press Relations, Department of State, Washington, DC 20520, a signed application and FORM DSP–97 for a press building pass. Applicants must comply with instructions contained in paragraphs 1 and 6 of FORM DSP–97 regarding fingerprinting and prior arrests. FORM DSP–97 requires the following information:

(1) Name;

(2) Affiliation with news media organizations;

(3) Date of birth;

(4) Place of birth;

(5) Sex;

(6) Citizenship;

(7) Social Security or passport number;

(8) Marital status;

(9) Spouse name;

(10) Office address and telephone number;

(11) Length of employment;

(12) Home address and telephone number; and

(13) Length of residence.

[49 FR 4465, Feb. 7, 1984, as amended at 54 FR 1686, Jan. 17, 1989]

§ 9b.3 Press correspondents employed by foreign media organizations.

In order to obtain a Department of State press building pass, correspondents employed by foreign media organizations must:

(a) Present to the Office of Press Relations, Department of State, Washington, DC 20520 a letter from his or her organization stating:

(1) That the applicant is a bona fide, full-time media correspondent based permanently and residing in the Washington, DC, metropolitan area:

(2) That the applicant is employed by the certifying organization;

(3) That the organization and the applicant have regular and substantial assignments in connection with the Department of State as evidence by regular attendance at the daily press briefings.

(b) A letter from the Washington, DC Embassy of the nation where the organization is headquartered or from the Embassy of the United States in the nation where the organization is headquartered attesting to the existence of the news organization and the applicant's employment by that organization. The Director of the Office of Press Relations may accept a letter from another source attesting to the existence of such news organizations and the applicant's employment if, in his or her judgment, a substitute letter is warranted.

(c) Submit to the Office of Press Relations, Department of State, Washington, DC 20520 a signed application and FORM DSP–97 for a press building pass. Applicants must comply with instructions contained in paragraphs 1 and 6 of FROM DSP–97 regarding fingerprinting and prior arrests. FORM DSP–97 requires the following information:

(1) Name;

(2) Affiliation with news media organizations;

(3) Date of birth;

(4) Place of birth;

(5) Sex;

(6) Citizenship;

(7) Social Security or passport number;

(8) Marital status;

(9) Spouse name;

(10) Office address and telephone number;

(11) Length of employment;

(12) Home address and telephone number; and

(13) Length of residence.

[49 FR 4465, Feb. 7, 1984, as amended at 54 FR 1687, Jan. 17, 1989]

§9b.4 Department of State building press pass for technical crews.

Department of State press building passes are issued to members of television and radio technical crews who provide technical support on a daily basis for media correspondents assigned to the Department of State. Members of technical crews who do not possess press passes, but who provide technical support for media correspondents assigned to the Department of State, may apply to the Office of Press Relations for a visitor's pass valid for one day.

[54 FR 1687, Jan. 17, 1989]

§9b.5 Temporary Department of State press building passes.

A media correspondent or technician who meets all the qualifications stated in §§9b.2(a)(1) and 9b.2(a)(2) or §§9b.3(a) and 9b.3(b), but does not have regular and substantial assignments in connection with the Department of State may make arrangements with the Office of Press Relations for the issuance of a visitor's pass valid for one day.

[54 FR 1687, Jan. 17, 1989]

§9b.6 Grounds for denial, revocation, or non-renewal of Department of State press building passes.

In consultation with the Bureau of Diplomatic Security and the Office of the Legal Adviser, the Director of the Office of Press Relations of the Department of State, may deny, revoke, or not renew the Department of State press building pass of any media correspondent or technician who:

(a) Does not meet the qualifications stated in §§9b.2(a)(1), 9b.2(a)(2) and 9b.2(a)(3) or §§9b.3(a)(1), 9b.3(a)(2), 9b.3(a)(3) and 9b.3(b). (Upon denial, revocation, or non-renewal the correspondent or technician may not reapply for a period of one year unless there are material changes in meeting the qualifications.) or,

(b) Poses a risk of harm to the personal safety of Department of State or other Governmental personnel or to Government property; or

(c) Engages or engaged in conduct which there are reasonable grounds to believe might violate federal or state law or Department of State regulations.

(d) Has been convicted of a felony (or a crime in a foreign country that would be considered a felony if it were committed in the United States).

(e) Fails to claim an approved authorization form for a State Department press building pass after notification by the Office of Press Relations following a period of three (3) months.

[49 FR 4465, Feb. 7, 1984, as amended at 54 FR 1687, Jan. 15, 1989]

§ 9b.7 Procedures for denial, revocation, or non-renewal of Department of State press building passes.

(a) If the Director of the Office of Press Relations, Department of State, anticipates, after consultation with the Office of the Legal Adviser, that in applying the standard set forth in § 9b.6 a Department of State press building pass might be denied, revoked or not renewed, the media correspondent or technician will be notified in writing by the Director of the basis for the proposed denial in as much detail as the security of any confidential source of information will permit. This notification will be sent by registered mail.

(b) The notification of the proposed denial, revocation or non-renewal sent to the correspondent will also contain a statement advising the correspondent of his or her right to respond to the proposed denial and to rebut any factual basis supporting the proposed denial.

(c) The correspondent shall be allowed thirty (30) days from the date of the mailing of the proposed denial, revocation or non-renewal notification to respond in writing. The response shall consist of any explanation or rebuttal deemed appropriate by the correspondent and will be signed by the correspondent under oath or affirmation.

(d) If the correspondent is unable to prepare a response within 30 days, an extension for one additional 30-day period will be granted upon receipt of the correspondent's written request for such an extension.

(e) At the time of the filing of the media correspondent's or technician's written response to the notification of the proposed denial, revocation or non-renewal, the correspondent or technician may request, and will be granted, the opportunity to make a personal appearance before the Director of the Office of Press Relations, Department of State, for the purpose of personally supporting his/her eligibility for a press pass and to rebut or explain the factual basis for the proposed denial. The Director shall exercise, in consultation with the Bureau of Diplomatic Security and the Office of the Legal Adviser, final review authority in the matter. The correspondent or technician may be represented by counsel during this appearance.

(f)(1) On the basis of the correspondent's or technician's written and personal response and the factual basis for the proposed denial, revocation or non-renewal, the Director of the Office of Press Relations, Department of State, will consult with the Bureau of Diplomatic Security and the Office of the Legal Adviser to determine whether or not further inquiry or investigation concerning the issues raised is necessary.

(2) If a decision is made that no such inquiry is necessary, a final decision will be issued in conformity with paragraph (g) of this section.

(3) If a decision is made that such further inquiry is necessary, the Director of the Office of Press Relations of the Department of State, the Bureau of Diplomatic Security and the Office of the Legal Adviser will conduct such further inquiry as is deemed appropriate. At the Director's discretion the inquiry may consist of:

(i) The securing of documentary evidence:

(ii) Personal interviews:

(iii) An informal hearing:

(iv) Any combination of paragraphs (f)(3)(i) through (f)(3)(iii) of this section.

(g) On the basis of the correspondent's or technician's written and personal response, the factual basis for the proposed denial and the additional inquiry provided for if such inquiry is conducted, the Director of the Office of Press Relations of the Department of State will consult with the Bureau of Diplomatic Security and the Office of the Legal Adviser and expeditiously reach a final decision in accordance with the standard set forth in § 9b.6. If a final adverse decision is reached, the correspondent or technician will be notified of this final decision in writing. This notification will set forth as precisely as possible, and to the extent

that security considerations permit, the factual basis for the denial in relation to the standard set forth in §9b.6. This notification will be sent by registered mail and will be signed by the Director of the Office of Press Relations of the Department of State.

[49 FR 4465, Feb. 7, 1984, as amended at 54 FR 1687, Jan. 17, 1989]

§9b.8 Term and renewal of Department of State press building passes.

(a) Department of State press building passes for U.S. citizens are issued with three years' validity. Subject to positive completion of an international background check, passes for non-U.S. citizens are issued with one year's validity and may be renewed for three years. Notwithstanding its initial validity, any press building pass that has not been used for a twelve-month period, as recorded by the Bureau of Diplomatic Security's turnstyle entry devices, will become invalid at the end of that twelve-month period.

(b) For any valid passes issued before October 1, 1995, notification shall be sent by the Department of State to the holder of the pass that the pass has become invalid by reason of lack of use for 12-month period. However, failure of the holder for any reason to receive such a notification shall not affect the invalidity of the pass. Anyone whose pass has become invalid may apply for a new pass in accordance with §§9b.2 through 9b.5.

[61 FR 3800, Feb. 2, 1996]

SUBCHAPTER B—PERSONNEL

PART 11—APPOINTMENT OF FOREIGN SERVICE OFFICERS

Sec.
11.1 Junior Foreign Service officer career candidate appointments.
11.2 Written examination for appointment to class 7 or 8.
11.3 Oral examination for appointment to class 7 or 8.
11.4 Medical examination for appointment to class 7 or 8.
11.5 Certification for appointment to class 7 or 8.
11.6 Final Review Panel.
11.7 Termination of eligibility.
11.8 Travel expenses of candidates.
11.10 Mid-level Foreign Service officer career candidate appointments. [Reserved]
11.11 Mid-level Foreign Service officer career candidate appointments.
11.20 Foreign Service specialist career candidate appointments.
11.30 Senior Foreign Service officer career candidate and limited non-career appointments.

AUTHORITY: 22 U.S.C. 3926, 3941.

§ 11.1 Junior Foreign Service officer career candidate appointments.

(a) *General considerations*—(1) *Authority*. Pursuant to sections 302 and 306 of the Foreign Service Act of 1980 (hereinafter referred to as the Act), all Foreign Service officers shall be appointed by the President, by and with the advice and consent of the Senate. All appointments shall be made to a class and not to a particular post. No person shall be eligible for appointment as a Foreign Service officer unless that person is a citizen of the United States. Such appointment is initially to career candidate status with subsequent commissioning to career status governed by the provisions of Volume 3 (Personnel), Foreign Affairs Manual, section 570. In accordance with section 102(b) of the Act, all references in these regulations to Foreign Service officers shall, with respect to the United States Information Agency, be deemed to refer to Foreign Service information officers.

(2) *Veterans' preference*. Pursuant to section 301 of the Act, and notwithstanding the provisions of section 3320 of title 5 of the United States Code, the fact that an applicant is a veteran or disabled veteran, as defined in section 2108 (3A), (3B), or (3C) of such title, shall be considered as an affirmative factor in the selection of candidates for appointment as Foreign Service officer career candidates.

(3) *Policy*. Appointment as a Junior Foreign Service officer Career Candidate of class 6, 5, or 4, is governed by these regulations. Successful applicants will be appointed as Career Candidates for a period not to exceed 5 years. Under precepts of the Commissioning and Tenure Board, Career Candidates may be granted tenure and converted to career Foreign Service officer status. Those who are not granted tenure prior to the expiration of their Career Candidate appointments will be separated from the Career Candidate program no later than the expiration date of their appointments. Separated candidates who originally were employees of a department or agency will be entitled to reemployment rights in their former department or agency in accordance with section 310 of the Act.

(b) *Written examination*. The following regulations apply to the written examination.

(1) *Purpose*. The written examination is designed to enable the Board of Examiners for the Foreign Service to test the applicant's intelligence, breadth and quality of knowledge, and understanding in relation to the requirements of Foreign Service work.

(2) *Eligibility*. Prior to each written examination, the Board of Examiners will establish a closing date for the receipt of applications for designation to take the examination. No person will be designated to take the examination who has not, as of that closing date, filed an application with the Board. To be designated to take the written examination, an applicant, as of the date of the examination, must be a citizen of the United States and at least 20 years of age.

(3) *When and where given*. The written examination will be given periodically, normally at least once a year, in designated cities in the United States and

at Foreign Service posts, on dates established by the Board of Examiners and publicly announced.

(4) *Grading*. The several parts of the written examination will be weighted and graded according to standards established by the Board of Examiners. The number of candidates who pass each written examination will be governed by the projected hiring needs of the participating foreign affairs departments and agencies in subsequent years.

(c) *Oral examination*. The following regulations apply to the oral examination:

(1) *Purpose*. The oral examination is designed to enable the Board of Examiners for the Foreign Service to test the candidate's competence to perform the work of a Foreign Service officer at home and abroad, potential for growth in the Foreign Service, and suitability to serve as a representative of the United States abroad. The oral examination for the Junior Career Candidate Program will consist of an assessment procedure publicly announced by the Board of Examiners and hereinafter referred to as the oral examination.

(2) *Eligibility*—(i) *Through written examination*. (A) Candidates whose weighted score on the written examination is at or above the passing level set by the Board of Examiners will be eligible for selection to take the oral examination. All eligible candidates normally will be invited to take the oral examination.

(B) Should the total number of eligible candidates substantially exceed the projected hiring needs of the Foreign Service, the Board of Examiners may establish and publicly announce a higher written examination score than the passing level as the basis for selection to take the oral examination.

(C) The Board of Examiners may authorize special consideration to be given in the selection of candidates, from among those eligible, for the purpose of meeting language requirements, Affirmative Action goals, or for other purposes which the Board with the concurrence of the prospective hiring agencies may from time to time approve and publicly announce.

(D) The nature and applicability of all criteria utilized to select eligible candidates to take the oral examination will be developed by the Board of Examiners in consultation with the prospective hiring agencies and publicly announced in advance of each examination by the Board.

(E) Candidates who are selected to take the oral examination will be notified of the period of time after the date of the written examination, as determined by the Board of Examiners, within which the oral examination must be conducted. That period will normally be 1 year, but it may be extended or shortened in special circumstances by the Board. The candidacy of anyone whose candidacy has not been extended by the Board, and who has not again passed the written examination in the meantime, will be terminated 2 years after the end of the month in which the written examination was held. Time spent outside the United States and its territories, for reasons acceptable to the Board of Examiners, will not be counted against this 2-year period. The candidacy of anyone for whom the 2-year period is extended by the Board because of being abroad will be terminated automatically if the candidate fails to appear for the oral examination within 3 months after first returning to the United States. If a candidate fails to appear for the oral examination on an agreed date within the period of eligibility without an excuse acceptable to the Board, the candidacy will automatically terminate.

(ii) *Through affirmative action*. Members of the minority groups specified by the Equal Opportunity Act of 1972, as amended, may be selected by the Board of Examiners for admission to the oral examination in accordance with the Affirmative Action Programs of the participating departments and agencies. Such candidates must be at least 21 years of age, citizens of the United States, and holders of at least a bachelor's degree from an accredited college or university. Affirmative Action Program applicants will be evaluated on a highly competitive basis, in accordance with criteria established by the Board in conjunction with the participating departments and agencies

and publicly announced, to determine those to be selected for the oral examination.

(iii) *Through the mustang program.* (A) Employees of the Department of State in classes FS–9 through FS–4 and grades GS–1 through GS–12 who are at least 21 years of age and who have at least 3 years of service with the Department may be selected by the Board of Examiners for admission to the oral examination for the Junior Career Candidate Program in accordance with the Mustang Program of the Department. Such Mustang candidates must: (*1*) Complete successfully an appropriate Foreign Service Institute-sponsored or approved university or correspondence course relevant to officer-level responsibility in the chosen Foreign Service field of specialization; (*2*) submit an autobiography of approximately 1000 words; and (*3*) be recommended by a Qualifications Evaluation Panel of the Board of Examiners for selection for the oral examination.

(B) Employees of the Department of State in classes FS–3 and GS–13 and above are eligible for the Mid-Level Career Candidate Program and should apply under that program if they wish to be considered for conversion to Foreign Service officer status (see § 11.10).

(iv) *Through the upward mobility program.* Admission to the oral examination through the Upward Mobility Program of the United States Information Agency is governed by procedures established by that agency.

(3) *When and where given.* The oral examination cycle will be held each year in Washington, DC, and in selected cities in the United States. If circumstances permit, oral examinations may also be held at selected Foreign Service posts when approved by the Board of Examiners.

(4) *Examining panel.* The oral examination will be given by a panel of deputy examiners approved by the Board of Examiners from a roster of Foreign Service officers; Foreign Service information officers; career officers from the Department of State, the United States Information Agency, and the Department of Commerce; and qualified private citizens who, by prior service as members of departmental or agency Foreign Service selection boards or other appropriate activities, have demonstrated special qualifications to serve as deputy examiners. Service as a deputy examiner shall be limited to a maximum of 5 years, unless a further period is specifically authorized by the Board. Examination panels shall be chaired by a career officer of the Foreign Service. Determinations of duly constituted panels of deputy examiners are final unless modified by specific action of the Board of Examiners.

(5) *Grading.* Candidates taking the oral examination will be graded numerically according to standards established and publicly announced by the Board of Examiners. The candidacy of anyone whose score is at or above the passing level set by the Board will be continued. The candidacy of anyone whose score is below the passing level will be terminated and may not be considered again until the candidate has passed a new written examination. An Affirmative Action, Mustang, or Upward Mobility candidate who fails the oral examination may not be considered again until 1 year after that date.

(d) *Background investigation.* Candidates who pass the oral examination will be eligible for selection by the Board for the background investigation. The background investigation shall be conducted to determine the candidate's suitability for appointment to the Foreign Service. Should the total number of eligible candidates substantially exceed the anticipated needs of the Foreign Service, the Board of Examiners may authorize priorities to be established, on the basis of combined written and oral examination scores and Affirmative Action considerations, for scheduling the background investigation.

(e) *Medical examination*—(1) *Eligibility.* Candidates who pass the oral examination, and their dependents, will be eligible for selection by the Board of Examiners for the medical examination.

(2) *Purpose.* The medical examination shall be conducted to determine the candidate's physical fitness to perform the duties of a Foreign Service officer on a worldwide basis and, for candidates and dependents, to determine the presence of any physical, neurological, or mental condition of such a

nature as to make it unlikely that they would be able to function on a worldwide basis.

(3) *Conduct*. The medical examination may be conducted by medical officers of the Department of State, the Armed Forces, the Public Health Service, accredited colleges and universities, or by private physicians.

(4) *Determination*. The Medical Director of the Department of State will determine, on the basis of the report of the physician(s) who conducted the medical examination, whether the candidate has met the required medical standards for appointment (see section 1930, Volume 3, Foreign Affairs Manual).

(5) *Waiver of worldwide availability requirement*. When authorized and requested by the candidate, the Director General of the Foreign Service, or the Director General's delegatee, will review the case of any Department of State Foreign Service candidate who has been denied an unlimited medical clearance for assignment worldwide, and determine whether or not the candidate should be appointed despite the medical disqualification. Decisions of the Director General of the Foreign Service, or the Director General's delegatee, are final and are not subject to further appeal by the candidate.

(f) *Final review panel*. After the results of the medical examination and background investigation are received, the candidate's entire file will be reviewed and graded by a Final Review Panel, consisting of two or more deputy examiners of the Board of Examiners. Candidates who have completed the examination process; have passed their medical examination, or have obtained a waiver from the Director General of the Foreign Service, or his or her delegatee, or the equivalent in accordance with the procedures of the other participating agencies; and on the basis of their background investigation, have been found suitable to represent the United States abroad, will have their names placed on the functional rank-order register(s), or a special register, for the agency or agencies for which they have been found qualified. Thereafter, they will be considered for employment based on the needs of the individual foreign affairs agencies. The candidacy of any candidate who is determined by the Final Review Panel to be unqualified for appointment shall be terminated and the candidate so informed.

(g) *Certification for appointment*—(1) *Eligibility*. (i) A candidate will not be certified as eligible for appointment as a Foreign Service Officer Career Candidate of class FS–6 unless that candidate is at least 21 years of age and a citizen of the United States.

(ii) Career Candidate appointments shall be made before the candidate's 60th birthday. Appointments by the United States Information Agency shall be made before the candidate's 58th birthday. The maximum age for appointment under this program is based on the requirement that all career candidates shall be able to: (A) Complete at least two full tours of duty, exclusive of orientation and training, (B) complete the requisite eligibility period for tenure consideration, and (C) complete the requisite eligiblity period to receive retirement benefits, prior to reaching the mandatory retirement age of 65 prescribed by the Act.

(iii) A candidate may be certified as eligible for direct appointment to classes FS–5 or FS–4 if the Board of Examiners determines in accordance with published criteria that, in addition to meeting the requirements for class FS–6, the candidate has additional special experience and skills for which there is a need in the Foreign Service.

(iv) Recommended candidates who meet the requirements of this section will be certified for appointment by the Board, in accordance with the needs of the foreign affairs agencies, in the order of their standing on their respective registers.

(2) *Functional rank-order registers*. The Board of Examiners may maintain separate rank-order registers for Career Candidates in administrative, consular, economic, and political functions of the Department of State; for Career Candidates in the information/cultural function of the United States Information Agency; for Career Candidates in the foreign commercial function of the Department of Commerce; and for functions of other participating foreign affairs agencies. Appointments from

each functional register will be made in rank order according to the needs of the relevant agency.

(3) *Special programs.* (i) Qualified minority candidates who apply and qualify under the Department of State Affirmative Action Junior Officer Program (AAJOP) may be placed on a separate register and offered appointment from that register to meet Affirmative Action hiring goals established by the Secretary.

(ii) Qualified minority candidates who apply and qualify under the Comprehensive Minority Recruitment and Training Program (COMRAT) of the United States Information Agency may be placed on a separate register and offered appointment from that register in accordance with the Affirmative Action Program established by that agency.

(iii) Mustang and Upward Mobility candidates who are career employees of the Department of State or the United States Information Agency will be certified by the Board of Examiners for direct appointment on an individual basis after satisfactorily completing all aspects of the examination process.

(4) *Postponement of entrance on duty.* Postponement of entrance on duty because of civilian Federal Government service abroad (to a maximum of 2 years of such service), including Peace Corps volunteer service, or required active regular or reserve military service (to a maximum of the limit of such required service), may be authorized by the Board.

(5) *Foreign language requirement.* A candidate may be certified for appointment to classes FS–6, FS–5, or FS–4 without first having passed an examination in a foreign language, but the appointment will be subject to the condition that the newly appointed Career Candidate may not be converted to career Foreign Service officer status unless, within a specified period of time, adequate proficiency in a foreign language is achieved. For limitations on promotion, see section 874, Volume 3, Foreign Affairs Manual.

(h) *Termination of eligibility*—(1) *Time limit.* Candidates who have qualified but have not been appointed because of lack of openings will be removed from the rank-order register 18 months after the date of placement on the rank-order register. Time spent in civilian Federal Government service abroad (to a maximum of 2 years of such service), including Peace Corps volunteer service, or in required active regular or reserve military service (to a maximum of the limit of such required service), will not be counted as part of the 18-month eligibility period.

(2) *Extension.* The Board of Examiners may extend the eligibility period when such extension is, in its judgment, justified in the interest of the Foreign Service.

(i) *Travel expenses.* The travel and other personal expenses of candidates incurred in connection with the written and oral examinations will not be borne by the Government. However, the participating foreign affairs departments and agencies may issue round-trip invitational travel orders to bring candidates to Washington, DC, at Government expense, when it is determined by the agencies that this is necessary in the interest of the Foreign Service.

(Secs. 206(a) and 301(b), Foreign Service Act of 1980 (secs. 206(a) and 301(b), Pub. L. 96–465, 94 Stat. 2079 and 2083 (22 U.S.C. 3926 and 3941)))

[48 FR 13162, Mar. 30, 1983, as amended at 67 FR 46109, July 12, 2002]

§ 11.2 Written examination for appointment to class 7 or 8.

The Board of Examiners for the Foreign Service has established the following rules regarding the written examination:

(a) *When and where given.* The written examination will be given annually or semiannually, if required, in designated cities in the United States and at Foreign Service posts on dates established by the Board of Examiners for the Foreign Service. Applicants must indicate in their applications whether they are applying for the Department of State or for the U.S. Information Agency. Candidates who pass the written examination successfully may request a transfer of their applications to the other agency.

(b) *Designation to take written examination.* No person will be permitted to take a written examination for appointment as a Foreign Service officer

or Foreign Service information officer who has not been specifically designated by the Board of Examiners to take that particular examination. Prior to each written examination, the Board will establish a closing date for the receipt of applications for designation to take the examination. No person will be designated for the examination who has not, as of that closing date, filed an application with the Board. To be designated for the written examination, a candidate, as of the date of the examination, must be a citizen of the United States and shall be at least 21 years of age, except that an applicant who has been awarded a bachelor's degree by a college or university, or has successfully completed the junior year at a college or university, may qualify if at least 20 years of age.

(c) *Content*. The written examination is designed to permit the Board to test the candidate's intelligence, breadth and quality of knowledge, and understanding. It will consist of three parts: (1) A general ability test, (2) an English expression test, and (3) a general background test.

(d) *Grading*. The several parts of the written examination are weighted in accordance with the rules established by the Board of Examiners.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972, as amended at 38 FR 13640, May 24, 1973]

§ 11.3 Oral examination for appointment to class 7 or 8.

The Board of Examiners for the Foreign Service has established the following rules regarding the oral examination:

(a) *When and where given*. The oral examination will be given throughout the year at Washington and periodically in selected cities in the United States and, if circumstances permit, at selected Foreign Service posts.

(b) *Eligibility*. If a candidate's weighted average on the written examination is 70 or higher, the candidate will be eligible to take the oral examination. Candidates eligible for the oral examination will be given an opportunity and will be required to take the oral examination within 9 months after the date of the written examination. If a candidate fails to appear for the oral examination on an agreed date within the 9-month period, the candidacy will automatically terminate, except that time spent outside the United States and its territories, for reasons acceptable to the Board of Examiners, will not be counted against the 9-month period. The candidacy of anyone for whom the 9-month period is extended because of being abroad will be automatically terminated if the candidate fails to appear for the oral examination within 3 months after first returning to the United States: *Provided*, That the candidacy of anyone who has not returned and been examined in the meantime will be canceled 2 years after the end of the month in which the written examination was held.

(c) *Examining process*. (1) The oral examination will be given by a panel of deputy examiners approved by the Board of Examiners from a roster of Foreign Service officers, officers from the Department of State, and other Government agencies, and qualified private citizens who by prior service as members of selection boards or through other appropriate activities have demonstrated special qualifications for this work. Service as deputy examiners shall be limited to a maximum of 5 years, unless a further period is specifically authorized by the Board.

(2) The examination will be conducted in the light of all available information concerning the candidate and will be designed to determine the candidate's: (i) Competence to perform the work of a Foreign Service officer at home and abroad; (ii) potential for growth in the Service; and (iii) suitability to serve as a representative of the United States abroad. Panels examining candidates for the Department of State will be chaired by a Foreign Service officer of the Department. Panels examining candidates for the U.S. Information Agency will be chaired by a Foreign Service officer of that Agency. Determinations of duly constituted panels of deputy examiners are final, unless modified by specific action of the Board of Examiners for the Foreign Service.

(3) Grading: Candidates appearing for the oral examination will be graded

''recommended'' or ''not recommended.'' If recommended, the panel will assign a grade which will be advisory to the Final Review Panel in determining the candidate's standing on the rank-order register of eligibles. The candidacy of anyone who is graded ''not recommended'' is automatically terminated and may not be considered again until the candidate has passed a new written examination.

(4) An investigation shall be conducted of candidates who have been graded ''recommended'' by the oral examining panel to determine loyalty to the Government of the United States and attachment to the principles of the Constitution.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972, as amended at 38 FR 13640, May 24, 1973]

§ 11.4 Medical examination for appointment to class 7 or 8.

The Board of Examiners for the Foreign Service has established the following rules regarding the medical examination of candidates.

(a) A candidate graded ''recommended'' on the oral examination will be eligible for the physical examination.

(b) The medical examination is designed to determine the candidate's physical fitness to perform the duties of a Foreign Service officer on a worldwide basis and to determine the presence of any physical, nervous, or mental disease or defect of such a nature as to make it unlikely that the candidate would become a satisfactory officer. The Executive Director of the Board of Examiners for the Foreign Service, with the concurrence of the Deputy Assistant Secretary for Medical Services, may make such exceptions to these physical requirements as are in the interest of the Service. All such exceptions shall be reported to the Board of Examiners for the Foreign Service at its next meeting.

(c) The medical examination will be conducted by medical officers of the Armed Forces, the Public Health Service, the Department, accredited colleges and universities, or, with the approval of the Board of Examiners, by private physicians.

(d) The Deputy Assistant Secretary for Medical Services will determine, on the basis of the report of the physician(s) who conducted the medical examination, whether the candidate has met the standards set forth in paragraph (b) of this section.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972]

§ 11.5 Certification for appointment to class 7 or 8.

(a) Candidates will not be certified as eligible for appointment as Foreign Service officers of class 8 unless they are at least 21 years of age, is a citizen of the United States, and, if married, married to a citizen of the United States. A candidate may be certified as eligible for direct appointment to class 7 if, in addition to meeting these specifications, the candidate also has additional qualifications of experience, education, and age which the Board of Examiners for the Foreign Service currently defines as demonstrating ability and special skills for which there is a need in the Foreign Service. Recommended candidates who meet these requirements will be certified for appointment, in accordance with the needs of the Service, in the order of their standing on their respective registers.

(b) Separate registers for Department of State candidates will be maintained for the administrative, consular, commercial/economic, and political functional specialties. Successful candidates for the U.S. Information Agency will have their names placed on a separate rank-order register and appointments will be made according to the needs of the Agency. Postponement of entrance on duty for required active military service, or required alternative service, civilian Government service abroad (to a maximum of 2 years of such civilian service), or Peace Corps volunteer service, will be authorized. A candidate may be certified for appointment to class 7 or 8 without first having passed an examination in a foreign language, but the appointment will be subject to the condition that the newly appointed officer may not receive more than one promotion unless,

within a specified period of time, adequate proficiency in a foreign language is achieved.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972, as amended at 38 FR 13640, May 24, 1973]

§ 11.6 Final Review Panel.

After the results of the medical examination and background investigation are received, the candidate's entire file will be reviewed by a Final Review Panel, consisting of two or more deputy examiners. Candidates who have been graded ''recommended'' by oral examining panels, who have passed their medical examination, and who, on the basis of investigation have been found to be loyal to the Government of the United States and personally suitable to represent it abroad, will have their names placed on a rank-order register for the functional specialty for which they have been qualified. Their standing on the register will be determined by the Final Review Panel after taking into account the grade assigned by the oral examining panel and any information developed subsequent to the oral examination concerning the applicant. The candidacy of anyone who is determined by the Final Review Panel to be unqualified for appointment shall be terminated and the candidate so informed.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972]

§ 11.7 Termination of eligibility.

(a) Candidates who have qualified but have not been appointed because of lack of vacancies will be dropped from the rank-order register 30 months after the date of the written examination: *Provided, however,* That reasonable time spent in civilian Government service abroad (to a maximum of 2 years such service), including service as a Peace Corps volunteer, in required active military service, or in required alternative service, subsequent to establishing eligibility for appointment will not be counted in the 30-month period.

(b) The Chairman of the Board of Examiners may extend the eligibility period when such extension is, in his judgment, justified in the interests of the Service. The Chairman shall report the approved extensions to the Board of Examiners.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972]

§ 11.8 Travel expenses of candidates.

The travel and other personal expenses of candidates incurred in connection with the written and oral examinations will not be borne by the Government, except that the Department may issue round-trip invitational travel orders to bring candidates to Washington at Government expense when it is determined that it is necessary in ascertaining a candidate's qualifications and adaptability for appointment.

(22 U.S.C. 1221 *et seq.*)

[37 FR 19356, Sept. 20, 1972]

§ 11.10 Mid-level Foreign Service officer career candidate appointments. [Reserved]

§ 11.11 Mid-level Foreign Service officer career candidate appointments.

(a) *General considerations*—(1) *Authority*. Pursuant to sections 302 and 306 of the Foreign Service Act of 1980 (hereinafter referred to as the Act), all Foreign Service officers shall be appointed by the President, by and with the advice and consent of the Senate. All appointments shall be made to a class and not to a particular post. No person shall be eligible for appointment as a Foreign Service officer unless that person is a citizen of the United States. Such appointment is initially to career candidate status, with subsequent commissioning to career status governed by Volume 3 (Personnel), Foreign Affairs Manual section 570.

(2) *Veterans' preference*. Pursuant to section 301 of the Act, and notwithstanding the provisions of section 3320 of title 5 of the United States Code, the fact that an applicant is a veteran or disabled veteran, as defined in section 2108(3A), (3B), and (3C) of such title, shall be considered as an affirmative factor in the selection of candidates for appointment as Foreign Service officer career candidates (22 U.S.C. 1234).

(3) *Purpose and policy*. The Mid-Level Career Candidate Program of the Department of State supplements the Junior Foreign Service Officer Career Candidate Program to meet total requirements for Foreign Service officers at the mid-level. The purposes of the Mid-Level Program are: (i) To provide expanded opportunities and upward mobility for outstanding members of the Foreign Service with high potential who have been serving with particular success in other occupational categories; (ii) to permit the recruitment of a limited number of highly skilled and qualified personnel from outside the Foreign Service to meet specific needs which cannot be met from within the career Service; and (iii) to assist in meeting the Affirmative Action goals of the Department of State. This section governs appointments to generalist occupational categories (that is, administrative, consular, economic and political) at classes FS–3, 2, or 1. All appointments above FS–1, regardless of occupational category, are govern by § 11.30 (to be supplied). Appointments to Specialist occupational categories below the Senior Foreign Service are governed by § 11.20. Successful applicants under the Mid-Level Program will be appointed to career candidate status for a period not to exceed 5 years. Under precepts of the Commissioning and Tenure Board, career candidates may be granted tenure and converted to career Foreign Service officer status. Those who are not granted tenure prior to the expiration of their career candidate appointments will be separated from the Career Candidate Program no later than the expiration date of their appointments. As provided in section 310 of the Act, such separated candidates who had originally been employed by the Department of State with the consent of the head of their agency shall be entitled to reemployment rights in their former agency under section 3597 of title 5, United States Code.

(4) *Sources of candidates*—(i) *Department*. The great majority of mid-level entrants will be career employees of the Department of State and the Foreign Service of proven ability who possess high potential for advancement. On the basis of the needs of the Foreign Service, the Department will approve the mid-level appointment of Foreign Service and Civil Service personnel on its rolls who apply, for whom the Bureau of Personnel issues a certificate of need, and who are found qualified by the Board of Examiners for the Foreign Service.

(ii) *Other Federal Government agencies*. Personnel with similar qualifications from other Federal Government agencies may also apply for the Mid-Level Program based on agreements between the Department and those agencies.

(iii) *Other*. Other candidates may be drawn from non-Government sources, including minority and women applicants for the Department's Mid-Level Affirmative Action Program.

(b) *Eligibility requirements*—(1) *Citizenship*. Each person appointed as a Foreign Service mid-level career candidate must be a citizen of the United States.

(2) *Service*. (i) On the date of application, a candidate must have completed a minimum of 9 years of professional work experience, including at least 3 years of service in a position of responsibility in a Federal Government agency or agencies. For this purpose, a position of responsibility is defined as one in the Foreign Service at class FS–5, in the Civil Service at GS–9, or in the Armed Forces as first lieutenant or lieutenant junior grade, or higher. Academic studies, particularly those related to Foreign Service work, may be substituted for part of the required experience. The duties and responsibilities of the position occupied by the candidate must have been similar to or closely related to that of a Foreign Service officer in terms of knowledge, skills, abilities, and overseas work experience. In addition, a candidate must currently be in, or have been in, a grade or class comparable to FS–4 or higher.

(ii) Candidates from outside the Department who at the time of application lack 3 years of service in a position of responsibility as defined in the preceding paragraph may, however, be considered if they are found to possess a combination of educational background, employment, experience, and skills needed by the Foreign Service at the mid-level.

(3) *Age*. All career candidate appointments shall be made before the candidate's 60th birthday. The maximum age for appointment under this program is based on the requirement that all career candidates shall be able to (i) complete at least two full tours of duty, exclusive of orientation and training, (ii) complete the requisite eligibility period for tenure consideration, and (iii) complete the requisite eligibility period to receive retirement benefits, prior to reaching the mandatory retirement age of 65 prescribed by the Act.

(4) *Certification of need*. Before the Board of Examiners may process a candidacy, the Director General of the Foreign Service must certify that there is a continuing, long-term requirement, consistent with the projections of personnel flows and needs mandated by section 601(c)(2) of the Act, for a combination of professional work experience, educational background, skills, and capabilities possessed by the applicant which cannot reasonably be met from within the ranks of the career service, including by special training of career personnel and/or limited appointments pending completion of such training, if feasible. No applicant may be appointed in an occupational category or at a class level for which the Director General has not certified a need. Such certifications shall take into full account the latest published skills resources inventory and shall be based on a written assessment of the assignment and promotion effects on career members of the Foreign Service. A separate certification of need is not required for applicants under the Mid-Level Affirmative Action Program, as the hiring goals established by the Secretary constitute the certification for applicants under that Program. The exclusive employee representative will be advised promptly in writing on request of the number, nature, and dates of the certifications of need issued since the last request, including an affirmation that each such issuance has been in accordance with the requirements of this section.

(c) *Recruitment*—(1) *From within the Department*. It is the Department's policy to encourage eligible personnel on its rolls to apply for appointment as Mid-Level Foreign Service officer career candidates including, in particular, the following categories: (i) Members of the Foreign Service whose performance has been consistently of a high caliber, and whose background, experience, and general qualifications indicate that they can compete favorably with Foreign Service officers; and (ii) Civil Service personnel who are serving in positions to which Foreign Service officers are normally assigned, who have superior records, and whose general qualifications indicate that they can compete favorably with Foreign Service officers.

(2) *Other*. The Department also encourages highly qualified applicants from other agencies of the Federal Government, and from outside the Federal Government, who meet the statutory and other eligibility requirements, to apply for the Mid-Level Program. Appointments from these sources for available openngs are made on a highly competitive basis to fill specific needs of the Foreign Service at the Mid-Level.

(d) *Methods of application*—(1) *Forms*. Application is made for a Mid-Level Foreign Service officer career candidate appointment but not for a specific class. Applicants for mid-level entry must complete Standard Form 171, ''Personnel Qualifications Statement,'' and Form DSP–34, ''Supplement to Application for Federal Employment,'' and forward them, together with an autobiography not exceeding four typewritten pages in length, to the Board of Examiners for the Foreign Service for consideration.

(2) *Qualifications evaluation panel*. The Board of Examiners establishes a file for each applicant, placing in it all available documentation of value in evaluating the applicant's potential for service as a Foreign Service officer. A Qualifications Evaluation Panel of deputy examiners of the Board of Examiners reviews the file to determine whether the applicant meets the statutory and other eligibility requirements, to assess the applicant's skills relative to the needs of the Foreign Service, and to recommend whether the applicant should be examined for possible appointment under the Mid-Level Program.

(e) *Examination for mid-level appointment.* The submission of an application to the Board of Examiners does not in itself entitle an applicant to examination. The decision whether to proceed with an examination will be made by the Board of Examiners after a thorough review of the candidate's qualifications and a determination of eligibility for appointment following receipt of a certification of need for that candidate.

(1) *Purpose.* The mid-level examination is designed to enable the Board of Examiners to determine a candidate's aptitude for the work of the Foreign Service at the mid-level and fitness for a Foreign Service career.

(2) *Class.* In determining the Foreign Service officer class for which a candidate will be examined, the Board of Examiner's presumption will be for the class which is equivalent to the candidate's current salary level. In evaluating qualifications and in conducting examinations, the Board of Examiners will determine whether the candidate's qualifications compare favorably with Foreign Service officers at the candidate's current salary level. However, the Board of Examiners, at its discretion, may certify a candidate for appointment as a career candidate at a class other than that equivalent to current salary level in those instances where the Board determines that the candidate's qualifications clearly warrant such action.

(3) *Written examination.* A written examination will not normally be required of candidates for mid-level appointment. However, if the volume of applications for a given class or classes, or a particular functional specialty, is such as to make it infeasible to examine all candidates orally within a reasonable time, such candidates may be required to take an appropriate written examination prescribed by the Board of Examiners. Candidates whose score on the written examination is at or above the passing level set by the Board of Examiners will be eligible for selection for the oral examination.

(4) *Oral examination*—(i) *Purpose.* The oral examination will be designed to enable the Board of Examiners to determine whether candidates are functionally qualified for work in the Foreign Service at the mid-level, whether they have the potential to advance in the Foreign Service, and whether they have the background and experience to make a contribution to the Foreign Service.

(ii) *When and where given.* The oral examination is individually scheduled throughout the year and is normally given in Washington, DC. At the discretion of the Board of Examiners, it may be given in other American cities, or at Foreign Service posts, selected by the Board.

(iii) *Examining panel.* Candidates recommended by a Qualifications Evaluation Panel for examination will be given an oral examination by a panel of deputy examiners of the Board of Examiners. That panels shall include at least one officer from the functional or professional specialty for which the candidate is being examined. Examining panels shall be chaired by a career officer of the Foreign Service. Determinations of duly constituted panels of deputy examiners are final unless modified by specific action of the Board of Examiners.

(iv) *Content.* The Examining Panel will question the candidate regarding the indicated functional or professional specialty; knowledge of American history, government, and other features of American culture; familiarity with current events and international affairs; and other matters relevant to the candidate's qualifications for appointment.

(v) *Grading.* Candidates taking the oral examination will be graded numerically according to standards established by the Board of Examiners. The candidacy of anyone whose score is at or above the passing level set by the Board will be continued. The candidacy of anyone whose score is below the passing level will be terminated and may not be considered again until 1 year after that date.

(5) *Written essay.* Candidates who take the oral examination will be asked to write an essay during the examination day, on a topic related to Foreign Service work, to enable the Board of Examiners to measure the candidate's effectiveness of written expression.

(6) *Other exercises.* Candidates who take the oral examination also may be

asked to complete other exercises during the examination day, to enable the Board of Examiners to measure additional aspects of performance related to Foreign Service work at the mid-level.

(7) *Background investigation.* Candidates who pass the oral examination will be eligible for selection for the background investigation. The background investigation shall be conducted to determine suitability for appointment to the Foreign Service.

(8) *Medical examination.* Candidates who pass the oral examination, and their dependents, will be eligible for selection for the medical examination. The medical examination shall be conducted to determine the candidate's physical fitness to perform the duties of a Foreign Service officer on a worldwide basis and, for candidates and dependents, to determine the presence of any physical, neurological, or mental condition of such a nature as to make it unlikely that they would be able to function on a world-wide basis.

(9) *Final review panel.* The entire file of candidates who pass the oral examination will be reviewed and graded by a Final Review Panel, consisting of two or more deputy examiners of the Board of Examiners, after the results of the background investigation and the medical examination are received. The Final Review Panel will take into account the grade assigned by the oral Examining Panel, as well as all other available information concerning the candidate, and decide whether or not to recommend the candidate for appointment. The candidate's file will then be submitted to the Board of Examiners for approval. If approved by the Board, the candidate's name will be entered on the rank-order register for the class and functional specialty for which the candidate has been found qualified. The candidacy of anyone who is not recommended for appointment by the Final Review Panel shall be terminated and the candidate so informed.

(10) *Foreign language requirement.* All candidates who pass the oral examination will be required to take a subsequent test to measure their fluency in foreign languages or their aptitude for learning them. A candidate may be appointed without first having passed an examination in a foreign language, but the appointment will be subject to the condition that the newly appointed career candidate may not be converted to career Foreign Service officer status unless, within a specified period of time, adequate proficiency in a foreign language is achieved. For limitations on promotions see Volume 3 (Personnel), Foreign Affairs Manual, section 874.

(11) *Certification for appointment*—(i) *Departmental employees.* A candidate who is a career employee of the Department, for whom a certification of need has been issued, will be certified by the Board of Examiners for appointment after satisfactorily completing all aspects of the examination process. The appointment certification will specify the class and salary for which the candidate has been found qualified.

(ii) *Others.* Other successful candidates will, after being approved by the board of Examiners, have their names placed on the rank-order register for the class and functional specialty for which they have been found qualified. A separate rank-order register may be established for candidates under the Mid-Level Affirmative Action Program. Appointments to available openings will be made from the registers in rank-order according to the needs of the Foreign Service.

(12) *Termination of eligibility.* Candidates who have qualified but have not been appointed because of lack of openings will be removed from the rank-order register 18 months after the date of placement on the rank-order register. The Board of Examiners may extend the eligibility period when such extension is, in its judgment, justified in the interests of the Foreign Service.

(Secs. 206(a) and 301(b), Foreign Service Act of 1980 (secs. 206(a) and 301(b), Pub. L. 96–465, 94 Stat. 2079 and 2083 (22 U.S.C. 3926 and 3941)))

[48 FR 19702, May 2, 1983]

§ 11.20 Foreign Service specialist career candidate appointments.

(a) *General considerations.* (1) Section 303 of the Foreign Service Act of 1980 (hereinafter referred to as the Act) authorizes the appointment of members of the Service (other than Presidential appointments).

(2) Section 306 of the Act provides that, before receiving a career appointment in the Foreign Service, an individual shall first serve under a limited appointment for a trial period of service as a career candidate.

(3) This section governs the appointment by the Department of State of Foreign Service specialist career candidates to classes FS–1 and below. Specialist candidates comprise all candidates for career appointment in all occupational categories other than generalists (that is, administrative, consular, economic, political, and program direction), who are governed by the regulations respecting Foreign Service officer career candidates. The appointment of all Senior Foreign Service career candidates regardless of occupational category is governed by § 11.30 (to be supplied). Regulations governing trial service and tenuring of specialist candidates are found in Volume 3 (Personnel), Foreign Affairs Manual, section 580.

(4) Veterans' preference shall apply to the selection and appointment of Foreign Service specialist career candidates.

(b) *Specialist career candidate appointments*—(1) *Certification of need*. Candidates for appointment as specialist career candidates must be world-wide available and must have a professional or a functional skill for which there is a continuing need in the Foreign Service. Before an application can be processed, the Director General of the Foreign Service must certify that there is a need for the applicant as a career candidate in the specialist category at or above the proposed class of appointment. No applicant shall be appointed at a class level for which there is no certified need. This individual certification of need is not required for those specialist occupations which the Director General determines in advance to be shortage or continuous recruitment categories, and for which the Director General has certified the need for a specific number of appointments at given levels. Such appointments, including an appointment of an individual who is the employee of any agency, may not exceed 5 years in duration, and may not be renewed or extended beyond 5 years. A specialist candidate denied tenure under Volume 3 (Personnel), Foreign Affairs Manual, section 580, may not be reappointed as a career candidate in the same occupational category.

(2) *Eligibility*. An applicant must be a citizen of the United States and at least 20 years of age. The minimum age for appointment as a career candidate is 21. All career candidate appointments shall be made before the candidate's 60th birthday. The maximum age for appointment under the program is based on the requirement that all career candidates shall be able to (i) complete at least two full tours of duty, exclusive of orientation and training, (ii) complete the requisite eligibility period for tenure consideration, and (iii) complete the requisite eligibility period to receive retirement benefits, prior to reaching the mandatory retirement age of 65 prescribed by the Act.

(3) *Selection and initial screening*. Specialist career candidates will be selected on the basis of education, experience, suitability, performance potential, and physical fitness for world-wide service. Applicants normally will be given personal interviews and will be subject to such written, oral, physical, foreign language, and other examinations as may be prescribed by the Board of Examiners for the Foreign Service and administered by the Office of Recruitment, Examination, and Employment (PER/REE). The Board of Examiners will identify and/or approve the knowledge, skills, abilities, and personal characteristics required to perform the tasks and duties of Foreign Service specialists in each functional field. PER/REE will screen applications for appointment as Foreign Service specialist career candidates under approved criteria and select those who meet the requirements for further processing under these regulations.

(4) *Oral examination*. Candidates selected through the initial screening will be eligible for an oral examination unless they are candidates for appointment in occupational categories for which the oral examination may be waived by the Director General. This waiver normally will apply only to continuous-recruitment categories and to appointments below the FS–6 level, and

where such waivers occur, a thorough oral interview will be conducted. The oral examination will be given by a panel of deputy examiners, at least one of whom will be a career Foreign Service specialist proficent in the functional field for which the candidate is being tested. The examination may include a writing sample. Candidates taking the oral examination will be graded numerically according to standards set by the Board of Examiners. The candidacy of anyone whose score is at or above the passing level set by the Board will be continued. The candidacy of anyone whose score is below the passing level will be terminated and may not be considered again for 1 year.

(5) *Background investigation.* Candidates who have passed the oral examination, and candidates who have passed the initial screening if the oral examination has been waived, will be eligible for selection for the background investigation to determine their suitability for appointment to the Foreign Service.

(6) *Medical examination.* Such candidates and their dependents will be eligible for selection for the medical examination. The medical examination shall be conducted to determine the candidate's physical fitness to perform the duties of a Foreign Service specialist on a world-wide basis and, for candidates and dependents, to determine the presence of any physical, neurological, or mental condition of such a nature as to make it unlikely that they would be able to function on a world-wide basis.

(7) *Final review panel.* After the results of the medical examination and background investigation have been received, a Final Review Panel, consisting of two or more deputy examiners of the Board of Examiners, or by another appropriate panel appointed for the purpose by the Director of PER/REE, will review and grade the candidate's entire file. Candidates approved by the Final Review Panel will have their names placed on a rank-order register for the functional specialty for which they are qualified. Candidates will remain eligible for appointment for 18 months from the date of placement on the rank-order register. The Board of Examiners may extend this eligibility period when such extension is, in its judgment, justified in the interests of the Foreign Service. The candidacy of anyone who is not recommended for appointment by the Final Review Board shall be terminated and the candidate so informed.

(c) *Limited non-career appointments.* Other Foreign Service specialist appointments may be made on a limited non-career basis. Before an application for a limited non-career appointment can be processed, the Director General of the Foreign Service must certify that there is a need for the applicant. Such limited specialists must serve overseas, and they will be subject to the same conditions as those outlined in these regulations for career candidates, with the exception that the maximum age of 59 does not apply to such appointments. However, because members of the Foreign Service generally are subject to the mandatory retirement age of 65 under section 812 of the Act, limited non-career appointments normally will not extend beyond the appointee's 65th birthday. Applicants for limited non-career appointments will be subject to the same screening, medical examination, background investigation, and final review process required of career candidates, but normally they will not be subject to a written or oral examination. Their appointments will normally be limited to the duration of the specific assignment for which they are to be hired, may not exceed 5 years in duration, and may not be renewed or extended beyond 5 years. Ordinarily, no limited non-career appointee will be reappointed until at least 1 year has elapsed since the expiration of a previous appointment. However, earlier reappointment may be granted in cases of special need, provided the exclusive employee representative is advised in advance and is afforded an opportunity to comment. Prior to the expiration of their limited appointments, if otherwise eligible, non-career appointees may compete for career candidate status by qualifying at that time for and taking the examinations required of career candidates. If successful, their names would be entered on the rank-

order register for their functional specialty. If appointed as career candidates, the length of service under their previous limited non-career appointments may be counted as part of the trial period of service prescribed before a candidate can receive a career appointment.

(Secs. 206(a) and 301(b), Foreign Service Act of 1980 (secs. 206(a) and 301(b), Pub. L. 96–465, 94 Stat. 2079 and 2083 (22 U.S.C. 3926 and 3941)))

[48 FR 19704, May 2, 1983]

§ 11.30 Senior Foreign Service officer career candidate and limited non-career appointments.

(a) *General considerations.* (1) Career officers at the Senior Level normally shall be appointed as the result of promotion of Mid-Level career officers. Where the needs of the Foreign Service at the Senior Level cannot otherwise be met by this approach, limited appointments may by granted to applicants as Senior Career Candidates or as limited non-career appointees in accordance with these regulations. However, as required by section 305(b) of the Foreign Service Act of 1980 (hereinafter referred to as the Act), but qualified by section 305(b)(1) and (2) and section 2403(c) of the Act, the limited appointment of an individual in the Senior Foreign Service shall not cause the number of members of the Senior Foreign Service serving under limited appointments to exceed 5 percent of the total members of the Senior Foreign Service.

(2) Successful applicants under the Senior Career Candidate Program will be appointed to Career Candidate status for a period not to exceed 5 years. Such limited Career Candidate appointments may not be renewed or extended beyond 5 years.

(3) Under section 306 of the Act, Senior Career Candidates may be found qualified to become career members of the Senior Foreign Service. Those who are not found to be so qualified prior to the expiration of their limited appointments will be separated from the Career Candidate Program no later than the expiration date of their appointments. Separated candidates who originally were employees of a Federal department or agency, and who were appointed to the Senior Foreign Service with the consent of the head of that department or agency, will be entitled to reemployment rights in that department or agency in accordance with section 310 of the Act and section 3597 of title 5, United States Code.

(4) The following regulations shall be utilized in conjunction with section 593, Volume 3, Foreign Affairs Manual (''Senior Foreign Service Officer Career Candidate Program''). (Also see Foreign Affairs Manual Circulars No. 8 [applicable to the Department of State only] and No. 9 [applicable to the Departments of State, Agriculture, and Commerce, the Agency for International Development, and the United States Information Agency], dated March 6, 1981.)

(b) *Senior Career Candidate appointments*—(1) *Eligibility requirements.* Senior Career Candidates must meet the following eligibility requirements:

(i) *Citizenship.* Each person appointed as a Senior Career Candidate must be a citizen of the United States.

(ii) *Age.* All career candidate appointments shall be made before the candidate's 60th birthday. Appointments by the United States Information Agency shall be made before the candidate's 58th birthday. The maximum age for appointment under this program is based on the requirement that all career candidates shall be able to: (A) Complete at least two full tours of duty, exclusive of orientation and training; (B) complete the requisite eligibility period for tenure consideration and (C) complete the requisite eligibility period to receive retirement benefits, prior to reaching the mandatory retirement age of 65 prescribed by the Act.

(iii) *Service.* (A) On the date of application, an applicant must have completed a minimum of 15 years of professional work experience, including at least 5 years of service in a position of responsibility in a Federal Government agency or agencies or elsewhere equivalent to that of a Mid-Level Foreign Service officer (classes FS–1 through FS–3). The duties and responsibilities of the position occupied by the applicant must have been similar to or closely related to that of a Foreign Service officer in terms of knowledge,

skills, abilities, and overseas work experience. In addition, an applicant must currently be in, or have been in, a position comparable to a Foreign Service officer of class 1 (FS–1), or higher.

(B) Applicants from outside the Federal Government, and Federal employees who at the time of application lack the 15 years of professional work experience or the 5 years of service in a position of responsibility as defined in the preceding paragraph, may, however, be considered if they are found to possess a combination of educational background, professional work experience, and skills needed by the Foreign Service at the Senior Level in employment categories which normally are not staffed by promotion of Mid-Level career officers.

(C) Non-career members of the Senior Foreign Service of a Federal Government department or agency also may apply for the Senior Career Candidate Program if they meet the eligibility requirements for the program.

(iv) *Certification of need*. Before an application can be processed, the Director of Personnel of the foreign affairs agency concerned must certify that there is a need for the applicant as a Senior Career Candidate based upon (A) the projections of personnel flows and needs mandated by section 601(c)(2) of the Act, and (B) a finding that the combination of educational background, professional work experience, and skills possessed by the applicant is not expected to be available in the immediate future in sufficient numbers within the Senior Foreign Service, including by promotion and/or special training of career personnel. This certification of need will be requested by the Board of Examiners for the Foreign Service from the appropriate foreign affairs agency Director of Personnel.

(2) *Application*. All applicants for the Senior Career Candidate Program must apply in writing through the prospective employing agency to the Board of Examiners for consideration. The applicant shall submit a completed Standard Form 171, ''Personnel Qualifications Statement,'' and Form DSP–34, ''Supplement to Application for Federal Employment,'' to the Board. In addition, the applicant shall submit a narrative statement, not exceeding four typewritten pages in length, describing the applicant's pertinent background and professional work experience, which includes a statement of the applicant's willingness and ability to accept the obligation of world-wide service. The Board may request additional written information from the applicant following receipt of the initial application.

(3) *Qualifications evaluation panel*. (i) The Board of Examiners will establish a file for each applicant, placing in it all available documentation of value in evaluating the applicant's potential for service as a Senior Career Candidate. For an applicant from within the Federal Government, this will include the personnel file from the employing department or agency.

(ii) The complete file will be reviewed by a Qualifications Evaluation Panel of the Board of Examiners to determine whether the applicant meets the statutory and other eligibility requirements, to assess the applicant's skills under the certification of need issued by the prospective employing agency, and to recommend whether the applicant should be examined for possible appointment as a Senior Career Candidate. If the Qualifications Evaluation Panel decides that the applicant is not eligible for examination, the prospective employing agency shall be informed by the Board of the reasons for that decision.

(4) *Written examination*. The Board of Examiners normally will not require Senior Career Candidate applicants to undergo a written examination. However, the Board may, upon securing the agreement of the prospective employing agency, decide that such applicants should be required to take an appropriate written examination prescribed by the Board. If so, an applicant whose score on the written examination is at or above the passing level set by the Board will be eligible for selection for the oral examination.

(5) *Oral examination*—(i) *Examining panel*. Applicants recommended by the Qualifications Evaluation Panel will be given an appropriate oral examination by a Panel of Senior Foreign Service deputy examiners of the Board of Examiners. The Oral Examining Panel

shall be composed of at least two deputy examiners who are Senior Foreign Service career officers of the prospective employing agency, and at least one deputy examiner who is a Senior Foreign Service career officer from another foreign affairs agency operating under the Foreign Service Act. The Examining Panel shall be chaired by a deputy examiner who is a Senior Foreign Service career officer of the prospective employing agency. At least one of the Examining Panel members shall represent the functional or specialist field for which the applicant is being examined. Determinations of duly constituted panels of deputy examiners are final, unless modified by specific action of the Board of Examiners.

(ii) *Criteria.* (A) The Examining Panel will question the applicant regarding the indicated functional or specialist field and other matters relevant to the applicant's qualifications for appointment as a Senior Career Candidate. Prior to the oral examination, the applicant will be asked to write an essay, on a topic related to Foreign Service work, to enable the Examining Panel to judge the applicant's effectiveness of written expression. This essay requirement may be waived at the request of the head of the prospective employing agency, if, for example, the applicant is a career member of the Senior Executive Service.

(B) The oral examination will be conducted under written criteria, established in consultation with the prospective employing agency and publicly announced by the Board of Examiners. The examination will seek to determine the ability of the applicant to meet the objective of section 101 of the Act, which provides for a Senior Foreign Service ''characterized by strong policy formulation capabilities, outstanding executive leadership qualities, and highly developed functional, foreign language, and area expertise.''

(iii) *Grading.* Applicants taking the oral examination will be graded as ''recommended,'' or ''not recommended'' by the Examining Panel. Those graded as ''recommended'' also will be given a numerical score, under the standard Board of Examiners scoring criteria, for use by the Final Review Panel.

(6) *Background investigation.* Senior Career Candidate applicants recommended by the Examining Panel will be subject to the same background investigation as required for Junior and Mid-Level Foreign Service Officer Career Candidates. The background investigation shall be conducted to determine suitability for appointment to the Foreign Service.

(7) *Medical examination.* Senior Career Candidate applicants recommended by the Examining Panel, and their dependents, will be subject to the same medical examination as required for the Junior and Mid-Level Foreign Service Career Candidates. The medical examination shall be conducted to determine the applicant's physical fitness to perform the duties of a Foreign Service officer on a world-wide basis and, for applicants and dependents, to determine the presence of any physical, neurological, or mental condition of such a nature as to make it unlikely that they would be able to function on a world-wide basis. Applicants and/or dependents who do not meet the required medical standards may be given further consideration, as appropriate, under the procedures of the prospective employing agency.

(8) *Foreign language requirement.* Applicants recommended by the Examining Panel will be required to take a subsequent examination to measure their fluency in foreign languages, and/or their aptitude for learning them. Senior Career Candidates will be subject to the foreign language requirements established for their occupational category by their prospective employing agency. Senior Career Candidate applicants for the Foreign Commercial Service must demonstrate proficiency by examination in two foreign languages. United States Information Agency Senior Career Candidates, other than Senior Specialist Career Candidates, must demonstrate proficiency in at least one foreign language. Except for the Foreign Commercial Service and the United States Information Agency, an applicant may be appointed without first having passed an examination in a foreign language,

but the appointed Senior Career Candidate may not be commissioned as a Career Senior Foreign Service officer unless adequate proficiency in a foreign language is achieved. This language requirement will not apply to candidates in occupational categories which, in the judgment of the prospective employing agency, do not require foreign language proficiency.

(9) *Final review panel.* (i) The entire file of an applicant recommended by the Examining Panel will be reviewed and graded by a Final Review Panel, after the results of the background investigation, medical examination and language examination are received. The Final Review Panel will decide whether or not to recommend the applicant for appointment, taking into account all of the available information concerning the applicant.

(ii) The Final Review Panel shall consist of a chairperson who shall be a Deputy Examiner who is a career Senior Foreign Service officer of the prospective employing agency, and at least two other Deputy Examiners of the Board of Examiners. Of the Deputy Examiners serving on the Final Review Panel, the majority shall be career Senior Foreign Service officers of the prospective employing agency; and at least one shall be a career Senior Foreign Service officer of one of the other foreign affairs agencies operating under the Act.

(10) *Certification of appointment.* The file of an applicant recommended by the Final Review Panel will be submitted to the Board of Examiners for consideration and approval. An applicant found by the Board to meet the standards for appointment as a Senior Foreign Service Career Candidate shall be so certified to the Director of Personnel of the prospective employing agency.

(c) *Limited non-career appointments.* (1) Other Senior Foreign Service appointments may be made on a limited non-career basis for individuals who do not wish to compete for career appointments, but for whom a need can be certified by the Director of Personnel of the foreign affairs agency concerned. Such limited non-career senior appointees will be subject to the eligibility requirements set forth in §11.30(b)(1) (i) and (iv). The maximum age set forth in §11.30(b)(1)(ii) does not apply to such appointments. However, because Foreign Service members generally are subject to the mandatory retirement age of 65, under section 812 of the Act, limited non-career Senior appointments normally will not extend beyond the appointee's 65th birthday. Limited non-career appointees of the Department of Commerce and the United States Information Agency will not be subject to the language requirements of §11.30(b)(8). Applicants for limited non-career senior appointments will be subject to the same background investigation and medical examination required of career candidates, but normally they will not be subject to a written or oral examination, or to approval by the Board of Examiners. Processing procedures for such applicants will be established by the Director of Personnel of the foreign affairs agency concerned. Their appointments normally will be limited to the duration of the specific assignments for which they are to be hired, may not exceed 5 years in duration, and may not be renewed or extended beyond 5 years.

(2) Prior to the expiration of their limited non-career senior appointments, if they meet all the eligibility requirements set forth in §11.30(b)(1), such individuals may elect to compete for career candidate status in the Senior Foreign Service by qualifying at that time for and taking the examinations required of career candidates. If appointed as career candidates, the length of service under their previous limited non-career appointments may be counted under the procedures of the employing agency as part of the trial period of service prescribed before a career candidate can receive a career appointment. The total period of limited appointment (non-career and career candidate) of such individuals may not exceed 5 years in duration.

(3) Nothing in this section will limit the right of an individual who has previously served as a limited non-career senior appointee from subsequently applying for consideration as a new applicant and being appointed as a Senior Career Candidate after a limited non-career appointment has expired.

(d) *Reporting requirement*. The Director of Personnel of each foreign affairs agency shall report annually to the Director General of the Foreign Service, Department of State, the number and nature of the limited Senior Foreign Service appointments (non-career and career candidates) made by that agency under these regulations.

(Secs. 206(a) and 301(b), Foreign Service Act of 1980 (secs. 206(a) and 301(b), Pub. L. 96–465, 94 Stat. 2079 and 2083 (22 U.S.C. 3926 and 3941)))

[48 FR 38607, Aug. 25, 1983]

PART 12—COMPLAINTS AGAINST EMPLOYEES BY ALLEGED CREDITORS

Sec.
12.1 No cognizance taken of complaint.
12.2 Claimants denied access to employees.

§ 12.1 No cognizance taken of complaint.

The Department of State will take no cognizance of a complaint against an employee by an alleged creditor, so far as the complainant is concerned, beyond acknowledging receipt of his communication.

(Sec. 4, 63 Stat. 111, as amended; 22 U.S.C. 2658)

[22 FR 10789, Dec. 27, 1957]

§ 12.2 Claimants denied access to employees.

Persons claiming to be creditors or collectors of debts or claims will be denied access to employees for the purpose of presenting or collecting claims during the hours set apart for the transaction of public business or while the employees concerned are on duty.

(Sec. 4, 63 Stat. 111, as amended; 22 U.S.C. 2658)

[22 FR 10789, Dec. 27, 1957]

PART 13—PERSONNEL

Sec.
13.1 Improper exaction of fees.
13.2 Embezzlement.
13.3 Liability for neglect of duty or for malfeasance generally; action on bond; penalty.
13.4 False certificate as to ownership of property.

AUTHORITY: Sec. 302, 60 Stat. 1001; 22 U.S.C. 842.

SOURCE: 22 FR 10789, Dec. 27, 1957, unless otherwise noted.

§ 13.1 Improper exaction of fees.

Any consular officer who collects, or knowingly allows to be collected, for any services any other or greater fees than are allowed by law for such services, shall, besides his or her liability to refund the same, be liable to pay to the person by whom or in whose behalf the same are paid, treble the amount of the unlawful charge so collected, as a penalty. The refund and penalty may be recovered with costs, in any proper form of action, by such person for his or her own use. The amount of such overcharge and penalty may at the discretion of the Secretary of the Treasury be ordered withheld from the compensation of such officer for payment to the person entitled to the same (22 U.S.C. 1189).

NOTE: The foregoing relates to improper collection and personal withholding of funds by consular officers. For procedure where a collection, having been erroneously made, has been returned by the officer to the Treasury in good faith, making a subsequent accounting adjustment necessary, see § 22.4, *Refund of fees* of this chapter.

(22 U.S.C. 2658 and 3926)

[22 FR 10789, Dec. 27, 1957, as amended at 49 FR 16989, Apr. 23, 1984]

§ 13.2 Embezzlement.

Every consular officer who shall receive money, property, or effects belonging to a citizen of the United States and shall not within a reasonable time after demand made upon him or her by the Secretary of State or by such citizen, his or her executor, administrator, or legal representative, account for and pay over all moneys, property, and effects, less his or her lawful fees, due to such citizen, shall be deemed guilty of embezzlement, and shall be punishable by imprisonment for not more than five years, and by a fine of not more than $2,000 (22 U.S.C. 1198). Penalties of imprisonment and fine are also prescribed for embezzlement in connection with the acceptance, without execution of a prescribed form of bond, of appointment from any

foreign state as administrator, guardian, or to any other office of trust for the settlement or conservation of estates of deceased persons or of their heirs or of persons under legal disabilities (22 U.S.C. 1178 and 1179). Acceptance of such appointments is not ordinarily permitted under existing regulations. See § 92.81 of this chapter.

(22 U.S.C. 2658 and 3926)

[22 FR 10789, Dec. 27, 1957, as amended at 49 FR 16989, Apr. 23, 1984]

§ 13.3 Liability for neglect of duty or for malfeasance generally; action on bond; penalty.

Whenever any consular officer willfully neglects or omits to perform seasonably any duty imposed upon him or her by law, or by any order or instruction made or given in pursuance of law, or is guilty of any willful malfeasance or abuse of power, or of any corrupt conduct in his or her office, he or she shall be liable to all persons injured by any such neglect, or omission, malfeasance, abuse, or corrupt conduct, for all damages, occasioned thereby; and for all such damages, he or she and his or her sureties upon his or her official bond shall be responsible thereon to the full amount of the penalty thereof to be sued in the name of the United States for the use of the person injured. Such suit, however, shall in no case prejudice, but shall be held in entire subordination to the interests, claims, and demands of the United States, as against any officer, under such bond, for every willful act of malfeasance or corrupt conduct in his or her office. If any consul neglects or omits to perform seasonably the duties imposed upon him or her by the laws regulating the shipment and discharge of seamen, or is guilty of any malversation or abuse of power, he or she shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office, he or she shall be punishable by imprisonment for not more than five years and not less than one, and by a fine of not more than $10,000 and not less than $1,000 (22 U.S.C. 1199).

(22 U.S.C. 2658 and 3926)

[22 FR 10789, Dec. 27, 1957, as amended at 49 FR 16989, Apr. 23, 1984]

§ 13.4 False certificate as to ownership of property.

If any consul of vice consul falsely and knowingly certifies that property belonging to foreigners is property belonging to citizens of the United States, he or she shall be punishable by imprisonment for not more than three years, and by a fine of not more than $10,000 (22 U.S.C. 1200).

(22 U.S.C. 2658 and 3926)

[22 FR 10789, Dec. 27, 1957, as amended by Dept. Reg. 108.838, 49 FR 16989, Apr. 23, 1984]

PART 16—FOREIGN SERVICE GRIEVANCE SYSTEM

Sec.
16.1 Definitions.
16.2 General provisions.
16.3 Access to records.
16.4 Time limits for grievance filing.
16.5 Relationship to other remedies.
16.6 Security clearances.
16.7 Agency procedures.
16.8 Agency review.
16.9 Records.
16.10 Foreign Service Grievance Board.
16.11 Grievance Board consideration of grievances.
16.12 Hearing.
16.13 Decisions.
16.14 Reconsideration of a grievance.
16.15 Judicial review.

AUTHORITY: Sec. 4 of the Act of May 26, 1949, as amended (63 Stat. 111; 22 U.S.C. 2658); Pub. L. 94–141 (89 Stat. 765); 22 U.S.C. 1037; sec. 10 of E.O. 11636 (36 FR 24901).

SOURCE: 41 FR 13912, Apr. 1, 1976, unless otherwise noted.

§ 16.1 Definitions.

(a) *Act* means the Foreign Service Act of 1946, as amended.

(b) *Grievant* means any officer or employee of the Service who is a citizen of the United States; or for purposes of paragraphs (c) (7) and (8) of this section, a former officer or employee of the Service; or in the case of death of the officer or employee, a surviving spouse or dependent family member of the officer or employee.

(c) *Grievance* means any act or condition subject to the control of the Foreign Affairs agencies (the Department

of State, the Agency for International Development, or the U.S. Information Agency) which is alleged to deprive the grievant of a right or benefit authorized by law or regulation or is otherwise a source of concern or dissatisfaction to the grievant, including, but not limited to the following:

(1) Complaints against separation of an officer or employee allegedly contrary to law or regulation or predicated upon alleged inaccuracy (including inaccuracy resulting from omission or any relevant and material document), error, or falsely prejudicial character of any part of the grievant's official personnel record;

(2) Other alleged violation, misinterpretation, or misapplication of applicable law, regulation, or published policy affecting the terms and conditions of the grievant's employment or career status;

(3) Allegedly wrongful disciplinary action against an employee constituting a reprimand or suspension from official duties;

(4) Dissatisfaction with any matter subject to the control of the agency with respect to the grievant's physical working environment;

(5) Alleged inaccuracy, error, or falsely prejudicial material in the grievant's official personnel file;

(6) Action alleged to be in the nature of reprisal or other interference with freedom of action in connection with an employee's participation under these grievance procedures;

(7) When the grievant is a former officer who was involuntarily retired pursuant to sections 633 and 634 of the Act within 6 years prior to December 1, 1975, ''grievance'' shall mean a complaint that such involuntary retirement violated applicable law or regulation effective at the time of the retirement or that the involuntary retirement was predicated directly upon material contained in the grievant's official personnel file alleged to be erroneous or falsely prejudicial in character; and

(8) When the grievant is a former officer or employee or a surviving spouse or dependent family member of a former officer or employee, ''grievance'' shall mean a complaint that an allowance or other financial benefit has been denied arbitrarily, capriciously or contrary to applicable law or regulation.

(d) Grievance does not include the following:

(1) Complaints against individual assignment or transfers of Foreign Service officers or employees, which are ordered in accordance with law and regulation (see also paragraph (c)(2) of this section);

(2) Judgments of Selection Boards rendered pursuant to section 623 of the Act, or of equivalent bodies, in ranking Foreign Service officers and employees for promotion on the basis of merit, or judgments in examinations prescribed by the Board of Examiners pursuant to section 516 or 517 of the Act (see also paragraph (c)(2) of this section);

(3) Termination of time-limited appointments pursuant to 22 U.S.C. 929 and 1008, and the pertinent regulations prescribed by the employing agency (see also paragraph (c)(2) of this section);

(4) Any complaints or appeals for which a specific statutory appeals procedure exists (see appendix A for examples).

A grievance filed under these procedures may be based on matters for which there is a specific statutory appeals procedure which is applicable to the Foreign Service grievant. Should the jurisdiction of the Grievance Board over a specific grievance be placed into question on grounds that the basis of the grievance is not encompassed within the Board's authority (§ 16.1(d)(4) and Appendix A), the Board shall consult with the other statutory body concerned, transmitting the views of the parties concerned before determining whether it has jurisdiction.

(e) *Employee organization* means any employee organization accorded recognition as the excusive employee representative pursuant to Executive Order 11636 dated December 17, 1971.

(f) *Grievance Board* or *Board* means the full Foreign Service Grievance Board, or a Panel or member thereof, as appropriate.

(g) *Party* means the grievant or the Foreign Affairs agency having control over the act or condition forming the subject matter of the grievance.

(h) *Bureau* means equivalent organizational elements in State and USIA, and includes offices in AID.

(i) *Days* means calendar days.

§ 16.2 General provisions.

(a) *Statement of purpose.* These regulations establish procedures as required by law to provide Foreign Service officers and employees (and their survivors) of the Foreign Affairs agencies, a grievance procedure to insure a full measure of due process, and to provide for the just consideration and resolution of grievances of such officers, employees, and survivors. No regulation promulgated in this part shall be interpreted or applied in any manner which would alter or abridge the provisions of the due process established by the Congress in Pub. L. 94–141, 22 U.S.C. 1037, section 691.

(b) *Discussion of complaints.* (1) Every effort should be made to settle any employee complaint informally, promptly, and satisfactorily.

(2) Supervisors and other responsible officers should encourage employees to discuss complaints with them and should respond in a timely manner to resolve the complaints.

(3) An employee initially should discuss a complaint with the employee's current supervisor or with the responsible officer who has immediate jurisdiction over the complaint to give that person an opportunity to resolve the matter, before further steps are taken under these procedures.

(c) *Guidance.* Nothing in these procedures prevents a grievant from seeking guidance from any official who might be helpful respecting the submission of a grievance or its resolution.

(d) *Freedom of action.* (1) Any grievant, witness, representative or other person involved in a proceeding hereunder shall be free from any restraint, interference, coercion, harassment, discrimination, or reprisal in those proceedings or by virtue of them. The Foreign Affairs agencies recognize their obligation to insure compliance with this section. Any person involved or having immediate knowledge of any alleged breach of this section should call it to the attention of the pertinent foreign affairs agency through appropriate channels for corrective action as necessary. Normally such allegations should be brought to the attention of the senior agency official at the post; and at Washington, DC, to the Director, Grievance Staff for State; Chief, Employee Relations Branch for AID and Chief, Employee-Management Relations Division for USIA.

(2) The grievant has the right to a representative of the grievant's own choosing at every stage of the proceedings. The grievant and representative(s) who are under the control, supervision, or responsibility of the Foreign Affairs agencies shall be granted reasonable periods of administrative leave to prepare, to be present, and to present the grievance.

(3) Any witness under the control, supervision, or responsibility of a Foreign Affairs agency shall be granted reasonable periods of administrative leave to appear and testify at any such proceeding.

(4) The Foreign Service Grievance Board established hereunder shall have authority to ensure that no copy of the determination of the agency head or designee to reject a Grievance Board recommendation, no notation of the failure of the Grievance Board to find for the grievant, and no notation that a proceeding is pending or has been held, shall be entered in the personnel records of the grievant (unless by order of the Grievance Board as a remedy for the grievance) or those of any other officer or employee connected the grievance. The Foreign Affairs agencies shall maintain grievance records under appropriate safeguards to preserve confidentiality (§ 16.9).

§ 16.3 Access to records.

(a) *Grievance Board records.* The grievant and the grievant's representative shall have access to the record of proceedings, including the decision of the Board.

(b) *Agency records.* (1) In considering the validity of a grievance, the Grievance Board shall have access, to the extent permitted by law, to any agency record considered by the Board to be relevant to the grievant and the subject matter of the grievance.

(2) The agency shall, subject to applicable law, promptly furnish the grievant any agency record which the grievant requests to substantiate the grievance and which the agency or the Grievance Board determines is relevant and material to the proceeding. When deemed appropriate by the agency or the Board, a grievant may be supplied with only a summary of extract of classified material. If a request by a grievant for a document is denied prior to or during the agency's consideration of a grievance, such denial may be raised by the grievant as an integral part of the grievance before the Board.

(3) These regulations do not require disclosure of any official agency record to the Grievance Board or a grievant where the head of agency or deputy determines in writing that such disclosure whould adversely affect the foreign policy or national security of the United States.

§ 16.4 Time limits for grievance filing.

(a) A grievance concerning a continuing practice or condition may be presented at any time if its adverse effect is presently continuing. Documents contained in official employee personnel files, for example, shall be deemed to constitute a continuing condition.

(b) Subject to paragraph (a) of this section, a grievance under these regulations is forever barred, and the Grievance Board shall not consider or resolve the grievance, unless the grievance is presented within a period of 3 years after the occurrence or occurrences giving rise to the grievance, except that if the grievance arose earlier than 2 years prior to the effective date of these regulations, the grievance shall be so barred, and no considered and resolved, unless it is presented within a period of 2 years after the effective date of these regulations, There shall be excluded from the computation of any such period any time during which the grievant was unaware of the grounds which are the basis of the grievance and could not have discovered such grounds if the grievant had exercised, as determined by the Grievance Board, reasonable diligence.

(c) A grievance shall be deemed presented to the responsible official (§ 16.7(b)), transmitted to post or bureau (§ 16.7(c)) submitted for agency review (§ 16.8) or filed with the Grievance Board § 16.11(a):

(1) On the date of its dispatch by telegram, registered or certified mail, or receipted mail, in a diplomatic pouch;

(2) On the date of its arrival at the appropriate office, if delivered by any other means.

§ 16.5 Relationship to other remedies.

(a) A grievant may not file a grievance under these procedures if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided, under another provision of law, regulation, or executive order, and the matter has been carried to final decision thereunder on its merits or is still under consideration.

(b) If a grievant is not prohibited from filing a grievance under these regulations by paragraph (a) of this section, the grievant may file under these regulations notwithstanding the fact that such grievance may be eligible for consideration, resolution, and relief under a regulation or executive order other than under these regulations, but such election of remedies shall be final upon the acceptance of jurisdiction by the Board.

§ 16.6 Security clearances.

The agencies shall use their best endeavors to expedite security clearances whenever necessary to ensure a fair and prompt investigation and hearing.

§ 16.7 Agency procedures.

(a) *Initial consideration.* (1) Grievances shall be considered through the steps provided in this section before they are filed with the Grievance Board.

(2) During the pendency of agency procedures under this section, the grievant may request a suspension of the proposed action of the character of separation or termination of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses or allowances, which is related to the grievance. The request must be

in writing and addressed to the responsible official of the agencies, as designated in §16.8(a)(2) stating the reasons for such suspension. If the request is related to separation or termination of the grievant, and the agency considers that the grievance is not frivolous and is integral to the proposed action, the agency shall suspend its proposed action until completion of agency procedures, and for a period thereafter if necessary, consistent with paragraph (a) of §16.11, to permit the grievant to file a grievance with the Board, and to request interim relief under paragraph (c) of §16.11. If a request is denied, the agency shall provide the grievant in writing the reason for denial. Nothing in these regulations shall be deemed to preclude an employee from requesting the suspension of any proposed action.

(b) *Consideration by responsible officer.* (1) While every effort should be made to resolve a complaint by an initial discussion between an employee and the supervisor or responsible officer, an employee may present the complaint as a grievance by submitting it in writing, to that person. (The term ''responsible officer'' as used herein includes any appropriate officer who has immediate jurisdiction over the complaint.) The presentation shall include a description of the act or condition which is the subject of the grievance; its effect on the grievant; any provision of law, regulation, or agency policy which the grievant may believe was violated or misapplied; any documentary evidence readily available to the grievant on which the grievance rests; the identity of individuals having knowledge of relevant facts; and a statement of the remedial action requested.

(2) The responsible officer, whenever possible, shall use independent judgment in deciding whether the grievance is meritorious and what the resolution of it should be. Within 15 days from receipt of the written grievance, the responsible officer shall provide the grievant with a written response, which shall include a statement of any proposed resolution of the grievance.

(3) If the response denies in whole or in part the remedial action requested, such response shall notify the grievant of the time within which to appeal the decision, and identity of the senior official, or designee, to whom the appeal should be addressed. In those cases in which the senior official, or designee, is the responsible officer to whom the grievance was initially presented or has participated in the decision process and has formally approved the written response of the responsible officer, the grievant shall be so notified and advised that the grievance may be submitted directly to the agency for review under §16.8.

(c) *Bureau or post review.* (1) If the responsible officer's written response does not resolve the grievance to the grievant's satisfaction, within 10 days of receiving it (or, if no response is received, within 25 days after first presenting the grievance), the grievant may pursue the grievance by transmitting it in writing to the senior official, or the designee in the bureau or post which has authority to resolve the grievance. The written transmission shall include all the information required by paragraph (b)(1) of this section and copies of any correspondence under paragraphs (b) (2) and (3) of this section.

(2) Within 15 days from receipt of the grievance that official shall provide the grievant with a written decision, including any proposed resolution of the grievance. If the decision denies in whole or in part the remedial action requested, the communication shall notify the grievant of the time within which to submit the grievance for agency review and the identity of the appropriate agency official to whom the grievance should be addressed.

§16.8 Agency review.

(a) *Submission.* (1) An employee may submit the grievance for agency review if the grievance (i) is not within the jurisdiction of a post or bureau, or (ii) the grievance has been considered but not resolved to the grievant's satisfaction within the post or bureau as provided in §16.7(c) within 10 days after receipt of the post's or bureau's decision (or, if no response is received, within 25 days after presenting it to the senior official or the designee). The grievant shall submit it in writing to the responsible official of the agency which

has control of the act or condition which is the subject of the grievance.

(2) *Responsible officials.* The responsible officials of the agencies are the Deputy Assistant Secretary for Personnel (State), the Director of Personnel and Manpower (AID), and the Chief, Employee-Management Relations Division (USIA).

(3) *Contents.* (i) A request for agency review shall include a description of the act or condition which is the subject of the grievance; its effect on the grievant; any provision of law, regulation or agency policy which the grievant may believe was violated or misapplied; copies of any correspondence under §16.7(a), any documentary evidence readily available to the grievant on which the grievance rests; the identity of individuals having knowledge of relevant facts; and a statement of the remedial action requested.

(ii) The responsible official shall review the grievance on the basis of available documentary evidence, and, in that official's discretion, interview persons having knowledge of the facts. The agency review shall be completed and its decision dispatched within 90 days from the date of the initial written presentation of the grievance. The grievant shall be informed in writing of the findings of the responsible official and any proposed resolution of the grievance. The communication shall also include the time within which the grievant may file a grievance with the Grievance Board and the appropriate procedure to be followed in this respect.

§ 16.9 Records.

All official records concerning agency consideration of grievances, except those appropriate to implementation of decisions favorable to grievants, shall be kept separate from the official personnel record of the grievant and any other individuals connected with the grievance, and shall not be accessible to agency personnel other than the grievant, the grievant's representative, and those responsible for consideration of grievances.

§ 16.10 Foreign Service Grievance Board.

(a) *Establishment and composition.* There is hereby established a Foreign Service Grievance Board for the Department of State, the Agency for International Development and the U.S. Information Agency to consider and resolve grievances under these procedures.

(b) The Grievance Board shall consist of not less than 5 members nor more than 15 members (including a chairperson) who shall be independent, distinguished citizens of the United States, well known for their integrity, who are not active officers, employees, or consultants of the Foreign Affairs agencies (except consultants who served as public members of the Interim Grievance Board previously established under section 660, Volume 3, Foreign Affairs Manual) but may be retired officers or employees. On its initial establishment, the Board shall consist of 15 members including chairperson.

(c) The Board may act by or through panels or individual members designated by the chairperson, except that hearings within the continental United States shall be held by panels of at least three members unless the parties agree otherwise. Reference in these regulations to the Grievance Board shall be considered to be reference to a panel or member of the Grievance Board where appropriate. All members of the Grievance Board shall act as impartial individuals in considering grievances.

(d) The members of the Grievance Board, including the chairperson, shall be appointed by the Secretary of State after being designated by the written agreement of the Foreign Affairs agencies and the employee organization.

(e) The Board chairperson and other members shall be appointed for terms of 2 years, subject to renewal upon the agreement of the Foreign Affairs agencies and the employee organization; except that the terms of 7 of the initially appointed members shall expire at the end of one year.

(f) Any vacancies shall be filled by the Secretary of State upon the nomination by the Board following the

agreement of the agencies and the employee organization.

(g) *Compensation*. Members, including the chairperson, who are not employees of the Federal Government shall receive compensation for each day they are performing their duties as members of the Grievance Board (including travel time) at the daily rate paid an individual at GS–18 level of the General Schedule under section 5332 of title 5 of the United States Code.

(h) *Removal*. Grievance Board members shall be subject to removal by the Secretary of State for corruption, other malfeasance, or the demonstrated incapacity to perform their functions. No member shall be removed from office until after the Board of the Foreign Service has conducted a hearing and made its recommendations in writing to the Secretary of State, except where the right to a hearing is waived in writing. The Board of the Foreign Service shall provide a member with full notice of the charges against that member, and afford a member the right to counsel, to examine and cross-examine witnesses, and to present documentary evidence.

(i) *Grievance Board procedures*. In accordance with part J, title VI of the Act, the Board may adopt regulations concerning the organization of the Board and such other regulations as mey be necessary to govern its proceedings.

(j) *Board facilities and staff support*. The Grievance Board may obtain facilities, services, and supplies through the general administrative services of the Department of State. All expenses of the Board, including necessary costs of the grievant's travel and travel-related expenses, shall be paid out of funds appropriated to the Department for obligation and expenditure by the Board. At the request of the Board, officers and employees on the rolls of the Foreign Affairs agencies may be assigned as staff employees to the Grievance Board. Within the limit of appropriated funds, the Board may appoint and fix the compensation of such other employees as the Board considers necessary to carry out its functions. The officers and employees so appointed or assigned shall be responsible solely to the Grievance Board and the Board shall prepare the performance evaluation reports for such officers and employees. The records of the Grievance Board shall be maintained by the Board and shall be separate from all other records of the Foreign Affairs agencies.

§ 16.11 Grievance Board consideration of grievances.

(a) *Filing of grievance*. A grievant whose grievance is not resolved satisfactorily under agency procedures (§ 16.7) shall be entitled to file a grievance with the Grievance Board no later than 60 days after receiving the agency decision. In the event that an agency has not provided its decision within 90 days of presentation, the grievant shall be entitled to file a grievance with the Grievance Board no later than 150 days after the date of presentation to the agency. The Board may extend or waive, for good cause, the time limits stated in this section.

(b) *Exhaustion of agency procedures*. In the event that the Grievance Board finds that a grievance has not been presented for agency consideration or that a grievance has been expanded or modified to include materially different elements, the Board shall return the grievance to the official responsible for final agency review unless the agency waives any objection to Board consideration of the grievance without such review.

(c) *Prescription of interim relief*. If the Grievance Board determines that the agency is considering any action of the character of separation or termination of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board, and that such action should be suspended, the agency shall suspend such action until the Board has ruled upon the grievance. *Notwithstanding* such suspension of action, the head of the agency concerned or a chief of mission or principal officer may exclude an officer or employee from official premises or from the performance of specified duties when such exclusion is determined in writing to be essential to the functioning of the post or office

to which the officer or employee is assigned.

(d) *Inquiry into grievances.* The Board shall conduct a hearing at the request of a grievant in any case which involves disciplinary action, or a grievant's retirement from the Service under sections 633 and 634 of the Act, or which in the judgment of the Board can best be resolved by a hearing or by presentation of oral argument. In those grievances in which the Board holds no hearing, the Board shall offer to each party the opportunity to review and to supplement, by written submission, the record of proceedings prior to its decision.

§ 16.12 Hearing.

(a) *Appearances and representation.* The grievant, a reasonable number of representatives of the grievant's own choosing, and a reasonable number of agency representatives, are entitled to be present at the hearing. The Grievance Board may, after considering the views of the parties and any other individuals connected with the grievance, decide that a hearing should be open to others.

(b) *Conduct of hearing.* (1) Testimony at a hearing shall be given by oath or affirmation which any Board member or person designated by the Board shall have authority to administer.

(2) Each party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition, and to serve interrogatories answered by the other party unless the Board finds such interrogatory irrelevant or immaterial. Upon request of the Board, or upon a request of the grievant deemed relevant and material by the Board, and agency shall promptly make available at the hearing or by deposition any witness under its control, supervision or responsibility, except that if the Board determines that the presence of such witness at the hearing is required for just resolution of the grievance, then the witness shall be made available at the hearing, with necessary costs and travel expenses provided by the agency.

(3) During any hearings held by the Board, any oral or documentary evidence may be received but the Board shall exclude any irrelevant, immaterial, or unduly repetitious evidence normally excluded in hearings conducted under the Administrative Procedures Act (5 U.S.C. 556).

(4) A verbatim transcript shall be made of any hearing and shall be part of the record of proceedings.

§ 16.13 Decisions.

(a) Upon completion of the hearing or the compilation of such record as the Board may find appropriate in the absence of a hearing, the board shall expeditiously decide the grievance on the basis of the record of proceedings. In each case the decision of the Board shall be in writing, shall include findings of fact, and shall include the reasons for the Board's decision.

(b) If the Grievance Board finds that the grievance is meritorious, the Board shall have the authority within the limitations of the authority of the head of the agency, to direct the agency:

(1) To correct any official personnel record relating to the grievant which the Board finds to be inaccurate, erroneous, or falsely prejudicial;

(2) To reverse and administrative decision denying the grievant compensation including related within-class salary increases pursuant to section 625 of the Act or any other perquisite of employment authorized by law or regulation when the Board finds that such denial was arbitrary, capricious, or contrary to law or regulation;

(3) To retain in service and employee whose termination would be in consequence of the matter by which the employee is aggrieved;

(4) To reinstate with back pay, under applicable law and regulations, an employee where it is clearly established that the separation or suspension without pay of the employee was unjustified or unwarranted;

(5) To order an extension of the time of an employee's eligibility for promotion to a higher class where the employee suffered career impairment in consequence of the matter by which the employee is aggrieved;

(6) To order that an employee be provided with facilities relating to the physical working environment which

the employee has been denied arbitrarily, capriciously or in violation of applicable regulation.

(c) Such orders of the Board shall be final, subject to judicial review as provided for in section 694 of the Act, except that reinstatement of former officers who have filed grievances under § 16.1(c)(7) shall be presented as Board recommendations, the decision on which shall be subject to the sole discretion of the agency head or designee, who shall take into account the needs of the Service in deciding on such recommendations, and shall not be subjected to judicial review under section 694 of the Act. The reason(s) for the agency head's (or designee's) decision will be conveyed in writing to the Board and the grievant.

(d) If the Board finds that the grievance is meritorious and that remedial action should be taken that directly relates to promotion or assignment of the grievant, or to other remedial action, including additional step increases, not provided for in paragraph (b) of this section, or if the Board finds that the evidence before it warrants disciplinary action against any officer or employee, it shall make an appropriate recommendation to the head of the agency, and forward to the head of the agency the record of the Board's proceedings, including the transcript of the hearing, if any. The head of the agency (or designee, who shall not have direct responsibility for administrative management) shall make a written decision to the parties and to the Board on the Board's recommendation within 30 days from receipt of the recommendation. A recommendation of the Board may be rejected in part or in whole if the action recommended would be contrary to law, would adversely affect the foreign policy or security of the United States, or would substantially impair the efficiency of the Service. If the decision rejects the Board's recommendation in part or in whole, the decision shall state specifically any and all reasons for such action. Pending the decision, there shall be no ex parte communications concerning the grievance between the agency head, or designee, and any person involved in the grievance proceeding.

§ 16.14 Reconsideration of a grievance.

A grievant whose grievance is found not to be meritorious by the Board may obtain reconsideration by the Board only upon presenting newly discovered or previously unavailable material evidence not previously considered by the Board and then only upon approval of the Board.

§ 16.15 Judicial review.

Any aggrieved party may obtain judicial review of these regulations, and revisions thereto, and final actions of the agency head (or designee) or the Grievance Board hereunder, in the District Courts of the United States, in accordance with the standards set forth in chapter 7 of title 5 of the United States Code. Section 706 of title 5 shall apply without limitation or exception.

PART 17—OVERPAYMENTS FROM THE FOREIGN SERVICE RETIREMENT AND DISABILITY FUND UNDER THE FOREIGN SERVICE RETIREMENT AND DISABILITY SYSTEM (FSRDS) AND THE FOREIGN SERVICE PENSION SYSTEM (FSPS)

Sec.

17.1 General.
17.2 Conditions for waiver of recovery of an overpayment.
17.3 Fault.
17.4 Equity and good conscience.
17.5 Financial hardship.
17.6 Ordinary and necessary living expenses.
17.7 Waiver precluded.
17.8 Burdens of proof.
17.9 Procedures.

AUTHORITY: 22 U.S.C. 4047(d); 22 U.S.C. 4071(b); 5 U.S.C. 8470(b); 5 CFR 845.301–07.

SOURCE: 71 FR 16229, Mar. 31, 2006, unless otherwise noted.

§ 17.1 General.

This part establishes procedures for notifying individuals of their rights if they have received an overpayment from the Foreign Service Retirement and Disability Fund under Chapter 8 of the Foreign Service Act of 1980, as amended, including their right to contest the determination that there has been an overpayment and the right to request a waiver of recovery of the

overpayment. This part also provides the procedures for administrative determination of these rights and for appeals of negative determinations.

§ 17.2 Conditions for waiver of recovery of an overpayment.

(a) *Foreign Service Retirement and Disability System.* Recovery of an overpayment from the Foreign Service Retirement and Disability Fund under the Foreign Service Retirement and Disability System may be waived pursuant to section 4047(d), of title 22, United States Code when the individual is without fault and recovery would be against equity and good conscience or administratively infeasible.

(b) *Foreign Service Pension System.* Recovery of an overpayment from the Foreign Service Retirement and Disability Fund under the Foreign Service Pension System may be waived pursuant to section 4071(b) of title 22, United States Code and section 8470(b) of title 5, United States Code when the individual is without fault and recovery would be against equity and good conscience.

(c) When it has been determined that the recipient of an overpayment is ineligible for waiver, the individual is nevertheless entitled to an adjustment in the recovery schedule if he or she shows that it would cause him or her financial hardship to make payment at the rate scheduled.

§ 17.3 Fault.

A recipient of an overpayment is without fault if he or she performed no act of commission or omission that resulted in the overpayment. The fact that the Department of State or other agency may have been at fault in initiating an overpayment will not necessarily relieve the individual from liability.

(a) *Considerations.* Pertinent considerations in finding fault are—

(1) Whether payment resulted from the individual's incorrect but not necessarily fraudulent statement, which he/she should have known to be incorrect;

(2) Whether payment resulted from the individual's failure to disclose material facts in his/her possession which he/she should have known to be material; or

(3) Whether he/she accepted a payment which he/she knew or should have known to be erroneous.

(b) *Mitigation factors.* The individual's age, physical and mental condition or the nature of the information supplied to him or her by the Department of State or a Federal agency may mitigate against finding fault if one or more contributed to his or her submission of an incorrect statement, a statement which did not disclose material facts in his or her possession, or his or her acceptance of an erroneous overpayment.

§ 17.4 Equity and good conscience.

(a) *Defined.* Recovery is against equity and good conscience when—

(1) It would cause financial hardship to the person from whom it is sought;

(2) The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either he/she has relinquished a valuable right or changed positions for the worse; or

(3) Recovery could be unconscionable under the circumstances.

(b) [Reserved]

§ 17.5 Financial hardship.

(a) Waiver of overpayment will not be allowed in any case prior to receipt and evaluation of a completed Statement of Financial Status, duly sworn by the recipient of the overpayment.

(b) Financial hardship may be deemed to exist in, but not limited to, those situations where the recipient from whom collection is sought needs substantially all of his or her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.

(1) *Considerations.* Some pertinent considerations in determining whether recovery would cause financial hardship are as follows:

(i) The individual's financial ability to pay at the time collection is scheduled to be made.

(ii) Income to other family member(s), if such member's ordinary and

necessary living expenses are included in expenses reported by the individual.

(c) *Exemptions*. Assets exempt from execution under State law should not be considered in determining an individual's ability to repay the indebtedness, rather primary emphasis shall be placed upon the individual's liquid assets and current income in making such determinations.

§ 17.6 Ordinary and necessary living expenses.

An individual's ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, food, clothing, insurance (life, health and accident), taxes, installment payments, medical expenses, support expenses when the individual is legally responsible, and other miscellaneous expenses which the individual can establish as being ordinary and necessary.

§ 17.7 Waiver precluded.

(a) Waiver of an overpayment cannot be granted when:

(1) The overpayment was obtained by fraud; or

(2) The overpayment was made to an estate.

(b) [Reserved]

§ 17.8 Burdens of proof.

(a) *Burden of the Department of State*. The Bureau of Resource Management, Department of State, must establish by the preponderance of the evidence that an overpayment occurred.

(b) *Burden of individual*. The recipient of an overpayment must establish by substantial evidence that he or she is eligible for waiver or an adjustment in the recovery schedule.

§ 17.9 Procedures.

(a) *Notice*. The Bureau of Resource Management, Department of State, shall give written notification to any individual who has received an overpayment promptly by first-class mail to the individual at the individual's most current address in the records of the Bureau of Resource Management. The written notice shall inform the individual of:

(1) The amount of the overpayment;

(2) The cause of the overpayment;

(3) The intention of the Department to seek repayment of the overpayment,

(4) The date by which payment should be made to avoid the imposition of interest, penalties, and administrative costs;

(5) The applicable standards for the imposing of interest, penalties, and administrative costs;

(6) The department's willingness to discuss alternative payment arrangements and how the individual may offer to enter into a written agreement to repay the amount of the overpayment under terms acceptable to the Department; and

(7) The name, address and telephone number of a contact person within the Bureau of Resource Management. The written notice also shall inform the individual of their right to contest the overpayment, their right to request a waiver of recovery of the overpayment, and the procedures to follow in case of such contest or request for waiver of recovery. The notification shall allow at least 30 days from its date within which the individual may contest in writing the overpayment or request a waiver of recovery, including with their submission all evidence and arguments in support of their position.

(b) *Administrative file*. The Bureau of Resource Management will prepare an administrative file as a basis for determination in each case where an individual contests a claim to recover overpayment or requests waiver of recovery of the overpayment. On the basis of the administrative file, the Chief Financial Officer or his or her delegate, shall make the final administrative determination.

(c) *Additional information*. At any time before the final administrative decision, the Department may request the individual to supplement his or her submission with additional factual information and may request that the individual authorize the Department of State to have access to bank and other financial records bearing on the application of these regulations. If the individual, without good cause shown, fails or refuses to produce the requested additional information or authorization, the Department of State is entitled to make adverse inferences with respect

to the matters sought to be amplified, clarified, or verified.

(d) *Decision and right of appeal.* The final administrative decision shall be reduced to writing and sent to the individual. If the decision is adverse to the individual, the notification of the decision shall include a written description of the individual's rights of appeal to the Foreign Service Grievance Board. The Foreign Service Grievance Board shall consider any appeal under this part in accordance with the regulations of the Board set forth in 22 CFR part 901.

PART 18—REGULATIONS CONCERNING POST EMPLOYMENT CONFLICT OF INTEREST

Subpart A—General Provisions

Sec.
18.1 Scope.
18.2 Definitions.
18.3 Director General.
18.4 Records.

Subpart B—Applicable Rules

18.5 Interpretative standards; advisory opinions.

Subpart C—Administrative Enforcement Proceedings

18.6 Authority to prohibit appearances.
18.7 Report of violation by a former employee.
18.8 Institution of proceeding.
18.9 Contents of complaint.
18.10 Service of complaint and other papers.
18.11 Answer.
18.12 Motions and requests.
18.13 Representation.
18.14 Hearing examiner.
18.15 Hearings.
18.16 Evidence.
18.17 Depositions.
18.18 Proposed findings and conclusions.
18.19 Decision of the hearing examiner.
18.20 Appeal to the Board of Appellate Review.
18.21 Decision of the Board of Appellate Review.
18.22 Notice of disciplinary action.

AUTHORITY: 18 U.S.C. 207, as amended, 92 Stat. 1864.

SOURCE: 46 FR 2608, Jan. 12, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 18.1 Scope.

This part contains rules governing disciplinary action against a former officer or employee of the Department of State, including the Foreign Service, because of a violation of the post employment conflict of interest prohibitions. Such disciplinary action may include prohibition from practice before the Department of State and any component thereof as defined in this part.

§ 18.2 Definitions.

For the purpose of this part—

(a) The term *Department* means the Department of State and includes the Foreign Service.

(b) The term *Director General* means the Director General of the Foreign Service and Director of Personnel.

(c) The term *practice* means any informal or formal appearance before, or, with the intent to influence, any oral or written communication to the Department on a pending matter of business on behalf of any other person (except the United States).

§ 18.3 Director General.

The Director General shall institute and provide for the conduct of disciplinary proceedings involving former employees of the Department as authorized by 18 U.S.C. 207(j), and perform such other duties as are necessary or appropriate to carry out his/her functions under this part.

§ 18.4 Records.

The roster of all persons prohibited from practice before the Department shall be available to public inspection at the Office of Director General. Other records may be disclosed upon specific request, in accordance with appropriate disclosure regulations of the Department.

Subpart B—Applicable Rules

§ 18.5 Interpretative standards; advisory opinions.

(a) A determination that a former officer or employee of the Department violated 18 U.S.C. 207(a), (b) or (c) will be made in conformance with the

standards established in the interpretative regulations promulgated, either in interim or final form by the Office of Government Ethics and published at 5 CFR part 737.

(b) Former officers and employees of the Department wanting to know whether a proposed course of conduct would be in conformity with the Act or the interpretive regulations thereunder may contact the Assistant Legal Adviser for Management to request an advisory opinion.

Subpart C—Administrative Enforcement Proceedings

§ 18.6 Authority to prohibit appearances.

Pursuant to 18 U.S.C 207(j), if the Director General finds, after notice and opportunity for a hearing, that a former officer or employee of the Department has violated 18 U.S.C. 207(a), (b) or (c), the Director General in his/her discretion may prohibit that person from engaging in practice before the Department for a period not to exceed five years, or may take other appropriate disciplinary action.

§ 18.7 Report of violation by a former employee.

(a) If an officer or employee of the Department has reason to believe that a former officer or employee of the Department has violated any provision of this part, or if any such officer or employee receives information to that effect, he/she shall promptly make a written report thereof, which report or a copy thereof shall be forwarded to the Director General. If any other person has information of such violations, he/she may make a report thereof to the Director General or to any officer or employee of the Department.

(b) The Director General shall coordinate proceedings under this part with the Department of Justice in cases where it initiates criminal prosecution.

§ 18.8 Institution of proceeding.

Whenever the Director General determines that there is sufficient reason to believe that any former officer or employee of the Department has violated 18 U.S.C. 207(a), (b) or (c), he/she may institute an administrative disciplinary proceeding. The proceeding may be for that person's suspension from practice before the Department or for some lesser penalty. The proceeding shall be instituted by a complaint which names the respondent and is signed by the Director General and filed in his/her office. Except in cases of willfulness, or where time, the nature of the proceeding, or the public interest does not permit, a proceeding will not be instituted under this section until facts or conduct which may warrant such action have been called to the attention of the proposed respondent in writing and he/she has been accorded the opportunity to provide his/her position on the matter.

§ 18.9 Contents of complaint.

A complaint shall plainly and concisely describe the allegations which constitute the basis for the proceeding. A complaint shall be deemed sufficient if it fairly informs the respondent of the charges against him/her so that the respondent is able to prepare a defense. Written notification shall be given of the place and of the time within which the respondent shall file his/her answer, which time shall not be less than 15 days from the date of service of the complaint. Notice shall be given that a decision by default may be rendered against the respondent in the event he/she fails to file an answer.

§ 18.10 Service of complaint and other papers.

(a) *Complaint*. The complaint or a copy thereof may be served upon the respondent by certified mail; by delivering it to the respondent or his/her attorney or agent of record either in person; or by leaving it at the office or place of business of the respondent, attorney or agent; in any other manner which has been agreed to by the respondent; or by first-class mail in case of a person resident abroad.

(b) *Service of papers other than complaint*. Any paper other than the complaint may be served upon a respondent as provided in paragraph (a) of this section or by mailing the paper by first-class mail to the respondent at the last address known to the Director General, or by mailing the paper by first-class mail to the respondent's attorney or

agent of record. Such mailing shall constitute complete service.

(c) Whenever the filing of a paper is required or permitted in connection with a proceeding, and the place of filing is not specified by this subpart or by rule or order of the hearing examiner, the paper shall be filed with the Director General, Department of State, Washington, DC 20520. All papers shall be filed in duplicate.

§ 18.11 Answer.

(a) *Filing*. The respondent's answer shall be filed in writing within the time specified in the complaint or notice of institution of the proceeding, unless on application the time is extended by the Director General. The answer shall be filed in duplicate with the Director General.

(b) *Contents*. The answer shall contain a statement of facts which constitute the grounds of defense, and it shall specifically admit or deny each allegation set forth in the complaint. The respondent may also state affirmatively special matters of defense.

(c) *Failure to deny or answer allegations in the complaint*. Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proved. Failure to file an answer within the time prescribed in the notice to the respondent, except as the time for answer is extended by the Director General shall constitute a waiver of hearing, and the Director General may make his/her decision by default without a hearing or further procedure.

§ 18.12 Motions and requests.

Motions and requests, including requests to intervene, may be filed with the Director General.

§ 18.13 Representation.

A respondent or proposed respondent may appear in person or he/she may be represented by counsel or other representative. The Director General may be represented by an attorney or other employee of the Department.

§ 18.14 Hearing examiner.

(a) After an answer is filed, if the Director General decides to continue the administrative disciplinary proceedings, he/she shall appoint a hearing examiner to conduct those proceedings under this part.

(b) *Authorities*. Among other powers, the hearing examiner shall have authority, in connection with any proceeding assigned or referred to him/her, to do the following:

(1) Take evidence under appropriate formalities;

(2) Make rulings upon motions and requests;

(3) Determine the time and place of hearing and regulate its course and conduct;

(4) Adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make initial decisions.

§ 18.15 Hearings.

Hearings shall be stenographically recorded and transcribed and the testimony of witnesses shall be taken under oath or affirmation. Hearings will be closed unless an open hearing is requested by the respondent, except that if classified information or protected information of third parties is likely to be adduced at the hearing, it will remain closed. If either party to the proceeding fails to appear at the hearing, after due notice thereof has been sent to him/her, he/she shall be deemed to have waived the right to a hearing and the hearing examiner may make a decision against the absent party by default.

§ 18.16 Evidence.

The rules of evidence prevailing in courts of law and equity are not controlling in hearings under this part.

However, the hearing examiner shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

§ 18.17 Depositions.

Depositions for use at a hearing may, with the consent of the parties in writing or the written approval of the hearing examiner, be taken by either the Director General or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories. There shall be at least 10 days written notice to the other party. The requirement of a 10-day written notice may be waived by the parties in writing. When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and copies of any written cross-interrogation shall be mailed or delivered to the opposing party at least 5 days before the date of taking the depositions, unless the parties mutually agree otherwise. Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken.

§ 18.18 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the hearing examiner, prior to making his/her decision, shall afford the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor.

§ 18.19 Decision of the hearing examiner.

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the hearing examiner shall make the initial decision. The decision shall include

(a) A statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and

(b) An order of suspension from practice before the Department or other appropriate disciplinary action, or an order of dismissal of the complaint. The hearing examiner shall file the decision with the Director General and shall transmit a copy thereof to the respondent or his/her attorney of record. A party adversely affected by the decision shall be given notice of his or her right to appeal to the Board of Appellate Review (part 7 of this chapter) within 30 days from the date of the hearing examiner's decision.

§ 18.20 Appeal to the Board of Appellate Review.

Within 30 days from the date of the hearing examiner's decision, either party may appeal to the Board of Appellate Review. The appeal shall be taken by filing notice of appeal, in triplicate, with the Board of Appellate Review, which shall state with particularity exceptions to the decision of the hearing examiner and reasons for such exceptions. If an appeal is by the Director General, he/she shall transmit a copy thereof to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief, in triplicate, with the Board of Appellate Review. If the reply brief is filed by the Director General, he/she shall transmit a copy of it to the respondent. The Director General shall transmit the entire case record to the Board of Appellate Review within 30 days after an appeal has been taken.

§ 18.21 Decision of the Board of Appellate Review.

The Board of Appellate Review shall decide the appeal on the basis of the record. The decision of the Board shall be final, and not subject to further administrative review. Copies of the Board's decision shall be forwarded promptly to the parties by the Board.

§ 18.22 Notice of disciplinary action.

Upon the issuance of a final order suspending a former officer or employee from practice before the Department, the Director General shall give notice thereof to appropriate officers and employees of the Department. Officers and employees of the Department shall refuse to participate in any appearance by such former officer or employee or to accept any communication

which constitutes the prohibited practice before the Department during the period of suspension. The Director General shall take other appropriate disciplinary action as may be required by the final order.

PART 19—BENEFITS FOR SPOUSES AND FORMER SPOUSES OF PARTICIPANTS IN THE FOREIGN SERVICE RETIREMENT AND DISABILITY SYSTEM

Sec.
19.1 Authorities.
19.2 Definitions.
19.3 Participants.
19.4 Special rules for computing creditable service for purposes of payments to former spouses.
19.5 Required notifications to department respecting spouses and former spouses.
19.5–1 Notification from participant or annuitant.
19.5–2 Notification to Department from former spouses.
19.5–3 Residence of spouse during service at unhealthful post.
19.6 Court orders and divorce decrees.
19.6–1 Orders by a court.
19.6–2 Qualifying court order.
19.6–3 Application for payment.
19.6–4 Date of court orders.
19.6–5 Preliminary review.
19.6–6 Notification.
19.6–7 Decision.
19.6–8 Allotment to beneficiary.
19.6–9 Limitations.
19.6–10 Liability.
19.7 Spousal agreements.
19.7–1 Purpose.
19.7–2 Agreement with spouse.
19.7–3 Agreement with former spouse.
19.7–4 Form of agreement.
19.7–5 Limitations.
19.7–6 Duration and precedence of spousal agreements.
19.8 Obligations of members.
19.9 Pension benefits for former spouses.
19.9–1 Entitlement.
19.9–2 Commencement and termination.
19.9–3 Computation and payment of pension to former spouse.
19.9–4 Effect on annuitant.
19.10 Types of annuities to members.
19.10–1 Full annuity.
19.10–2 Reduced annuity with regular survivor annuity to spouse or former spouse.
19.10–3 Marriage after retirement.
19.10–4 Death or divorce of a spouse and remarriage after retirement.
19.10–5 Reduced annuity with additional survivor annuity to spouse of former spouse.
19.10–6 Benefits for recall service.
19.11 Survivor benefits.
19.11–1 Kinds of survivor benefits.
19.11–2 Regular survivor annuity for a former spouse.
19.11–3 Regular survivor annuity for a spouse.
19.11–4 Procedure in event a spouse or former spouse is missing.
19.11–5 Commencement, termination and adjustment of annuities.
19.11–6 Death during active duty.
19.11–7 Annuity payable to surviving child or children.
19.11–8 Required elections between survivor benefits.
19.12 Employment in a Government agency.
19.13 Lump-sum payment.
19.13–1 Lump-sum credit.
19.13–2 Share payable to a former spouse.
19.13–3 Payment after death of principal.
19.14 Waiver of annuity.

AUTHORITY: Secs. 206 and 801 of Foreign Service Act of 1980 (94 Stat. 2079, 2102); Sec. 4 of Act of May 26, 1949 (22 U.S.C. 2658).

SOURCE: 46 FR 12958, Feb. 19, 1981, unless otherwise noted. Redesignated at 46 FR 18970, Mar. 27, 1981.

§ 19.1 Authorities.

Chapter 8 of the Foreign Service Act of 1980 (Pub. L. 96–465, 94 Stat. 2102) (hereafter ''the Act''), and any Executive order issued under authority of section 827 of the Act.

§ 19.2 Definitions.

(a) *Agencies* means the Department, the Agency for International Development (AID), the International Communication Agency (USICA), the Foreign Agricultural Service (FAS), and the Foreign Commercial Service (FCS).

(b) *Annuitant* means any person including a former participant or survivor who meets all requirements for an annuity from the Fund under the provisions of the Foreign Service Act of 1980, or any other law and who has filed claim therefor.

(c) *Basic salary* means the salary fixed by law or administrative action before deductions and exclusive of additional compensation of any kind. It includes the salary fixed by sections 401, 402, 403, and 406 of the Act and salary incident to assignment under section 503 of the Act. Basic salary excludes premium pay for overtime,

night, Sunday and holiday work, allowances, post and special differentials, and chargé pay.

(d) *Chief of Mission* means a principal officer in charge of a diplomatic mission of the United States or of a United States Office abroad which has been designated diplomatic in nature or any member of the Foreign Service assigned under the terms of the Act to be chargé d'affaires or head of such a mission or office.

(e) *Child* means, except with reference to lump-sum payments, an unmarried child, under the age of 18 years, or such unmarried child regardless of age who because of physical or mental disability incurred before age 18 is incapable of self-support. In addition to the offspring of the participant, the term includes:

(1) An adopted child;

(2) A stepchild or recognized natural child who received more than one-half support from the participant; and

(3) A child who lived with and for whom a petition of adoption was filed by a participant, and who is adopted by the surviving spouse of the participant after the latter's death. ''Child'' also means an unmarried student under the age of 22 years. For this purpose, a child whose twenty-second birthday occurs before July 1 or after August 31 of a calendar year, and while a student, is deemed to have become 22 years of age on the first day of July after the birthday.

(f) *Court* means any court of any State or of the District of Columbia.

(g) *Court Order* means any court decree of divorce or annulment, or any court approved property settlement agreement incident to any court decree of divorce or annulment.

(h) *Department* means the Department of State.

(i) *Divorce* means the dissolution of a marriage by a final decree of divorce or annulment.

(j) *Expressly provided for* means a direction by a court order to divide a member's Foreign Service Retirement benefits or survivor benefits and awarding a portion of such benefits to an eligible beneficiary.

(k) *Former spouse*[1] means a former wife or husband of a participant or former participant who was married to such participant for not less than ten years during periods of service by that participant which are creditable under section 816 of the Act provided the participant was making contributions to the Fund under section 805 of the Act during some portion of such service, and provided the divorce occurred after February 15, 1981. For this purpose, a former spouse shall not be considered as married to a participant for periods assumed to be creditable under section 808 of the Act in the case of a disability annuity or section 809 of the Act in the case of a death in service. A former spouse will be considered married to a participant for any extra period of creditable service provided under section 817 of the Act for service at an unhealthful post during which the former spouse resided with the participant. See § 19.5–3 for procedures to determine this extra period of marriage.

(l) *Fund* means the Foreign Service Retirement and Disability Fund.

(m) *M/MED* means the Department's Office of Medical Services.

(n) *Military and naval service* means honorable active service:

(1) In the Armed Forces of the United States;

(2) In the Regular or Reserve Corps of the Public Health Service after June 30, 1960; or

(3) As commissioned officer of the National Oceanic and Atmospheric Administration or predecessor organization after June 30, 1961.

However, this definition does not include service in the National Guard, except when ordered to active duty in the service of the United States.

(o) *Participant* means a person as described in § 19.3.

[1] Note: Section 804(6) of the Act defines ''former spouse'' with respect to duration of marriage as being married to a participant ''for not less than 10 years during periods of service by that participant which are creditable under section 816.'' The Department interprets this as necessarily implying that the marriage must have covered a period of at least one day while the member of the Foreign Service was a participant in the System.

(p) *Previous spouse* means any person formerly married to a principal, whether or not such person qualifies as a former spouse under paragraph (k) of this section.

(q) *Principal* means a participant or former participant whose service forms the basis for a benefit under chapter 8 of the Act for a spouse, previous spouse, former spouse or child of a participant.

(r) *PER/ER/RET* means the Department's Retirement Division in the Bureau of Personnel.

(s) *Pro rata share* means, in the case of any former spouse of any participant or former participant, a percentage which is equal to the percentage that (1) the number of years and months during which the former spouse was married to the participant during the creditable service of that participant is of (2) the total number of years and months of such creditable service. When making this calculation, item (1) is adjusted in accordance with paragraph (k) of this section and item (2) is adjusted in accordance with § 19.4. In the total period, 30 days constitutes a month and any period of less than 30 days is not counted.

(t) *Spousal agreement* means any written agreement between a participant or former participant, and the participant's spouse or former spouse.

(u) *Student* means a child regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, university, or comparable recognized educational institution. A child who is a student shall not be deemed to have ceased to be a student during any interim between school years, semesters, or terms if the interim or other period of nonattendance does not exceed 5 calendar months and if the child shows to the satisfaction of the Retirement Division (PER/ER/RET) that the child has a bona fide intention of continuing to pursue such course during the school year, semester, or term immediately following the interim.

(v) *Surviving spouse* means the surviving wife or husband of a participant or annuitant who, in the case of death in service or marriage after retirement, was married to the participant or annuitant for at least one year immediately preceding death or is the parent of a child born of the marriage.

(w) *System* means the Foreign Service Retirement and Disability System.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.3 Participants.

The following persons are participants in the System:

(a) Members of the Service serving under a career appointment or as a career candidate under section 306 of the Act (1) in the Senior Foreign Service, or (2) assigned to a salary class in the Foreign Service Schedule;

(b) Any person not otherwise entitled to be a participant who has served as chief of mission or an ambassador at large for an aggregate period of 20 years or more, exclusive of extra service credit for service at unhealthful posts, and who has paid into the Fund a special contribution for each year of service;

(c) Any individual who was appointed as a Binational Center Grantee and who completed, prior to February 15, 1981, at least 5 years of satisfactory service as a grantee, as determined by the Director of Personnel of USICA, or under any other appointment under the Foreign Service Act of 1946, as amended, who has paid into the Fund a special contribution for such service.

(d) Any person converted to the competitive service pursuant to section 2104 of the Act who elects to participate in the System pursuant to section 2106(b)(1) or (2) shall remain a participant so long as he/she is employed in an agency which is authorized to utilize the Foreign Service personnel system.

§ 19.4 Special rules for computing creditable service for purposes of payments to former spouses.

For purposes of determining the pro rata share of annuity, survivor annuity or lump-sum payable to a former spouse, the following shall be considered creditable service—

(a) The entire period of a principal's approved leave without pay during full-time service with an organization composed primarily of Government employees irrespective of whether the

principal elects to make payments to the Fund for this service;

(b) The entire period of Government service for which a principal received a refund of retirement contributions which he/she has not repaid unless the former spouse received under § 19.13 a portion of the (lump-sum) refund or unless a spousal agreement or court order provided that no portion of the refund be paid to the former spouse; and

(c) All creditable service including service in excess of 35 years.

The period covered by the credit for unused sick leave is not creditable for this purpose.

§ 19.5 Required notifications to Department respecting spouses and former spouses.

§ 19.5–1 Notification from participant or annuitant.

If a participant or former participant becomes divorced on or after February 15, 1981, he/she shall notify the Department (PER/ER/RET) of the divorce on or prior to its effective date. The notice shall include the effective date of the divorce, the full name, mailing address, and date of birth of the former spouse and the date of the member's marriage to that person, and enclose a certified copy of the divorce decree. If there is a court order or spousal agreement concerning payment or nonpayment of Foreign Service benefits to the former spouse, the original or a certified copy of the order or agreement shall also be forwarded to PER/ER/RET. In the absence of a court order or spousal agreement providing otherwise, the Department will pay a pro rata share of the member's benefits to the former spouse. (A former spouse of a former participant who separated from the Service on or before February 15, 1981 is not eligible for a pension under § 19.9, *i.e.*, not eligible for a pro rata share of the principal's annuity.) Upon receipt of notice of a divorce, a court order, or spousal agreement, the Department will proceed as indicated in § 19.6 or § 19.7. Delinquent notice to the Department of the divorce of an annuitant will result in retroactive payments to any qualified former spouse to the extent that the retroactive payments can be deducted from future annuity payments to the principal as stated in § 19.6–4.

§ 19.5–2 Notification to Department from former spouses.

A former spouse is obligated to notify the Department of the following on a timely basis:

(a) A divorce from a participant or former participant when the former spouse is notified by the court of the divorce before the participant is notified;

(b) Any change in address; and

(c) Any remarriage.

Notices shall be sent to the Department of State, Attention PER/ER/RET, Washington, DC 20520.

§ 19.5–3 Residence of spouse during service at unhealthful post.

(a) The calculation of the pro rata share of benefits for a former spouse, and the determination of whether a person qualifies as a ''former spouse'' depends on the length of the marriage. The latter, under the definition in the Act and when the principal has received extra service credit for an assignment to an unhealthful post, depends upon whether a spouse has resided with the principal at the unhealthful post. In order to determine residency for this purpose, whenever a married participant is assigned to an unhealthful post for which he/she *does not* receive post differential and *does* receive or request extra service credit, the participant shall report on Form OF–140, Election to Receive Extra Service Credit Towards Retirement, whether his/her spouse is or is not residing at the post. Although a chief of mission is not required to submit Form OF–140 in order to receive extra credit for service at an unhealthful post, he/she must nevertheless submit this form if the chief of mission has a spouse that does not accompany him/her at post for the entire assignment. Both the participant and spouse shall sign the completed form. If there is a change in residence of the spouse during the assignment, a new joint Form OF–140 shall be filed to report the change.

(b) Whenever a participant retires or becomes divorced, or whenever a former participant becomes divorced

who has extra service credit for assignment at unhealthful posts completed prior to the issuance of this regulation who was married during at least a portion of the assignment, the participant or former participant shall submit a statement to PER/ER/RET reporting on whether his/her spouse resided at the unhealthful post and the dates of such residence. The statement shall be signed by the principal and his/her spouse or former spouse whenever possible.

(c) In the event of a disagreement between a principal and his/her spouse or former spouse concerning residency at an unhealthful post, or the submission of a report or statement by a principal showing a period of nonresidence at a post by a spouse which is not signed by the spouse, the determination of residence will be made by PER/ER/RET and based on records in the Department of payments for travel and allowances plus any other evidence that can be adduced. In the absence of any evidence to the contrary, the assumption will be made that the spouse resided at the post.

§ 19.6 Court orders and divorce decrees.

§ 19.6–1 Orders by a court.

(a) A court may—

(1) Fix the amount of any pension to a former spouse under § 19.9, or order that none be paid;

(2) Fix the amount of any regular survivor annuity to a former spouse under paragraphs (a) and (b) of § 19.11, or order that none be paid;

(3) Order provision of an additional survivor annuity for a spouse or former spouse under § 19.10–5;

(4) Fix the amount of any benefit under § 19.10–6 based on recall service payable to a former spouse to whom the annuitant was married during any portion of the recall service, or order that none be paid;

(5) Fix the amount of any lump-sum payable to a former spouse under § 19.13 or order that none be paid;

(6) Order, to the extent consistent with any obligation stated in § 19.8 between a participant and a former spouse, and pursuant to any court decree of divorce, legal separation or annulment or any court ordered or approved property settlement agreement incident to any court decree of divorce, legal separation, or annulment, that any payment from the Fund which would otherwise be made to a former participant based on his/her service shall be paid (in whole or in part) by the Secretary of State to a previous spouse or child of such participant. No apportionment under this paragraph may be made of a payment authorized to be paid to a survivor of a participant or annuitant.

(b) An order by a court that does not meet the definition of ''court'' in § 19.2(f) is not valid for purposes of this section even though a divorce decree issued by such court may be a basis for pro rata share payments to a former spouse as described in these regulations.

§ 19.6–2 Qualifying court order.

(a) To be valid for purposes of this section, a court order must be found to be ''qualified'' by PER/ER/RET acting for the Secretary of State. A qualifying court order must—

(1) Be consistent with the terms of the Act and applicable regulations;

(2) Not direct payment of an amount in excess of the maximum amount authorized to be paid by the relevant regulation;

(3) Direct that payments be made to an eligible beneficiary from a principal's Foreign Service retirement benefit or survivor benefit. If a court directs or implies that a principal, rather than the Secretary of State or the Government, make the payments, the order will not be considered qualified unless the principal does not object during the 30–day notice period provided under § 19.6–6;

(4) Define the amount to be paid to a beneficiary in way so that it can be readily calculated from information in the normal files of the Department;

(5) Not make payment contingent upon events other than those on which other payments from the Fund are based such as age, marital status and school attendance; and

(6) Not be in conflict with any previously issued court order which remains valid.

(b) No apportionment of annuity to a beneficiary under § 19.6–1(a) (1) or (6) shall exceed the net annuity of the principal. The net annuity is computed by excluding from the gross annuity the amounts which are:

(1) Owed by the individual to the United States;

(2) Deducted for health benefits premiums pursuant to section 8906 of Title 5, United States Code;

(3) Deducted for life insurance premiums under the Government Life Insurance Program;

(4) Owed due to overpayment of annuity;

(5) Properly withheld for Federal income tax purposes, if amounts withheld are not greater than they would be if the individual claimed all dependents to which he/she was entitled.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.6–3 Application for payment.

(a) To receive payment from the Fund pursuant to a court award, the beneficiary must submit an application in writing to the Chief of the Retirement Division (PER/ER/RET), Department of State, Washington, DC 20520. The application must be typed or printed, signed by the beneficiary, and include—

(1) The full name, date of birth, current address and current marital status of the beneficiary;

(2) Full name and date of birth of the participant or former participant and his/her date of birth or other identifying information;

(3) Relationship to the beneficiary, and if a spouse or former spouse, date of marriage to and/or divorce from the participant;

(4) A statement that the court order has not been amended, superseded, or set aside;

The original of the court order or a recently certified copy must be enclosed with the application, or a statement appended that such a copy has been sent to the Department by other means.

(b) When payments are subject to termination upon the occurrence of a condition subsequent, such as marriage, remarriage or termination of schooling, or death of the principal, no payment will be made until the beneficiary submits a statement to PER/ER/RET that—

(1) The condition has not occured;

(2) He/she will notify the Department (PER/ER/RET) within 15 calendar days of the occurrence of the condition subsequent; and

(3) He/she will be personally liable for any overpayment to him/her resulting from the occurrence of the condition subsequent. PER/ER/RET may require periodic recertification of these statements.

§ 19.6–4 Date of court orders.

(a) A court order directing or barring payment of a pension to a former spouse under § 19.9 may not be given effect by the Department if it is issued more than 12 months after the divorce becomes final. A court order adjusting the amount of a regular or additional survivor annuity to a former spouse under § 19.11–2 or § 19.10–5 may not be given effect by the Department if it is issued after the death of the principal.

(b) A court order issued within 12 months after a divorce becomes final directing payment of a pension to a former spouse in an amount other than provided in § 19.9 may be made retroactively effective to the first of the month in which the divorce becomes final if so specified by the court. In such event, the Department will adjust any future payments that may become due to an annuitant and a former spouse by increasing one and correspondingly reducing the other in order to give effect to the order of the court. However, if future payments to one party are not due, as for example if a court orders that no payments be made to a former spouse, or that 100 percent of an annuity be paid as pension to a former spouse, the Department will not give retroactive effect to a court order by collecting overpayments from one party in order to pay them to the other party and will not make overpayments from the Fund.

(c) A court order under this chapter involving any payment other than a pension to a former spouse under § 19.9 may not be given retroactive effect and shall not be effective until it is determined to be a qualifying order under § 19.6–5.

§ 19.6–5 Preliminary review.

(a) Upon receipt of an application for payment under § 19.6–3, PER/ER/RET will determine whether—

(1) The application is complete;

(2) The applicant is an eligible beneficiary under this chapter; and

(3) The court order is a qualifying order. If the application is completed, the beneficiary is eligible and the court order appears on its face to be a qualifying order, PER/ER/RET will provide the notification required by § 19.6–6, otherwise, it will notify the applicant of any deficiency or requirement for additional information, and if the order is determined to be non-qualifying, the basis for such determination.

(b) Upon receipt of a certified copy of a final decree of divorce, PER/ER/RET will determine whether—

(1) It is a valid decree. Any decree recognized as valid by the parties will be considered valid for this purpose. In addition, any non-recognized decree will be considered valid for this purpose unless:

(i)(A) Neither party was domiciled within the court's jurisdiction, and

(B) The party denying recognition did not participate in the proceedings, or

(ii) The party denying recognition was not afforded notice of the proceedings (actual or constructive);

(2) A related court order has been submitted by either party; and

(3) A pro rata share payment is or may become due the former spouse. If a divorce decree is deemed valid under this paragraph, a pro rata share payment is due a former spouse unless PER/ER/RET is in receipt of a court order which it has deemed qualified under paragraph (a) of this section, or a valid spousal agrement providing otherwise. If it determines that a pro rata share payment is due, it will provide the notification required by § 19.6–6, otherwise, unless action is being taken pursuant to a related court order, it will notify both parties to the divorce the reason a pro rata share payment is not payable.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.6–6 Notification.

(a) *Notification to a principal.* Whenever PER/ER/RET receives from a former spouse or other eligible beneficiary—

(1) a court order which it deems qualified that requires payment to the beneficiary; or

(2) A final decree of divorce which it deems valid together with a request for a pro rata share payment—PER/ER/RET will send a copy of the document to the principal and a notice stating: (i) That PER/ER/RET deems the order qualified or the divorce decree valid, (ii) that payments will be made from the principal's account to the beneficiary and the effective date of such payments, (iii) the effect of such payments on the principal's retirement benefit. In the case of any court order with retroactive or immediate effect, and in the case of pro rata share payments, the amounts will be withheld from future payments to the principal but will not be paid to the beneficiary for 30 days from the notice date in order to give the principal an opportunity to contest the court order or the validity of the divorce.

PER/ER/RET will provide the former spouse or other beneficiary the same information, stating the exact amount that will be payable to the beneficiary and explaining how that amount was calculated.

(b) *Notification to a former spouse.* When PER/ER/RET receives from a principal—(1) a court order which it deems qualified that requires or forbids payment to a former spouse; or (2) a final decree of divorce which it deems valid without an accompanying court order—PER/ER/RET will send a copy of the document to the former spouse and a notice stating: (i) That PER/ER/RET deems the court order qualified or the divorce decree valid, (ii) that PER/ER/RET intends to honor the court decree or to make pro rata share payments because of the divorce, (iii) the effective date, exact amount, and method of calculation of any payments to the former spouse.

PER/ER/RET will provide the same information to the principal and will explain the effect any payment to a

former spouse will have on the principal's retirement benefit.

§ 19.6–7 Decision.

(a) When a response has not been received by PER/ER/RET from a principal within the 30-day period under § 19.6–6a, payment will be made in accordance with the notification. When a response is received, the Chief, PER/ER/RET will consider the response. If it is shown that a court order is not qualifying or that a divorce is not valid under terms of the Act and these regulations, payment proposed in the notification will not be made. In such a case, PER/ER/RET will advise both parties of the basis for its decision and the alternative action, if any, that it proposes to take.

(b) If a principal responding to a notification under § 19.6–6a objects to the payment or other action proposed by the Department in the notification based on the validity of the court order or divorce decree, and the record contains support for the objection, PER/ER/RET will grant the principal 30 days to initiate formal legal action to determine the validity of the objection, will continue to delay payment to the former spouse or other beneficiary during this period, and will notify the beneficiary of this action. If evidence is submitted that formal legal action has been started within the 30-day period, the amount of any proposed payment to a former spouse or other beneficiary will continue to be withheld from any payments due the principal, but no payment will be made to the former spouse or other beneficiary until a judicial decision is rendered or agreement reached between the parties.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.6–8 Allotment to beneficiary.

If a court order is not a qualifying court order because it directs or implies that payment to the beneficiary is to be made by the principal rather than the Secretary of State, the principal may make an allotment to the beneficiary from his/her annuity. An annuitant may also make an allotment from his/her annuity to a previous spouse in the absence of a court order.

§ 19.6–9 Limitations.

(a) Retirement benefits are subject to apportionment by court order under § 19.6–1(a)(6) only while the principal is living. Payment of apportioned amounts will be made only to a previous spouse and/or the children of the principal. Such payments will not be made to any of the following:

(1) Heirs or legatees of the previous spouse;

(2) Creditors of either the principal or the previous spouse; or

(3) Assignees of either the principal or the previous spouse.

(b) The amount of any court ordered payment may not be less than one dollar and, in the absence of compelling circumstances, shall be in whole dollars.

(c) In honoring and complying with a court order, the Department shall not be required to disrupt the scheduled method of accruing retirement benefits or the normal timing for making such payments, despite the existence of any special schedule relating to a previous spouse or other beneficiary.

(d) In cases where the court order apportions a percentage of the retirement benefits, PER/ER/RET will initially determine the amount of proper payment. That amount will only be increased by future cost-of-living increases unless the court directs otherwise.

§ 19.6–10 Liability.

(a) The Department shall not be liable for any payment made from retirement benefits pursuant to a court order if such payment is made in accordance with the provisions of this chapter.

(b) In the event that the Secretary is served with more than one court order with respect to the same retirement benefits, the benefits shall be available to satisfy the court orders on a first-come, first-served basis.

(c) A previous spouse or other beneficiary may request that an amount be withheld from the retirement benefits of a principal or survivor of a principal which is less than the amount stipulated in a court order, or otherwise scheduled to be paid to the beneficiary under this chapter. This lower amount will be deemed a complete fulfillment

of the obligation of the Department for the period in which the request is in effect. See § 19.14.

§ 19.7 Spousal agreements.

§ 19.7–1 Purpose.

A spousal agreement may be used by both parties to establish an agreed-upon level of benefits to a spouse or a former spouse and to relieve the participant of responsibility for providing a higher level of benefits.

§ 19.7–2 Agreement with spouse.

(a) A spousal agreement between a participant and a spouse may waive or fix the level of a regular survivor annuity under § 19.11–3. If an agreement is filed, it will assure the spouse that the agreed-upon level of survivor annuity will be paid, irrespective of a future divorce provided the survivor meets the definition of ''former spouse'' in § 19.2(k). If an agreement is not filed, the participant's annuity will be reduced under § 19.10–2 to provide the maximum regular survivor annuity for the spouse, but in the event of a future divorce if the spouse meets the definition of ''former spouse,'' that person will be entitled only to a pro rata share of the survivor annuity. An agreement under this paragraph may be filed with PER/ER/RET at any time prior to retirement (commencement of the principal's annuity).

(b) A spousal agreement between an annuitant and a spouse filed with PER/ER/RET before commencement of a supplemental annuity for recall service may waive a supplemental survivor annuity that would otherwise be provided for a spouse under § 19.10–6.

(c) A spousal agreement between a participant or former participant and a spouse may be filed with PER/ER/RET at any time in accordance with § 19.10–5 and provide for an additional survivor annuity for the spouse.

(d) A spousal agreement filed under paragraph (a), (b), or (c) remains valid and binding in the event of divorce if the spouse qualifies as a former spouse.

§ 19.7–3 Agreement with former spouse.

(a) A spousal agreement between a participant or former participant and a former spouse may waive, reduce or increase the following benefits for a former spouse;

(1) A pension under § 19.9;

(2) A regular survivor annuity under § 19.11–2;

(3) A supplemental survivor annuity under § 19.10–6;

(4) A lump sum payment for regular or recall service under § 19.13.

A spousal agreement shall also be used by a participant or former participant who has a former spouse on February 15, 1981, to elect a regular survivor annuity for such former spouse in accordance with § 19.11–2(e). An agreement to establish or increase any benefit for a former spouse entered into while the principal is married to someone else, must be signed and agreed to by both the spouse and the former spouse. An agreement affecting pension benefits may be filed at any time and will govern payments made after its acceptance by PER/ER/RET. An agreement affecting a regular survivor annuity must be filed before the end of the 12-month period after the divorce involving that former spouse or at the time of retirement, whichever occurs first, except as authorized in § 19.11–2(b) for persons retired on February 15, 1981, or in § 19.11–2(e) with respect to persons who were former spouses on February 15, 1981. This filing requirement stated in the Act makes it impossible to adjust, other than by court order, a regular survivor annuity for a former spouse when the divorce occurs after a retirement which occurs on or after February 15, 1981. The survivor annuity for the former spouse in such case is fixed by any spousal agreement entered into prior to the divorce, by § 19.11–2 or by court order. An agreement affecting supplemental survivor benefits or lump-sum payments must be filed before the supplemental annuity of the principal begins or lump-sum payment is made.

(b) A spousal agreement between a participant or former participant and a former spouse may be filed with PER/ER/RET at any time in accordance with § 19.10–5 to provide an additional survivor annuity for the former spouse.

§ 19.7–4 Form of agreement.

(a) A spousal agreement is any legal agreement between the parties accepted by PER/ER/RET as meeting the requirements of this section. If in accordance with the regulations, PER/ER/RET will accept as a valid spousal agreement a property settlement agreed to by the parties and approved by a court regardless of the date of the agreement.

(b) A spousal agreement must either be authenticated by a court or notarized.

§ 19.7–5 Limitations.

(a) A spousal agreement may not provide for any payment from the Fund in excess of the amount otherwise authorized to be paid, or at a time not authorized by these regulations, or to a person other than a spouse or former spouse.

(b) A spousal agreement must be filed with the Department, Attention PER/ER/RET, and accepted by that office as in conformance with the Act and these regulations prior to the times specified in §§ 19.7–2 and 19.7–3. That office will provide advice to the parties on the validity of any proposed agreement and on proper format.

(c) A spousal agreement may apply only to payments from the Fund for periods after receipt of a valid agreement by the Department.

(d) Paragraphs (b), (c) and (d) of §§ 19.6–9 and 19.6–10 apply to spousal agreements and payments made pursuant to spousal agreements to the same extent that they apply to court orders and court ordered payments.

§ 19.7–6 Duration and precedence of spousal agreements.

(a) A spousal agreement may be revised or voided by agreement of the parties (by filing a new agreement under this section) at any time prior to the last day for filing an agreement determined in accordance with § 19.7–2 or § 19.7–3, except spousal agreements for additional survivor annuities are irrevocable. After the last day for filing a particular agreement, such agreement is irrevocable.

(b) A valid spousal agreement entered into subsequent to the issuance of a court order affecting the same parties will override the court order, and shall govern payments from the Fund.

(c) A spousal agreement may not override a previous spousal agreement involving the same principal but a different spouse or former spouse without agreement of such spouse or former spouse.

§ 19.8 Obligations of members.

Participants and former participants are obligated by the Act and these regulations to provide the following benefits to others and must accept the necessary reductions in their own retirement benefits to meet these obligations:

(a) A pension to a former spouse pursuant to § 19.9;

(b) A court ordered apportionment of annuity to a previous spouse or child under § 19.6–1 (a)(6) (the benefit to a child referred to here is paid during the annuitant's lifetime as distinguished from the automatic survivorship annuity to a child described in § 19.11–7);

(c) A regular survivor annuity to a former spouse who has not remarried prior to age 60, and to a spouse to whom married when annuity commences, pursuant to §§ 19.11–2 and 19.11–3;

(d) An additional survivor annuity for a spouse or former spouse under § 19.10–5 when elected by the participant or ordered by a court;

(e) Lump-sum payments to a former spouse pursuant to § 19.13;

(f) Benefits ordered by a court under § 19.6 or specified in a spousal agreement under § 19.7.

§ 19.9 Pension benefits for former spouses.

§ 19.9–1 Entitlement.

(a) Unless otherwise expressly provided by a spousal agreement under § 19.7 or a court order under § 19.6, a person who, after February 15, 1981, becomes a former spouse of a participant (or former participant who separated from the Service after February 15, 1981) and who has not remarried prior to becoming 60 years of age, becomes entitled to a monthly pension benefit effective on a date determined under § 19.9–2 in an amount determined under § 19.9–3.

(b) A former spouse shall not be qualified for a pension under this subsection if, before the commencement of that pension, the former spouse remarries before becoming 60 years of age.

(c) A pension benefit under this section is treated the same as a survivor annuity for purposes of § 19.11–5(b): a former spouse who elects to receive a pension under this section must waive simultaneous receipt of any survivor annuity.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.9–2 Commencement and termination.

(a) The pension of a former spouse under this subsection commences on the latter of the day the principal becomes entitled to a Foreign Service annuity or on the first day of the month in which the divorce becomes final. (Suspension or reduction of a Foreign Service annuity because or reemployment does not affect the commencement of a pension to a former spouse.) In the case of any former spouse of a disability annuitant, the pension of such former spouse shall commence on the latter of:

(1) The date the principal would qualify for an annuity (other than a disability annuity) on the basis of his/her creditable service;

(2) The date the disability annuity begins; or

(3) The first of the month in which the divorce becomes final.

(b) The pension of a former spouse and the right thereto terminate on:

(1) The last day of the month before the former spouse dies or remarries before 60 years of age; or

(2) The date the annuity of the former participant terminates unless the termination results from recall, reappointment or reinstatement in the Foreign Service or reemployment in Government service.

§ 19.9–3 Computation and payment of pension to former spouse.

(a) A pension to a former spouse is paid monthly on the same date that annuity is paid to the principal.

(b) No spousal agreement or court order may provide for a pension or any combination of pensions to former spouses of any one principal which exceeds the net annuity of the principal as defined in § 19.6–2(b).

(c) A pension to a former spouse not fixed by a spousal agreement or court order shall equal the former spouse's pro rata share of 50 percent of the annuity to which the principal is entitled on the date the divorce becomes final, or, if not then entitled to an annuity, 50 percent of the annuity to which the principal first becomes entitled following that date. A pension to a former spouse of a disability annuitant shall be calculated on the basis of an annuity for which the participant would qualify if not disabled. A pension to a former spouse will be increased by the same percentage of each cost-of-living adjustment received by the principal.

(d) The Department will initiate payment of a pension to a former spouse after complying with the notification and other procedures described in § 19.6.

(e) If a pension can not be paid because a former spouse is missing, the principal may file an affidavit with PER/ER/RET that he/she does not know the whereabouts of the former spouse. In such an event, the principal and the Department will follow the procedures in § 19.11–4 in an effort to locate the former spouse. The annuity of the principal will be reduced by the amount of the pension to the former spouse even though the latter is not being paid. If the former spouse has not been located during the 12-month period following the date the principal files an affidavit under this section, the annuity of the principal will be recomputed effective from its commencing date (or on the date following the last month a pension payment was made to the former spouse) and paid without reduction of the amount of pension to the former spouse. If the former spouse subsequently is located, pension payments to him/her will be initiated at that time at the rate that would have been payable had they been paid continuously from the original effective date. The Department shall not be liable to make any pension payments to the former spouse for the missing period if the procedures under this section were faithfully complied with nor will the Department be responsible for recovering any payments made to the

principal for the benefit of the former spouse.

§ 19.9–4 Effect on annuitant.

Any pension payable to a former spouse under this section or pursuant to any spousal agreement or court order shall be deducted from the annuity of the principal. (See § 19.6–4 concerning retroactive adjustments.) If the annuity of such a principal in any month is discontinued or reduced so that the net amount payable is less than the pension to the former spouse or spouses of the principal because of recall, reappointment or reinstatment in the Foreign Service or reemployment in the Government service, the principal's salary, rather than annuity, shall be reduced by the amount of the pension payment(s). Such salary reductions shall be deposited in the Treasury to the credit of the Fund. If a pension to a former spouse is discontinued for any reason except a suspension pending a determination of entitlement, the annuity of the principal shall be recomputed effective as of the date of discontinuance of the pension, and paid as if the pension to the former spouse had never been deducted.

§ 19.10 Types of annuities to members.

§ 19.10–1 Full annuity.

If a participant retires and does not provide a survivor annuity to a spouse, former spouse or designated beneficiary, the participant receives a ''full'' annuity. A full annuity means an annuity computed without any survivorship reduction. Example: Average salary $20,000 and maximum of 35 years of service.

Average basic annual salary for high 3 consecutive years of service	$20,000
Multiplied by 2 pct	.02
	$400.00
Multiplied by 35 years of creditable service	.35
Full annuity	$14,000

§ 19.10–2 Reduced annuity with regular survivor annuity to spouse or former spouse.

(a) At commencement of annuity, a participant or former participant may provide a regular survivor annuity for any eligible former spouse and, within the limits of paragraph (b) of this section, a regular survivor annuity to any spouse to whom he/she is then married as described in §§ 19.11–2 and 19.11–3, respectively. A regular survivor annuity for a spouse or former spouse equals 55 percent of the portion of the retiree's annuity (up to the full amount) designated as the base for the survivor annuity. To provide the survivor annuity, the participant must accept a reduction in his/her full annuity equal to 2½ percent of the first $3,600 of the designated base, plus 10 percent of the balance of the base. If a regular survivor annuity is being provided for both a spouse and a former spouse, the bases for each are added and the calculation made as in the following example:

Participant's full annuity as computed in § 19.10–1: $14,000.

Maximum regular survivor annuity is 55 percent of full annuity: $7,700.

Case I (Participant has a spouse and former spouse at retirement) If the pro rata share for a former spouse is 75 percent, the base for this benefit will be 75 percent of $14,000: $10,500.

The base for the maximum regular survivor annuity for a spouse would then be 25 percent of $14,000, or $3,500.

Combined base: $14,000.

Participant's full annuity reduced as follows:

2½ percent of first $3,600 of the base: $90.

Plus 10 percent of the amount over $3,600 ($14,000–3,600) $10,400: $1,040.

Total reduction in participant's full annuity: $1,130.

Participant's reduced annuity: $12,870.

Survivor annuity for former spouse: 55 percent of $10,500 or $5,775.

Survivor annuity for spouse: 55 percent of $3,500 or $1,925.

Case II (Participant married at retirement with no former spouse. All calculations made without reference to cost-of-living increases described in § 19.11–5d.)

Joint election of base for regular survivor annuity of 90 percent of the maximum, or 90 percent of $14,000: $12,600.

Participant's full annuity reduced as follows:

2½ percent of first $3,600 of the base: $90.

Plus 10 percent of the amount over $3,600 ($12,600–3,600) $9,000: $900.

Total reduction in participant's full annuity: $990.

Participant's reduced annuity: $13,010.

In this example, if divorce occurs subsequent to retirement and a court orders a 75 percent share for the former spouse, the base for the survivor annuity for the former spouse would be 75 percent of $14,000: $10,500.

The participant's full annuity would then be reduced by $780 in accordance with the above formula for this survivor benefit, and the reduced annuity would be $14,000–780: $13,220.

If the former spouse qualifies for a pension as described in § 19.9 based on a pro rata share of 75 percent, the pension would equal 50 percent of the participant's reduced annuity times 75 percent (50%×$13,220×75%): 4,957.50.

The participant's reduced annuity would then be further reduced by this pension ($13,220–$4,957.50) to provide an annuity to the former participant of $8,262.50.

If this annuitant later remarried, the maximum base for the regular survivor annuity for the new spouse would be the amount designated at retirement, $12,600, less the amount committed to the former spouse, $10,500: $12,600–10,500 or $2,100.

The survivor annuity for this spouse: 55 percent of $2,100 or $1,555.

The election of this benefit for the new spouse would be made individually by the annuitant since a marriage after retirement does not give a spouse a right to participate in the election.

If the election is made to provide a regular survivor annuity to the new spouse, all of the above calculations would be recomputed effective the first day of the month beginning one year after the date of the remarriage, as follows:

Base for survivor annuity for former spouse: 75% of $14,000 or $10,500.

Survivor annuity for former spouse: 55% of $10,500 or $5,775.

Base for survivor annuity for spouse: 15% of $14,000 or $2,100.

Survivor annuity for spouse: 55% of $2,100 or $1,555.

The combined base for the survivor benefits is $10,500 plus $2,100 or $12,600. The annuity reduction on this combined base as computed above is $990.

The participant's annuity after reduction for survivor benefit would be $14,000–$990 or $13,010.

The pension for the former spouse would be 50%×$13,010×75% or $4,878.75.

The participant's annuity would be further reduced by this amount: $13,010–$4,878.75 to provide an annuity after this recalculation of $8,131.25.

(b) The maximum regular survivor annuity or combination of regular survivor annuities that may be provided under this section is limited to 55% of the principal's full annuity computed at retirement. If an annuitant is recalled to active duty in the Foreign Service, he/she may provide additional regular survivor annuities under § 19.10–6. The maximum regular survivor annuity or combination of regular survivor annuities that an annuitant who was married at retirement may elect or provide, pursuant to a court order or otherwise, after retirement in the event of his/her divorce or remarriage, is limited to the amount provided at the time of initial retirement or reversion to retired status following recall service.

§ 19.10–3 Marriage after retirement.

If an annuitant who was unmarried at the time of retirement, marries, he/she may within one year after such marriage irrevocably elect to receive a reduced annuity and to provide, subject to any obligation to provide a survivor annuity for a former spouse, a survivor annuity for the new spouse. If such an election is made, the principal's annuity shall be reduced in accordance with § 19.10–2 effective on the first day of the first month which begins at least one year after the date of the marriage. The reduction is computed on the commencing rate of the principal's annuity.

§ 19.10–4 Death or divorce of a spouse and remarriage after retirement.

(a) If the marriage of an annuitant who received a reduced annuity at retirement under § 19.10–2 to provide a survivor annuity for a spouse is dissolved by divorce or by death of the spouse, the retiree's annuity shall be recomputed, if necessary, as of the first of the month following the death or divorce. If the marriage was dissolved by death, the annuity shall be recomputed and paid at its full amount. If the marriage is dissolved by divorce, procedures in § 19.11–2(b) shall be followed.

(b) In the event an annuitant affected by this paragraph remarries, the annuitant may elect within one year of remarriage to provide a survivor annuity for the new spouse equal in amount to the survivor benefit formerly in effect for the previous spouse less any amount committed for a former spouse. The annuity of a retiree making such an election shall be reduced effective on the first day of the first month which begins at least one year after the remarriage to the amount that would have been payable had there been no

recomputation under paragraph (a) of this section.

§ 19.10–5 Reduced annuity with additional survivor annuity to spouse or former spouse.

(a) *General.* This section provides an opportunity for a participant or former participant who has provided a regular survivor annuity to a former spouse to provide a survivor annuity to a second spouse or to another former spouse. The additional survivor annuity provided under this section generally is more costly than the regular survivor annuity because the participant is required to pay it's full cost by deduction from salary or annuity, or otherwise, as specified in paragraph (e) of this section. The participant must also be in normal health for his/her age and pass a physical examination prescribed by the Secretary of State (M/MED) to be eligible to provide an additional survivor annuity under this section.

(b) *Limitation on amount.* Neither the total amount of additional survivor annuity or annuities under this section provided by any participant or former participant nor any combination of regular or additional survivor annuities for any one surviving spouse or former spouse of a principal may exceed 55 percent of the principal's full annuity counting any supplemental annuity or recomputation of annuity because of recall service. An additional survivor annuity provided by any principal shall be further limited to the amount that can be provided by a monthly payment which is not greater than the principal's net annuity described in § 19.6–2(b). The amount of any additional survivor annuity provided by a spousal agreement effective prior to the principal's retirement, shall be reduced as necessary by PER/ER/RET after the principal's retirement to comply with this limitation. Any amount paid by a participant for the portion of additional survivor annuity cancelled pursuant to this paragraph shall be treated as an additional lump sum payment under paragraph (e) of this section and used to increase the amount of the additional annuity. A participant who separates from the Service without entitlement to any annuity is not entitled to provide an additional survivor annuity. Payments in such a case would be discontinued as described in paragraph (e) of this section.

(c) *Procedures to grant additional survivor annuity.* A participant or former participant who has provided a regular survivor annuity to a former spouse who wishes to provide, or who is ordered by a court to provide an additional survivor annuity under this section to a spouse or another former spouse, shall do so by filing a spousal agreement with PER/ER/RET on a form acceptable to PER/ER/RET. Such an agreement will be irrevocable when accepted by PER/ER/RET unless the beneficiary of the additional survivor annuity is subsequently made a beneficiary of a regular survivor annuity in equal amount. Within the limitations specified in paragraph (b) of this section, an individual may be made the beneficiary of both a regular and an additional survivor annuity. A spousal agreement granting an additional survivor annuity to a spouse will remain valid in the event the marriage is dissolved and the spouse qualifies as a former spouse under the definition § 19.2(k).

(d) *Eligibility for additional survivor annuity.* A spouse or former spouse must meet the same criteria (§ 19.2(v) or § 19.2(k)) to be eligible for an additional survivor annuity as a spouse or former spouse must meet to be eligible for a regular survivor annuity. Payment of a special survivor annuity will commence on the day after the participant dies and shall terminate on the last day of the month before death or remarriage before attaining age 60. If it is discontinued because of remarriage, it will not be resumed.

(e) *Payment for additional survivor annuity.* (1) Payment *for* an additional survivor annuity will commence on the first of the month following the effective date of a spousal agreement provising the additional survivor annuity. The effective date will be the date of acceptance of the spousal agreement by PER/ER-RET (upon a finding that the agreement conforms to the law and regulations) or such later date as may be specified in the agreement. No payment will be made to a beneficiary under the agreement if the principal

dies before its effective date. Accordingly, in order to give protection to a beneficiary during active service, the agreement must be made effective, and payment commence, during active service. Payment will be made by a participant or annuitant by deduction from salary or annuity. Payment will be made by a former participant while awaiting commencement of a deferred annuity by direct payment to the Department, Office of Financial Operations (M/COMP/FO). Payments not received by the due date may, at the option of M/COMP/FO and with notice to the principal and the beneficiary be collected from the principal's lump-sum account. Amounts so collected must be repaid by the principal with interest compounded at 10 percent annually to prevent exhaustion of the lump-sum account. If the lump-sum account does become exhausted, any rights to the lump-sum payment under § 19.13 and survivorship rights under this paragraph will expire on that date. If the principal dies with an amount owing, it shall be collected by set off from the survivor annuity or lump-sum account.

(2) Monthly payments may be reduced or eliminated by direct payment to M/COMP/FO by any participant or former participant under terms mutually agreed upon by the participant and PER/ER/RET. Minimum monthly payments will be based upon actuarial tables prescribed from time to time by the Director General of the Foreign Service (M/DGP) with the advice of the Secretary of Treasury. Such tables will be calculated so that the present value of all payments equal the present value of the survivor annuity. If new tables are prescribed, they would be applicable to additional survivor annuities provided by spousal agreements that become effective on or after the effective date of the new tables. Additional survivor annuities will be increased by regular cost-of-living adjustments from their commencing dates only when so specified at the option of the participant or former participant in a spousal agreement. Monthly payments will be higher if cost-of-living adjustments are provided.

(3) In the event of the disqualification of a beneficiary for an additional survivor annuity because of death, remarriage prior to age 60 or divorce from the principal and failure to meet the definition of ''former spouse,'' or in the event of an authorized reduction or cancellation of an election for an additional survivor annuity, the monthly payment for such discontinued or reduced additional survivor annuity will be discontinued or reduced, as appropriate, effective at the beginning of the first month following termination or reduction of the benefit. Except as otherwise specified in paragraph (b) of this section, any amount paid for such discontinued or reduced benefit by a participant or former participant in excess of the minimum monthly payments described above shall be refunded to the participant or former participant with interest calculated at the annual rate used in the last evaluation of the System or at such higher rate as may be authorized by M/COMP/FO as will not cause a loss to the Fund. The following table illustrates the minimum monthly payments schedule in effect February 15, 1981.

Age of principal and beneficiary on effective date of spousal agreement	Minimum monthly payment required to provide an additional survivor annuity of $100 per month.	
	Without COLA	With COLA
40	$7.49	$12.34
50	14.18	22.01
60	23.55	33.90
70	35.57	47.12

(4) Reduction from annuity to a principal to pay for an additional survivor annuity will be in the nature of an allotment and will not affect computations of cost-of-living adjustments to the principal.

§ 19.10–6 Benefits for recall service.

(a) *Annuity of recalled participant.* Any participant who is recalled to the Service under section 308 of the Act, shall, while serving, be entitled in lieu of annuity to the full salary of the class in which serving. During such service, the recalled annuitant shall make contributions to the Fund under section 805(a) of the Act. If a share of the annuity is being paid as a pension to a former spouse under § 19.9, that share shall be deducted from the salary

of the recalled annuitant during the period of the recall service. Upon reversion of the annuitant to retired status, any pension payable to a former spouse that was being deducted from the salary of the principal shall again be deducted from the annuity of the principal which shall be determined as follows:

(1) If the recall service lasts less than one year, a refund of retirement contributions made during the recall period will be refunded under § 19.13 and the former annuity will be resumed at the previous rate adjusted by any cost-of-living increases that became effective during recall service.

(2) If the recall service lasts between one and five years, the annuitant will be entitled to elect benefits under paragraph (a)(1) of this section or receive both the former annuity adjusted by cost-of-living increases and a supplemental annuity computed under § 19.10 on the basis of service credit and average salary earned during the recall period, irrespective of the number of years of service credit previously earned.

(3) If the recall service lasts five years or more, the annuitant will be entitled to recomputation of the annuity as if there had been no previous retirement, or elect benefits under paragraph (a) (1) or (2) of this section.

(4) An annuitant may receive credit in any computation under paragraph (a) (2) or (3) of this section for any Federal service performed subsequent to the separation upon which the original annuity was computed provided a special contribution is made for such service under section 805 of the Act.

(5) An annuitant entitled to a supplemental annuity under paragraph (a)(3) of this section or a recomputated annuity under paragraph (a)(4) of this section is obligated, in the absence of a court order or spousal agreement to the contrary, to have those annuities reduced to provide the benefits described in § 19.8 to any spouse or former spouse to whom married during any portion of the recall service. An annuitant must accept a reduction of 10 percent of his/her supplemental annuity in order to provide a supplemental survivor annuity to a spouse or former spouse. The maximum supplemental survivor annuity equals 55 percent of the supplemental annuity. If, upon reversion to retired status, an annuitant has a former spouse entitled to a pro rata share or some other share of the supplemental survivor annuity, but no spouse, the appropriate share of the supplemental annuity shall be reduced by 10 percent to provide such former spouse a share of the maximum supplemental survivor annuity.

(b) *Survivor benefit for death during recall service.* (1) If an annuitant entitled to a reduced annuity under § 19.10–2 dies in service after being recalled and is survived by a spouse or former spouse entitled to a survivor annuity based on the service of such annuitant, such survivor annuity shall be computed as if the recall service had otherwise terminated on the day of death and the annuity of the deceased had been resumed in accordance with paragraph (a) of this section. If such death occurs after the annuitant had completed sufficient recall service to attain eligibility for a supplemental annuity, a surviving spouse or surviving former spouse who was married to the participant at any time during a period of recall service shall be entitled to elect, in addition to any other benefits and in lieu of a refund of retirement contributions made during the recall service, a supplemental survivor annuity computed and paid under § 19.10–6a(5) as if the recall service had otherwise terminated. If the annuitant had completed sufficient recall service to attain eligibility to have his/her annuity determined anew, a surviving spouse or such a surviving former spouse may elect, in lieu of any other survivor benefit under § 19.11, to have the rights of the annuitant redetermined and to receive a survivor annuity computed under § 19.11–2 or § 19.11–3 on the basis of the total service of the annuitant. In the event such an annuitant is survived both by a spouse and such a former spouse, the former spouse will be entitled to a pro rata share of any refund or supplemental survivor benefit under this section computed on the basis of total service during the recall period and months of marriage during such period. If the surviving spouse and surviving former spouse elect different benefits under

this paragraph, the former spouse will receive the pro rata share of the benefit he/she elects and the spouse will receive the reciprocal share of the benefit he/she elects.

(2) In the event an annuitant dies during recall service and is survived by a former spouse to whom not married during any period of the recall service, such former spouse will not be entitled to any benefits based on the recall service.

§ 19.11 Survivor benefits.

§ 19.11–1 Kinds of survivor benefits.

If a participant or former participant dies in active service or after retirement, regular survivor annuities are payable under terms of this section to an eligible surviving spouse, former spouse or child. Also, if all rights to annuity and survivor annuity terminate prior to exhaustion of the participant's lump-sum credit, a lump-sum payment is made pursuant to § 19.13. In addition to the above, an additional survivor annuity, and a supplemental survivor annuity may be payable to an eligible survivor under §§ 19.10–5 and 19.10–6, respectively. If any participant or former participant makes an election, files a spousal agreement or becomes subject to a court order to provide a regular survivor annuity for a spouse or former spouse and does not subsequently become entitled to leave a survivor annuity under these regulations (because of separation from the Service and withdrawal of contributions, death after separation but before commencement of a deferred annuity, or for any other reason), none will be paid and such election, spousal agreement or court order to provide such survivor annuity will have no force or effect.

§ 19.11–2 Regular survivor annuity for a former spouse.

(a) *Divorce prior to retirement.* If a participant or former participant is divorced prior to commencement of annuity, any former spouse shall be entitled to a pro rata share of such a principal's maximum regular survivor annuity (based on service performed prior to the first date the principal becomes eligible for an annuity following the divorce) unless a different amount is elected in a spousal agreement filed with PER/ER/RET within 12 months after the divorce becomes final or at the time of the retirement, whichever occurs first, or unless a different amount is specified by a court prior to the death of the principal. The principal's annuity shall be reduced at the commencing date under § 19.10–2 in order to provide the survivor annuity committed to the former spouse.

(b) *Divorce after retirement.* In the event an annuitant is divorced after retirement (commencement of annuity), the maximum survivor annuity that may be provided for that former spouse is limited to the amount provided for that person at the time of retirement. Within that limit, the former spouse is entitled to a pro rata share of the participant's maximum survivor benefit (based on service performed prior to the divorce) unless a different amount was elected in a spousal agreement filed with PER/ER/RET at the time of retirement, or in the case of retirement before February 15, 1981, filed with PER/ER/RET within 12 months after the divorce becomes final, or unless a different amount is specified by a court prior to the death of the principal. For this purpose, a joint election filed with PER/ER/RET at the time of retirement is considered a spousal agreement. If the survivor annuity for the former spouse is reduced at the time of the divorce (because the pro rata share or the amount specified in a spousal agreement or court order is less than the amount elected at retirement), the principal's annuity shall be recomputed and paid, effective on the date the survivor benefit is reduced, as if the lower amount had been elected at the outset of retirement.

(c) *Death or remarriage of former spouse and transfer of survivor benefit to a spouse.* Remarriage below age 60 or death of a former spouse while a principal is alive will disqualify the former spouse for benefits under this section. In the event of such a remarriage or death of a former spouse, the portion of a principal's survivor annuity committed to that person will become available for transfer to any spouse. If such a remarriage or death of the

former spouse occurs after the principal's annuity commences, any reduction in the principal's annuity for that former spouse will be discontinued effective at the beginning of the first month following the remarriage or death unless the annuitant elects to provide or to increase a survivor benefit for a spouse. Such an election may be made within one year after the annuitant receives notice of the remarriage or death of his/her former spouse. The Department (PER/ER/RET) and the annuitant shall each notify the other promptly whenever either receives independent notice of such a remarriage or death. If an election to transfer survivor benefits to a spouse is not made by the annuitant, his/her annuity will be recomputed and paid as if there had been no reduction for the discontinued survivor benefit. If an annuity is so recomputed and an election is subsequently made to designate as beneficiary a spouse to whom married for at least one year at the time the election is made, the principal's annuity shall be restored retroactively to its former, lower rate and then adjusted by cost-of-living increases that have occured since the date of the first recomputation. If an election is made for a spouse when the marriage has not yet lasted a year, the procedures in § 19.10–4 shall be followed.

(d) *Amount of survivor annuity.* The amount of a regular survivor annuity is determined under § 19.11–3(c).

(e) *Special rules for election of survivor annuity for a person who is a former spouse on February 15, 1981.* (1) Any participant, or former participant eligible for a deferred annuity which has not yet commenced, who, on February 15, 1981 has a former spouse, may at any time prior to commencement of annuity, elect, with the consent of any spouse to whom married at the time of the election, to receive a reduced annuity and provide a regular survivor annuity for such former spouse. Such survivor annuity shall be limited by § 19.10–2(b). An election under this paragraph for a former spouse will reduce the amount of any regular survivor annuity that may subsequently be provided for any spouse or other former spouse.

(2) Any former participant in receipt of an annuity who has a former spouse on February 15, 1981 and who has not committed his/her entire annuity as a base for a regular survivor annuity for a spouse or any other former spouse, may, prior to December 31, 1982, designate any portion of the uncommitted base as the base for a regular survivor annuity for such former spouse.

(3) The annuity of a former participant making an election under this paragraph shall be reduced under § 19.10–2(a) effective February 15, 1981, or from its commencing date if later.

(4) An election under this paragraph shall be made by filing a spousal agreement with PER/ER/RET under § 19.7. A spousal agreement to provide a regular survivor annuity under this paragraph for a former spouse may be revoked or amended after its acceptance by PER/ER/RET as in accordance with the Act and these regulations, only by agreement of the parties up to the last day allowed by this paragraph for filing such an agreement. Thereafter, it is irrevocable. If a participant dies in service after having filed a valid election under this section, a survivor annuity will be paid to an eligible former suriving spouse in accordance with the terms of the election.

§ 19.11–3 Regular survivor annuity for a spouse.

(a) In the absence of a joint election or a spousal agreement to the contrary, a participant or former participant who is separated from active service on or after February 15, 1981 who is married at the commencement of his/her annuity shall provide a regular survivor annuity for a spouse under § 19.10–2 equal to the maximum amount that remains available under limitations stated in paragraph (b) of that section after allowing for any commitment of a regular survivor annuity for a former spouse who has not remarried prior to age 60 and who is alive on the date the former participant becomes eligible for an annuity.

(b) A regular survivor annuity is also payable to a surviving spouse for whom a principal elected an annuity under § 19.10–3, § 19.10–4, or § 19.11–2(c) following a marriage after comencement of his/her annuity.

(c) The amount of a regular survivor annuity equals 55 percent of the base designated for the benefit at the time the principal's annuity commenced, adjusted by the total percentage of cost-of-living increases the principal was receiving at death.

(d) A survivor annuity is payable to a surviving spouse only if that person was married to the principal at the time of his/her death or if the spouse became a former spouse under the definition in § 19.2(k).

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.11–4 Procedure in event a spouse or former spouse is missing.

If a participant or former participant has a spouse or former spouse whose whereabouts are unknown, such participant may elect to reduce or eliminate the share of a regular survivor annuity provided for that person under § 19.11–2 or § 19.11–3 by filing an affidavit with PER/ER/RET stating that his/her spouse or former spouse is missing and giving full name, last known address, date last heard from, circumstances of the disappearance and a description of the effort that has been made to locate the individual. Thereafter, the participant shall take such additional steps to locate the missing person as may be directed by PER/ER/RET. That Office shall also attempt to locate the missing person by sending a letter to the individual's last known address given in the Department's files, to the address given on the affidavit, and, if a Social Security number is known, to the Social Security Administration for forwarding. The election and affidavit may be filed at any time before commencement of annuity. It must remain on file with PER/ER/RET for at least one year before being given irrevocable effect by the Department. If the annuity to the former participant becomes effective prior to the expiration of this one year period, the annuity shall be computed and paid without reference to the election filed under this section. Following this one-year period, or at the commencement of annuity, if later, if the missing person has not been located, the affidavit may be reaffirmed by the participant, after which an election by the participant to reduce or eliminate the share of regular survivor annuity for the missing person shall be given irrevocable effect by the Department. If the annuity to the former participant has commenced, it shall be recomputed and paid retroactively to give effect to any election made under this section.

§ 19.11–5 Commencement, termination and adjustment of annuities.

(a) An annuity payable from the Fund to a surviving spouse or former spouse begins on the day after the participant or annuitant dies and stops on the last day of the month before the survivor's (1) marriage before age 60, or (2) death. If a survivor annuity is terminated because of remarriage, the annuity is restored at the same rate effective on the date such remarriage is terminated, provided any lump-sum paid upon termination of the annuity is returned to the Fund. The termination of a surviving spouse annuity due to remarriage does not apply to a survivor annuitant who is a surviving spouse of a participant who died in service or retired before October 1, 1976, unless elected following a marriage after retirement under circumstances described in § 19.10–3 or § 19.10–4.

(b) A surviving spouse or former spouse shall not become entitled to a survivor annuity or to the restoration of a survivor annuity payable from the Fund unless the survivor elects to receive it instead of any other survivor annuity to which entitled under this or any other retirement system for Government employees. (For this purpose, neither the Social Security system nor the military retirement system is considered a retirement system for Government employees.) This restriction does not apply to a survivor annuitant who is a surviving spouse of a participant who died in service or retired before October 1, 1976, unless the survivor annuity was elected under circumstances described in § 19.10–3 or § 19.10–4.

(c) A child's annuity begins on the day after the participant dies, or if a child is not then qualified, on the first day of the month in which the child becomes eligible. A child's annuity shall terminate on the last day of the month

which precedes the month in which eligibility ceases.

(d) Regular and supplemental survivor annuities to a spouse or former spouse of an annuitant described in §§ 19.11–2, 19.11–3 and 19.10–6(b) are increased from their effective date by the cumulative percentage of cost-of-living increases the annuitant was receiving under section 826 of the Act at death. All annuities payable to survivors on the date a cost-of-living adjustment becomes effective are increased by that percentage except (1) the first increase to a surviving spouse of a participant who dies in service shall be pro rated and (2) additional survivor annuities under § 19.10–5 when the spousal agreement authorizing the annuity makes no provision for cost-of-living increases.

(e) The annuity of survivors becomes effective as specified in this section but is not paid until the survivor submits Form JF–38, Application for Death Benefits, supported by such proof as may be required, for example, death, marriage, and/or divorce certificates. In the event that such is not submitted during an otherwise eligible beneficiary's lifetime, no annuity is due or payable to the beneficiary's estate.

[46 FR 12958, Feb. 19, 1981. Redesignated and amended at 46 FR 18970, Mar. 27, 1981]

§ 19.11–6 Death during active duty.

(a) *Annuity for surviving former spouse.* In the event a participant dies before separation from the Service and leaves a former spouse, such former spouse is entitled to a regular survivor annuity under § 19.11–2 computed as if the participant had retired on the date of death unless a court order or spousal agreement is on file in the Department waiving such entitlement or providing for some other computation, or unless the former spouse had been found missing and an election filed under the procedures of § 19.11–4 waiving a survivor benefit for that person. Any assumed service authorized to be used under paragraph (b) of this section in computing the annuity for a surviving spouse may not be counted as ''years of marriage'' when determining whether the previous spouse qualifies as a ''former spouse'' under the definition in § 19.2(k) or when computing the pro rata share under § 19.2(s). A former spouse is entitled to an additional survivor annuity under § 19.10–5 provided death occurs on or after the effective date of a spousal agreement providing for the additional annuity.

(b) *Annuity for surviving spouse.* If a participant who has at least 19 months of civilian service credit toward retirement under the System, excluding extra service credited for unhealthful post duty in accordance with section 816 of the Act, dies before separation from the Service, and is survived by a spouse as defined in § 19.2(v) such survivor shall be entitled to an annuity equal to 55 percent of the annuity computed in accordance with § 19.10–1 less any annuity payable to a former spouse under paragraph a. If the participant had less than three years of creditable civilian service at the time of death, the survivor annuity is computed on the basis of the average salary for the entire period of such service. If, at time of death, the participant had less than 20 years of creditable service, the annuity shall be computed on the assumption that the participant has had 20 years of service, but such additional service credit shall in no case exceed the difference between the participant's age on the date of death and age 65. A spouse is entitled to an additional survivor annuity under § 19.10–5 provided death occurs on or after the effective date of a spousal agreement providing for the additional annuity.

(c) *Annuity for a child or children.* If a participant described in paragraph (b) of this section is survived by a child or children, each surviving child is entitled to an annuity as described in § 19.11–7.

(d) *Annuity changes.* Annuities based on a death in service are subject to the provisions of § 19.11–5 governing commencement, adjustment, termination and resumption of annuities.

§ 19.11–7 Annuity payable to surviving child or children.

(a) If a participant who has at least 18 months of civilian service credit under the System dies in service, or if an annuitant who was a former participant dies, annuities are payable to a surviving child or children, as defined in § 19.2(e) as follows:

(1) *When survived by spouse and child or children.* If a principal is survived by a wife or husband and by a child or children, in addition to any other annuity, there shall be paid to or on behalf of each child an annuity equal to the smallest of:

(i) $900

(ii) $2,700 divided by the number of children—adjusted under paragraph (b).

(2) *When survived by a child or children but no spouse.* If the principal is not survived by a wife or husband, but by a child or children, each surviving child shall be paid an annuity equal to the smallest of:

(i) $1,080

(ii) $3,240 divided by the number of children—adjusted under paragraph (b) of this section.

(b) *Adjusted rates.* In order to reflect cost-of-living increases, the amounts referred to in paragraphs (a)(1) and (2) are increased from the commencing date of the annuity to each child by the cumulative percentage of all cost-of-living increases that have occurred under 5 U.S.C. 8340 since October 31, 1969.

(c) *Recomputation of annuity for child or children.* If a surviving wife or husband dies or the annuity of a child is terminated, the annuities of any remaining children shall be recomputed and paid as though such spouse or child had not survived the participant. If the annuity to a surviving child who has not been receiving an annuity is initiated or resumed, the annuities of any other children shall be recomputed and paid from that date as though the annuities to all currently eligible children in the family were then being initiated.

§ 19.11–8 Required elections between survivor benefits.

(a) *Bar against concurrent payment under this Act and Workers' Compensation Act.* Except as stated below, survivor annuities and survivors' compensation for work injuries under 5 U.S.C. 8102 are not payable concurrently if both are based on the death of the same employee. A survivor entitled to both must elect which of the two benefits he/she prefers. Should all eligible survivors of a deceased employee elect to receive the compensation benefit rather than the survivor annuity, their rights to the latter are terminated and, if the lump-sum credit has not been exhausted, a lump-sum payment will become due under § 19.13. The one exception to this rule occurs when a widow or widower is being paid the balance of a scheduled compensation award under 5 U.S.C. 8107 due the deceased employee. If so, the widow or widower may receive the survivor annuity and compensation award concurrently.

(b) *Election between survivor annuity and social security benefits.* Pursuant to 42 U.S.C. 417 (a) and (e), survivors who are eligible for annuity which is based in part on military service performed by a principal between September 16, 1940, and December 31, 1956, and also for survivor benefits under the Social Security system, may elect to have the military service credited toward the Social Security benefit. In practice, the survivors should apply for both benefits, ask the Department and the Social Security Administration for statements showing the amount of each benefit, and then make their election of where to credit the military service. If Social Security benefits are elected, the rights of *all* survivors to a foreign service annuity are terminated.

§ 19.12 Employment in a Government agency.

An annuitant who is reemployed by a Federal Government agency may not receive a combination of salary and annuity which exceeds his/her Foreign Service salary at the time of retirement. Refer to § 19.9–4.

§ 19.13 Lump-sum payment.

§ 19.13–1 Lump-sum credit.

''Lump-sum credit'' is the compulsory and special contributions to a participant's or former participant's credit in the Fund for his/her first 35 years of service plus interest thereon computed from the midpoint of each service period and compounded at four percent annually to the date of separation or December 31, 1976, whichever is earlier, and after such date, for a participant who separates from the Service after completing at least one year of civilian service and before completing 5

years of such service, at the rate of three percent annually to the date of separation. Interest shall not be paid for a fractional part of a month in the total service or on compulsory and special contributions from the annuitant for recall service or other service performed after the date of separation which forms the basis for annuity.

§ 19.13–2 Share payable to a former spouse.

A former spouse of a participant or annuitant is entitled to a prorata share of 50 percent of any lump-sum payment authorized to be paid to a former participant under this section who separated from the Service on or after February 15, 1981, unless otherwise directed in a court order or a spousal agreement.

§ 19.13–3 Payment after death of principal.

If a participant or former participant dies and no claim for annuity is payable, the lump-sum credit is paid to surviving beneficiaries.

§ 19.14 Waiver of annuity.

An individual entitled to be paid an annuity may, for personal reasons, decline to accept all or any part of the annuity. However, a principal may not waive the portion of his/her annuity authorized to be paid to a former spouse under § 19.7 or § 19.9 or to a beneficiary under § 19.6. An annuity waiver shall be in writing and sent to the Department (PER/ER/RET). A waiver may be revoked in writing at any time. Payment of the annuity waived may not be made for the period during which the waiver was in effect.

PART 20—BENEFITS FOR CERTAIN FORMER SPOUSES

Sec.
20.1 Definitions.
20.2 Funding.
20.3 Qualifications.
20.4 Retirement benefits.
20.5 Survivor benefits.
20.6 COLA.
20.7 Waiver.
20.8 Effect on other benefits.
20.9 Application procedure.

AUTHORITY: 22 U.S.C. 3901 *et seq.*

SOURCE: 53 FR 39457, Oct. 7, 1988, unless otherwise noted.

§ 20.1 Definitions.

As used in this part, unless otherwise specified, the following have the meaning indicated:

COLA means cost-of-living adjustment in annuity.

Creditable service or *service* means employment or other periods that are counted under sections 816, 817, or 854 in determining retirement benefits.

Disability annuitant means a participant in FSRDS or FSPS entitled to a disability annuity under section 808 of the Act or subchapter V, chapter 84, title 5 U.S.C., and a *disability annuity* means a Foreign Service annuity computed under those sections.

FSRDS means the Foreign Service Retirement and Disability System established by subchapter I, chapter 8, of the Act.

FSPS means the Foreign Service Pension System established by subchapter II, chapter 8, of the Act.

Former spouse means a former wife or husband of a participant or former participant who was married to such participant for not less than 10 years during service of the participant which is creditable under chapter 8 of the Act with at least 5 years occurring while the employee was a member of the Foreign Service and who retired from the Foreign Service Retirement System.

Full annuity equals the annuity the former participant would be eligible to receive except for deductions made to provide survivor benefits or because of payment of a portion of the annuity to others.

Participant means a person who contributes to the Fund identified in § 20.2. Such person may participate in either FSRDS or FSPS.

Principal means a participant or former participant whose service forms the basis for a benefit for a former spouse under this part.

Pro rata share, in the case of a former spouse of a participant or former participant, means the percentage obtained by dividing the number of months during which the former spouse was married to the participant during the creditable service of the participant by the total number of months of

such creditable service. In the total period, 30 days constitutes a month and any period of less than 30 days is not counted. When making this calculation for a former spouse married to a participant during a period the participant earned extra service credit under section 817 of the Act, the number of months of such extra service credit earned during that period of the marriage shall be added to the total number of months of the marriage.

§ 20.2 Funding.

Benefits under this part are paid from the Fund maintained by the Secretary of the Treasury pursuant to section 802 of the Act but are not authorized to be paid except to the extent provided therefor. Appropriations for such Fund are authorized by section 821(a) of the Act.

§ 20.3 Qualifications.

To be eligible for retirement or survivor benefits under this part, a former spouse must—

(a) Have been a former spouse on February 14, 1981;

(b) After becoming a former spouse, not have remarried before attaining age 55;

(c) In the case of any retirement benefit under § 20.5; elect this benefit instead of any survivor annuity for which the former spouse may simultaneously be eligible under this or another retirement system for Government employees; and

(d) Submit an application to the Department of State by June 22, 1990, in accordance with § 20.9 unless that date is extended as authorized by that section. The deadline for submission of an application for survivor benefits under § 20.5 will be deemed to have been met if the former spouse submits an application for retirement benefits within the deadline.

§ 20.4 Retirement benefits.

(a) *Type of benefits.* (1) A former spouse who meets the qualification requirements of § 20.3 is entitled to a share of any Foreign Service annuity (other than a disability annuity) or any supplemental annuity computed under section 806(a), 823 or 824 of the Act to which the principal is entitled under FSRDS and to any Foreign Service annuity (other than a disability annuity) or annuity supplement computed under section 824 or 855 of the Act of 5 U.S.C. 8415 to which the principal is entitled under FSPS.

(2) A former spouse of a disability annuitant is entitled to a share of benefits to which the annuitant would qualify under paragraph (a) of this section, he or she not been disabled based on the actual age and service of the annuitant.

(b) *Share.* The share of a participant's benefits to which a qualified former spouse is entitled is—

(1) 50 percent of the benefits described in § 20.4(a) if the former spouse was married to the participant throughout the latter's creditable service; or

(2) A pro rata share of 50 percent of such benefits if the former spouse was not married to the participant throughout such creditable service.

(c) *Reduction of benefits.* If retirement benefits of a principal are reduced because of reemployment, attainment of eligibility for Social Security benefits or for any other reason, the amount of the share payable to a former spouse is correspondingly reduced during the period of the reduction.

(d) *Commencement, termination and suspension.* (1) Entitlement to retirement benefits under this section (except for a former spouse of a disability annuitant) shall commence on the latter of—

(i) The day the principal becomes entitled to benefits described in § 20.4(a); or

(ii) December 22, 1987.

(2) Entitlement to retirement benefits under this section for a former spouse of a disability annuitant shall commence on the latter of—

(i) The date the principal would qualify for benefits (other than a disability annuity) described in § 20.4(a) on the basis of the principal's actual age and service;

(ii) The date the disability annuity begins; or

(iii) December 22, 1987.

(3) Entitlement to retirement benefits under this section shall terminate or be suspended on the earlier of—

(i) Last day of the month before the former spouse dies or remarries before attaining age 55;

(ii) Date benefits of the principal terminate or are suspended because of death, recall, reemployment, recovery from disability or for any other reason.

(4) Entitlement to benefits under this section shall be resumed for a former spouse, following their suspension, or the date they are resumed for the principal.

§ 20.5 Survivor benefits.

(a) *Type of benefits.* A former spouse who meets the eligibility requirements of § 20.3 is entitled to survivor benefits equal to one of the following; whichever is applicable:

(1) 55 percent of the full annuity to which the principal was entitled on the commencement or recomputation date of the annuity in the case of a principal who dies while in receipt of a Foreign Service annuity computed under section 806, 808, 823, 824, or 855 of the Act of 5 U.S.C. 8415;

(2) 55 percent of the annuity to which the principal was entitled at death in the case of a principal who dies while in receipt of a Foreign Service annuity computed under 5 U.S.C. 8452;

(3) 55 percent of the full annuity to which the principal would have been entitled if he or she retired (or returned to retirement status) on the date of death computed—depending on the provision that would be used to compute an annuity for a surviving spouse of the principal—under section 806(a), 823, 824, or 855(b) of the Act of 5 U.S.C. 8415 and using the actual service of the principal, in the case of a principal who dies while in active service, including service on recall or reemployment while annuity is suspended or reduced; or,

(4) 55 percent of the full annuity computed under 5 U.S.C. 8413(b) that the principal could have elected to receive commencing on the date of death or, if later, commencing on the date the principal would have attained the minimum retirement age described in 5 U.S.C. 8412(h), in the case of a principal while entitled to a deferred annuity under 5 U.S.C. 8413(b), but before commencement of that annuity. A survivor annuity under this paragraph may not commence before the date the principal would have attained the minimum retirement age.

(b) *Effect of election of alternate form annuity.* If a principal elects an alternate form annuity under section 829 of the Act or 5 U.S.C. 8420a, survivor benefits for a former spouse under this section shall, nevertheless, be based on what the principal's annuity would have been had the principal not withdrawn retirement contributions in a lump sum.

(c) *Reduction because of receipt of other survivor benefits.* If a former spouse is in receipt of a survivor annuity based on an election by the principal under section 806(f) or 2109 of the Act, the survivor benefits for the former spouse under this section shall be reduced on the effective date by the amount of such elected survivor annuity.

(d) *Commencement and Termination.* Entitlement to survivor benefits under this section—

(1) Shall commence on the latter of—

(i) The date the principal dies;

(ii) December 22, 1987; and

(2) Shall terminate on the last day of the month before the former spouse dies or remarries before attaining age 55.

§ 20.6 COLA.

(a) *Retirement benefits.* A retirement annuity payable to a former spouse under § 20.4 is adjusted for cost-of-living increases under section 826 or 858 of the Act in the same manner as the annuity of the principal. The first such increase for a former spouse shall be prorated under the applicable section in the same way the first increase for the principal is adjusted, irrespective of whether the annuity to the former spouse commences on the same date as the annuity to the principal. If the benefit of a former spouse is based in part on an annuity supplement payable to a principal under 5 U.S.C. 8421 which is not adjusted by COLA, then that portion of the benefit payable to a former spouse is not adjusted by COLA.

(b) *Survivor benefits.* (1) Survivor annuities payable to a former spouse are adjusted for COLA under section 826 or 858 of the Act in the same manner as annuities are or would be adjusted for other survivors of the principal.

(2) A survivor annuity payable to a former spouse under § 20.5–1(A) shall be increased from its commencing date pursuant to paragraph (c)(2) of section 826 of the Act or 8462 of Title 5, U.S. Code, by all COLA received by the principal at death, irrespective of the date of death and in instances where death occurred prior to December 22, 1987, by all COLA that would have been paid to a survivor annuitant from the date of death until December 22, 1987.

(3) The first increase to which a former spouse becomes entitled whose annuity is computed under § 20.5(a)(2) shall be prorated pursuant to 5 U.S.C. 8462(c)(4).

(4) The first increase to which a former spouse becomes entitled whose annuity is computed under § 20.5(a)(3) or

(5) Shall be prorated pursuant to paragraph (c)(1) of section 826 of the Act or 8462 or title 5, U.S. Code.

§ 20.7 Waiver.

A former spouse entitled to an annuity under this part may decide to decline all or any part of the annuity for personal reasons. An annuity waiver shall be in writing and sent to the Retirement Division (PER/ER/RET), Department of State, Washington, DC 20520. A waiver may be revoked in writing at any time. Payment of the annuity waived prior to receipt by the Retirement Division of the renovation may not be made.

§ 20.8 Effect on other benefits.

Payment to a former spouse under this part shall not impair, reduce, or otherwise affect benefits paid under the Act to the principal or other persons.

§ 20.9 Application procedure.

(a) *Submission of application.* To be eligible for retirement or survivor benefits under this part, a former spouse must submit a properly executed and completed application to the Department of State by June 22, 1990 or, if an exception is made for compelling cause to this deadline, within 60 days following the date of the letter from the Department transmitting the application to the former spouse. The application must be delivered or mailed to the Retirement Division (PER/ER/RET), Room 1251, Department of State, Washington, DC 20520.

(b) *Request for application.* The Department of State has attempted to mail applications to all former spouses of whom it is aware that it believes may be eligible for benefits under this part. Any eligible former spouse who does not have an application at the time this part is published in the FEDERAL REGISTER (October 7, 1988) must communicate with the Department as soon as possible and request an application. Request may be in person or by mail to the address in § 20.9(a) or by telephoning the Retirement Division on area code 202–647–9315. A request by letter must include the typed or printed full name and current address of the former spouse.

It shall also give the dates of marriage and divorce or annulment that establish eligibility and fully identify the Foreign Service employee or former employee in question and state the agency of current or last employment.

(c) *Payment of benefits delayed.* Payment of benefits cannot be made to a former spouse until the application for benefits is approved by the Retirement Division of the Department. Upon such approval, benefits will be paid to an eligible former spouse retroactively, if necessary, back to the commencing date determined under this part.

PART 21—INDEMNIFICATION OF EMPLOYEES

AUTHORITY: 5 U.S.C. 301; 22 U.S.C. 2658.

SOURCE: 60 FR 29988, June 7, 1995, unless otherwise noted.

§ 21.1 Policy.

(a) The Department of State may indemnify an employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined as a matter of discretion by the Under Secretary for Management or his or her designee.

(b) The Department of State may settle or compromise a personal damages claim against an employee by the payment of available funds at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined as a matter of discretion by the Under Secretary for Management or his or her designee.

(c) The Director General of the Foreign Service and Director of Personnel (''Director General'') shall be the designee of the Under Secretary for Management with respect to determinations under paragraphs (a) and (b) of this section in cases which involve:

(1) Foreign courts or foreign administrative bodies and

(2) Requests of less than five thousand dollars.

(d) Absent exceptional circumstances as determined by the Under Secretary for Management or his or her designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

(e) When an employee in the United States becomes aware that an action has been filed against the employee in his or her personal capacity as a result of conduct taken within the scope of his or her employment, the employee shall immediately notify the Department through the Executive Director of the Office of the Legal Adviser that such an action is pending. Employees overseas shall notify their Administrative Counselor who shall then notify the Assistant Legal Adviser for Special Functional Problems. Employees may be authorized to receive legal representation by the Department of Justice in accordance with 28 CFR 50.15.

(f) The employee may thereafter request indemnification to satisfy a verdict, judgment, or award entered against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the Legal Adviser. Except as provided in paragraph (g) of this section, the Legal Adviser and the Director General shall then, in coordination with the Bureau of Finance and Management Policy, forward the request with their recommendation to the Under Secretary for Management for decision. The Legal Adviser may seek the views of the Department of Justice, as appropriate, in preparing this recommendation.

(g) Cases in which the Director General is the designee under paragraph (c) of this section may be forwarded by the Assistant Legal Adviser for Special Functional Problems, along with the views of the employee and the bureau or post as appropriate, to the Director General for decision.

(h) Personal services contractors of the Department are considered employees for purposes of the policy set forth in this part.

(i) Any payment under this part either to indemnify a Department of State employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds.

(j) In addition to the indemnification provisions contained in the regulations in this part, the Department will also follow any specific policies or regulations adopted with respect to damages awarded against Department health care personnel for malpractice claims within the scope of 22 U.S.C. 2702.

[60 FR 29988, June 7, 1995]

SUBCHAPTER C—FEES AND FUNDS

PART 22—SCHEDULE OF FEES FOR CONSULAR SERVICES—DEPARTMENT OF STATE AND FOREIGN SERVICE

Sec.
22.1 Schedule of fees.
22.2 Requests for services in the United States.
22.3 Remittances in the United States.
22.4 Requests for services, Foreign Service.
22.5 Remittances to Foreign Service posts.
22.6 Refund of fees.
22.7 Collection and return of fees.

AUTHORITY: 8 U.S.C. 1101 note, 1153 note, 1183a note, 1351, 1351 note, 1713, 1714, 1714 note; 10 U.S.C. 2602(c); 11 U.S.C. 1157 note; 22 U.S.C. 214, 214 note, 1475e, 2504(a), 4201, 4206, 4215, 4219, 6551; 31 U.S.C. 9701; Exec. Order 10,718, 22 FR 4632 (1957); Exec. Order 11,295, 31 FR 10603 (1966).

SOURCE: 46 FR 58071, Nov. 30, 1981, unless otherwise noted.

§ 22.1 Schedule of fees.

The following table sets forth the U.S. Department of State's Schedule of Fees for Consular Services:

SCHEDULE OF FEES FOR CONSULAR SERVICES

Item No.	Fee
Passport and Citizenship Services	
1. Passport Book or Card Execution: Required for first-time applicants and others who must apply in person (Applicants applying for both the book and card simultaneously on the same application pay only one execution fee.).	$25.
2. Passport Book Application Services for:	
(a) Applicants age 16 or over (including renewals)	$70.
(b) Applicants under age 16	$40.
(c) Additional passport visa pages	82.
(d) Passport book replacement for name change if submitted within one year of passport issuance.	NO FEE.
(e) Passport book replacement for passport book limited in validity if submitted within one year of passport issuance. (Passport books limited in validity because of multiple losses, thefts, damage, or mutilations cannot be replaced).	NO FEE.
(f) Passport book replacement for data correction (name, date of birth, place of birth, sex printed erroneously) if submitted within one year of passport issuance.	NO FEE.
(g) Passport Book Security Surcharge (Enhanced Border Security Fee)	$40.
3. Expedited service: Passport processing within the expedited processing period published on the Department's website (see 22 CFR 51.56(b)) and/or in-person service at a U.S. Passport Agency (not applicable abroad).	$60.
4. Exemptions: The following applicants are exempted from all passport fees listed in Item 2 above:	
(a) Officers or employees of the United States and their immediate family members (22 U.S.C. 214) and Peace Corps Volunteers and Leaders (22 U.S.C. 2504(h)) proceeding abroad or returning to the United States in the discharge of their official duties.	NO FEE.
(b) U.S. citizen seamen who require a passport in connection with their duties aboard an American flag vessel (22 U.S.C. 214(a)).	NO FEE.
(c) Widows, children, parents, or siblings of deceased members of the Armed Forces proceeding abroad to visit the graves of such members (22 U.S.C. 214(a)).	NO FEE.
(d) Employees of the American National Red Cross proceeding abroad as members of the Armed Forces of the United States (10 U.S.C. 2602(c)).	NO FEE.
5. Travel Letter: Provided in rare, life-or-death situations as an emergency accommodation to a U.S. citizen returning to the United States when the consular officer is unable to issue a passport book.	NO FEE unless consular time charges (Item 75) apply.
6. File search and verification of U.S. citizenship: When applicant has not presented evidence of citizenship and previous records must be searched (except for an applicant abroad whose passport was stolen or lost abroad or when one of the exemptions is applicable).	$150.
7. Application for Consular Report of Birth Abroad of a Citizen of the United States	$100.
8. Documentation of formal renunciation of U.S. citizenship	$450.
9. Passport Card Application Services for:	
(a) Applicants age 16 or over (including renewals) [Adult Passport Card]	$30.
(b) Applicants under age 16 [Minor Passport Card]	$15.
(c) Passport card replacement for name change if submitted within one year of passport issuance.	NO FEE.
(d) Passport card replacement for data correction (name, date of birth, place of birth, sex printed erroneously) if submitted within one year of passport issuance.	NO FEE.

SCHEDULE OF FEES FOR CONSULAR SERVICES—Continued

Item No.	Fee
(Item 10 vacant.)	
Overseas Citizens Services **Arrests, Welfare and Whereabouts and Related Services**	
11. Arrest and prison visits	NO FEE.
12. Assistance regarding the welfare and whereabouts of a U.S. Citizen, including child custody inquiries and processing of repatriation and emergency dietary assistance loans.	NO FEE.
(Item 13 vacant.)	
Death and Estate Services	
14. Assistance to next-of-kin:	
(a) After the death of a U.S. citizen abroad (providing assistance in disposition of remains, making arrangements for shipping remains, issuing Consular Mortuary Certificate, and providing up to 20 original Consular Reports of Death).	NO FEE.
(b) Making arrangements for a deceased non-U.S. citizen family member (providing assistance in shipping or other disposition of remains of a non-U.S. Citizen).	$200 plus expenses.
15. Issuance of Consular Mortuary Certificate on behalf of a non-U.S. Citizen	$60.
16. Acting as a provisional conservator of estates of U.S. Citizens:	
(a) Taking possession of personal effects; making an inventory under an official seal (unless significant time and/or expenses incurred).	NO FEE.
(b) Overseeing the appraisal, sale, and final disposition of the estate, including disbursing funds, forwarding securities, etc. (unless significant time and/or expenses incurred).	NO FEE.
(c) For services listed in Item 16(a) or (b) when significant time and/or expenses are incurred.	Consular time (Item 75) plus expenses.
(Items 17 through 19 vacant.)	
Nonimmigrant Visa Services	
20. Filing Nonimmigrant Visa Petition Based on Blanket L Petition (collected for USCIS and subject to change)	For fee amount, see 8 CFR 103.7(b)(1).
(a) Petition for a nonimmigrant worker (Form I–129)	For fee amount, see 8 CFR 103.7(b)(1).
(b) Nonimmigrant petition based on blanket L petition	For fee amount, see 8 CFR 103.7(b)(1).
21. Nonimmigrant Visa Application and Border Crossing Card Processing Fees (per person):	
(a) Non-petition-based nonimmigrant visa (except E category)	$160.
(b) H, L, O, P, Q and R category nonimmigrant visa	$190.
(c) E category nonimmigrant visa	$270.
(d) K category (fiancé) nonimmigrant visa	$240.
(e) Border crossing card—age 15 and over (10 year validity)	$160.
(f) Border crossing card—under age 15; for Mexican citizens if parent or guardian has or is applying for a border crossing card (valid 10 years or until the applicant reaches age 15, whichever is sooner).	$15.
22. EXEMPTIONS from Nonimmigrant Visa Application Processing Fee:	
(a) Applicants for A, G, C–3, NATO and diplomatic visas as defined in 22 CFR 41.26	NO FEE.
(b) Applicants for J visas participating in official U.S. Government sponsored educational and cultural exchanges.	NO FEE.
(c) Replacement machine-readable visa when the original visa was not properly affixed or needs to be reissued through no fault of the applicant.	NO FEE.
(d) Applicants exempted by international agreement as determined by the Department, including members and staff of an observer mission to United Nations Headquarters recognized by the UN General Assembly, and their immediate families.	NO FEE.
(e) Applicants traveling to provide charitable services as determined by the Department	NO FEE.
(f) U.S. government employees traveling on official business	NO FEE.
(g) A parent, sibling, spouse, or child of a U.S. government employee killed in the line of duty who is traveling to attend the employee's funeral and/or burial; or a parent, sibling, spouse, son, or daughter of a U.S. government employee critically injured in the line of duty for visitation during emergency treatment and convalescence.	NO FEE.
23. Nonimmigrant Visa Issuance Fee, including Border-Crossing Cards (Reciprocity Fee)	RECIPROCAL.
24. EXEMPTIONS from Nonimmigrant Visa Issuance Fee:	
(a) An official representative of a foreign government or an international or regional organization of which the U.S. is a member; members and staff of an observer mission to United Nations Headquarters recognized by the UN General Assembly; and applicants for diplomatic visas as defined under item 22(a); and their immediate families.	NO FEE.
(b) An applicant transiting to and from the United Nations Headquarters	NO FEE.
(c) An applicant participating in a U.S. government sponsored program	NO FEE.
(d) An applicant traveling to provide charitable services as determined by the Department	NO FEE.
25. Fraud Prevention and Detection Fee for Visa Applicant included in L Blanket Petition (principal applicant only).	$500.
(Items 26 through 30 vacant.)	

SCHEDULE OF FEES FOR CONSULAR SERVICES—Continued

Item No.	Fee
Immigrant and Speical Visa Services	
31. Filing Immigrant Visa Petition (collected for USCIS and subject to change):	
(a) Petition to classify status of alien relative for issuance of immigrant Visa	For fee amount, see 8 CFR 103.7(b)(1).
(b) Petition to classify orphan as an immediate relative	For fee amount, see 8 CFR 103.7(b)(1).
32. Immigrant Visa Application Processing Fee (per person):	
(a) Immediate relative and family preference applications	$230.
(b) Employment-based applications	$405.
(c) Other immigrant visa applications (including I–360 self-petitioners and special immigrant visa applicants).	$220.
(d) Certain Iraqi and Afghan special immigrant visa applications	NO FEE.
33. Diversity Visa Lottery Fee (per person applying as a result of the lottery program)	$330.
34. Affidavit of Support Review (only when reviewed domestically)	$88.
35. Special Visa Services:	
(a) Determining Returning Resident Status	$275.
(b) Waiver of two year residency requirement	$215.
(c) Waiver of immigrant visa ineligibility (collected for USCIS and subject to change)	For fee amount, see 8 CFR 103.7(b)(1).
(d) Refugee or significant public benefit parole case processing	NO FEE.
36. Immigrant visa security surcharge	$74.
(Items 37 through 40 vacant.)	
Documentary Services	
41. Providing notarial service:	
(a) First service (seal)	$50.
(b) Each additional seal provided at the same time in connection with the same transaction	$50.
42. Certification of a true copy or that no record of an official file can be located (by a post abroad):	
(a) First Copy	$50.
(b) Each additional copy provided at the same time	$50.
43. Provision of documents, certified copies of documents, and other certifications by the Department of State (domestic):	
(a) Documents relating to births, marriages, and deaths of U.S. citizens abroad originally issued by a U.S. embassy or consulate.	$50.
(b) Issuance of Replacement Report of Birth Abroad	$50.
(c) Certified copies of documents relating to births and deaths within the former Canal Zone of Panama from records maintained by the Canal Zone Government from 1904 to September 30, 1979.	$50.
(d) Certifying a copy of a document or extract from an official passport record	$50.
(e) Certifying that no record of an official file can be located	$50.
(f) Each additional copy provided at same time	$50.
44. Authentications (by posts abroad):	
(a) Authenticating a foreign notary or other foreign official seal or signature	$50.
(b) Authenticating a U.S. Federal, State, or territorial seal	$50.
(c) Certifying to the official status of an officer of the U.S. Department of State or of a foreign diplomatic or consular officer accredited to or recognized by the U.S. Government.	$50.
(d) Each authentication	$50.
45. Exemptions: Notarial, certification, and authentication fees (Items 41–44) or passport file search fees (Item 6) will not be charged when the service is performed:	
(a) At the direct request of any Federal Government agency, any state or local government, the District of Columbia, or any of the territories or possessions of the United States (unless significant costs would be incurred).	NO FEE.
(b) With respect to documents to be presented by claimants, beneficiaries, or their witnesses in connection with obtaining Federal, state, or municipal benefits.	NO FEE.
(c) For U.S. citizens outside the United States preparing ballots for any public election in the United States or any of its territories.	NO FEE.
(d) At the direct request of a foreign government or an international agency of which the United States is a member if the documents are for official noncommercial use.	NO FEE.
(e) At the direct request of a foreign government official when appropriate or as a reciprocal courtesy.	NO FEE.
(f) At the request of direct-hire U.S. Government personnel, Peace Corps volunteers, or their dependents stationed or traveling officially in a foreign country.	NO FEE.
(g) With respect to documents whose production is ordered by a court of competent jurisdiction.	NO FEE.
(h) With respect to affidavits of support for immigrant visa applications	NO FEE.
(i) With respect to endorsing U.S. Savings Bonds Certificates	NO FEE.
(Items 46 through 50 vacant.)	

SCHEDULE OF FEES FOR CONSULAR SERVICES—Continued

Item No.	Fee
Judicial Assistance Services	
51. Processing letters rogatory and Foreign Sovereign Immunities Act (FSIA) judicial assistance cases, including providing seal and certificate for return of letters rogatory executed by foreign officials.	$2,275.
52. Taking depositions or executing commissions to take testimony:	
(a) Scheduling/arranging appointments for depositions, including depositions by video teleconference (per daily appointment).	$1,283.
(b) Attending or taking depositions, or executing commissions to take testimony (per hour or part thereof).	$309 per hour plus expenses.
(c) Swearing in witnesses for telephone depositions	Consular time (Item 75) plus expenses.
(d) Supervising telephone depositions (per hour or part thereof over the first hour)	Consular time (Item 75) plus expenses.
(e) Providing seal and certification of depositions	$415.
53. Exemptions: Deposition or executing commissions to take testimony. Fees (Item 52) will not be charged when the service is performed:	
(a) At the direct request of any Federal Government agency, any state or local government, the District of Columbia, or any of the territories or possessions of the United States (unless significant time required and/or expenses would be incurred).	NO FEE.
(b) Executing commissions to take testimony in connection with foreign documents for use in criminal cases when the commission is accompanied by an order of Federal court on behalf of an indigent party.	NO FEE.
(Items 54 through 60 vacant.)	
Services Relating to Vessels and Seamen	
61. Shipping and Seaman's services: Including but not limited to recording a bill of sale of a vessel purchased abroad, renewal of a marine radio license, and issuance of certificate of American ownership.	Consular time (Item 75) plus expenses.
(Items 62 through 70 vacant.)	
Administrative Services	
71. Non-emergency telephone calls	$10 plus long distance charge.
72. Setting up and maintaining a trust account: For 1 year or less to transfer funds to or for the benefit of a U.S. citizen in need in a foreign country.	$30.
73. Transportation charges incurred in the performance of fee and no-fee services when appropriate and necessary.	Expenses incurred.
74. Return check processing fee	$25.
75. Consular time charges: As required by this Schedule and for fee services performed away from the office or during after-duty hours (per hour or part thereof/per consular employee).	$231.
76. Photocopies (per page)	$1.
(Items 77 through 80 vacant.)	

[75 FR 36532, June 28, 2010, as amended at 76 FR 76035, Dec. 6, 2011; 77 FR 18913, Mar. 29, 2012]

§ 22.2 Requests for services in the United States.

(a) *Requests for records.* Requests by the file subject or the individual's authorized agent for services involving U.S. passport applications and related records, including consular birth, marriage and death records and authentication of other passport file documents, as well as records of births, marriages and deaths within the former Canal Zone of Panama recorded and maintained by the Canal Zone Government from 1904 to September 30, 1979, shall be addressed to Passport Services, Correspondence Branch, Department of State, Washington, D.C. 20524. Requests for consular birth records should specify whether a Consular Report of Birth (Form FS 240, or long form) or Certification of Birth (Form DS 1350, or short form) is desired. Advance remittance of the exact fee is required for each service.

(b) *Authentication services.* Requests for Department of State authentication of documents other than passport file documents must be accompanied by remittance of the exact total fee chargeable and addressed to the Authentication Officer, Department of State, Washington, DC 20520.

[46 FR 58071, Nov. 30, 1981, as amended at 64 FR 66770, Nov. 30, 1999]

§ 22.3 Remittances in the United States.

(a) *Type of remittance.* Remittances shall be in the form of: (1) Check or bank draft drawn on a bank in the United States; (2) money order—postal, international or bank; or (3) U.S. currency. Remittances shall be made payable to the order of the Department of State. The Department will assume no responsibility for cash which is lost in the mail.

(b) *Exact payment of fees.* Fees must be paid in full prior to issuance of requested documents. If uncertainty as to the existence of a record or as to the number of sheets to be copied precludes remitting the exact fee chargeable with the request, the Department of State will inform the interested party of the exact amount required.

§ 22.4 Requests for services, Foreign Service.

Officers of the Foreign Service shall charge for official services performed abroad at the rates prescribed in this schedule, in coin of the United States or at its representative value in exchange (22 U.S.C. 1202). For definition of representative value in exchange, see § 23.4 of this chapter. No fees named in this schedule shall be charged or collected for the official services to American vessels and seamen (22 U.S.C. 1186). The term ''American vessels'' is defined to exclude, for the purposes of this schedule, undocumented American vessels and the fees prescribed herein shall be charged and collected for such undocumented vessels. However, the fees prescribed herein shall not be charged or collected for American public vessels, which includes any vessel owned or operated by a U.S. Government department or agency and engaged exclusively in official business on a non-commercial basis. This schedule of fees shall be kept posted in a conspicuous place in each Foreign Service consular office, subject to the examination by all persons interested therein (22 U.S.C. 1197).

§ 22.5 Remittances to Foreign Service posts.

Remittances to Foreign Service posts from persons in the United States in payment of offical fees and charges or for the purpose of establishing deposits in advance of rendition of services shall be in a form acceptable to the post, drawn payable to the American Embassy (name of city), American Consulate General (name of city) or American Consulate (name of city), as the case may be. This will permit cashing of negotiable instruments for deposit in the Treasury when not negotiated locally. See § 23.2 of this chapter.

(a) *Time at which fees become payable.* Fees are due and payble prior to issue or delivery to the interested party of a signed document, a copy of a record, or other paper representative of a service performed.

(b) *Receipt for fees; register of services.* Every officer of the Foreign Service responsible for the performance of services as enumerated in the Schedule of Fees for Consular Services, Department of State and Foreign Service (§ 22.1), shall give receipts for fees collected for the official services rendered, specifying the nature of the service and numbered to correspond with entries in a register maintained for the purpose (22 U.S.C. 1192, 1193, and 1194). The register serves as a record of official acts performed by officers of the Foreign Service in a governmental or notarial capacity, corresponding in this regard with the record which notaries are usually expected or required to keep of their official acts. See § 92.2 of this chapter.

(c) *Deposits to guarantee payment of fees or incidental costs.* When the amount of any fee is determinable only after initiation of the performance of a service, or if incidental costs are involved, the total fee and incidental costs shall be carefully estimated and an advance deposit required, subject to refund of any unused balance to the person making the deposit.

§ 22.6 Refund of fees.

(a) Fees which have been collected for deposit in the Treasury are refundable:

(1) As specifically authorized by law (See 22 U.S.C. 214a concerning passport

fees erroneously charged persons excused from payment and 46 U.S.C. 8 concerning fees improperly imposed on vessels and seamen);

(2) When the principal officer at the consular post where the fee was collected (or the officer in charge of the consular section at a combined diplomatic/consular post) finds upon review of the facts that the collection was erroneous under applicable law; and

(3) Where determination is made by the Department of State with a view to payment of a refund in the United States in cases which it is impracticable to have the facts reviewed and refund effected by and at the direction of the responsible consular office. See § 13.1 of this chapter concerning refunds of fees improperly exacted by consular officers who have neglected to return the same.

(b) Refunds of $5.00 or less will not be paid to the remitter unless a claim is specifically filed at the time of payment for the excess amount. An automatic refund on overpayments due to misinformation or mistakes on the part of the Department of State will be made.

[52 FR 29515, Aug. 10, 1987, as amended at 65 FR 14212, Mar. 16, 2000]

§ 22.7 Collection and return of fees.

No fees other than those prescribed in the Schedule of Fees, § 22.1, or by or pursuant to an act of Congress, shall be charged or collected by officers of the Foreign Service for official services performed abroad (22 U.S.C. 1201). All fees received by any officer of the Foreign Service for services rendered in connection with the duties of office or as a consular officer shall be accounted for and paid into the Treasury of the United States (22 U.S.C. 99 and 812). For receipt, registry, and numbering provisions, see § 22.5(b). Collections for transportation and other expenses necessary for performance of services or for Interested Party toll telephone calls shall be refunded to post allotment accounts and made available for meeting such expenses.

PART 23—FINANCE AND ACCOUNTING

Sec.
23.1 Remittances made payable to the Department of State.
23.2 Endorsing remittances for deposit in the Treasury.
23.3 Refunds.
23.4 Representative value in exchange.
23.5 Claims for settlement by Department of State or General Accounting Office.

AUTHORITY: 22 U.S.C. 2651a.

SOURCE: 22 FR 10793, Dec. 27, 1957, unless otherwise noted.

§ 23.1 Remittances made payable to the Department of State.

Except as otherwise specified in this title, remittances of moneys shall be drawn payable to the Department of State and sent to the Department for action and deposit. (See §§ 21.2, 22.2, and 51.40 of this chapter.)

§ 23.2 Endorsing remittances for deposit in the Treasury.

The Office of Finance—Cashier Unit, the Authentication Office, the Passport Office or Passport Agency, American Embassy, American Legation, American consular office, or other office or unit of the Department of State authorized and required to deposit funds in the Treasury of the United States, is hereby authorized to endorse, or to have endorsed, to the order of the Treasurer of the United States by appropriate stamp, checks, drafts, money orders, or other forms of remittance, regardless of how drawn, which are for payment to the Department of State for deposit in the Treasury of the United States, including those payable to the Secretary of State.

§ 23.3 Refunds.

(a) *Rectifications and readjustments.* See § 22.6 of this chapter for outline of circumstances under which fees which have been collected for deposit in the Treasury may be refunded.

(b) *Refund of wrongful exactions.* See § 13.1 of this chapter concerning recovery from consular officers of amounts wrongfully exacted and withheld by them.

[22 FR 10793, Dec. 27, 1957, as amended at 65 FR 14212, Mar. 16, 2000]

§ 23.4 Representative value in exchange.

Representative value in exchange for the collection of a fee means foreign currency equivalent to the prescribed United States dollar fee at the current rate of exchange at the time and place of payment of the fee. ''Current rate'' of exchange for this purpose means the bank selling rate at which the foreign bank will sell the number of United States dollars required to liquidate the obligation to the United States for the Foreign Service fee.

§ 23.5 Claims for settlement by Department of State or General Accounting Office.

Claims for settlement by the Department of State or by the General Accounting Office shall be submitted to the Department in duplicate over the handwritten signature, together with the post office address of the claimant, and with appropriate recommendations of the officer of the Foreign Service, for items such as:

(a) Refunds of amounts representing payroll deductions such as for any retirement and disability fund;

(b) Amounts due deceased, incompetent, or insolvent persons including payees or bona fide holders of unpaid Government checks;

(c) Amounts claimed from the Government when questions of fact affect either the amount payable or the terms of payment, when for any reason settlement cannot or should not be affected at the Foreign Service office; and

(d) Amounts of checks, owned by living payees or bona fide holders, which have been covered into outstanding liabilities. The Foreign Service post or the Department of State shall be consulted before preparing the claim to ascertain whether any special form is required to be used. Claims for unpaid compensation of deceased alien employees shall be forwarded to the respective Foreign Service post.

SUBCHAPTER D—CLAIMS AND STOLEN PROPERTY

PART 33—FISHERMEN'S PROTECTIVE ACT GUARANTY FUND PROCEDURES UNDER SECTION 7

Sec.
33.1 Purpose.
33.2 Definitions.
33.3 Eligibility.
33.4 Applications.
33.5 Guaranty agreements.
33.6 Fees.
33.7 Conditions for claims.
33.8 Claim procedures.
33.9 Amount of award.
33.10 Payments.
33.11 Records.
33.12 Penalties.

AUTHORITY: 22 U.S.C. 1977.

SOURCE: 61 FR 49967, Sept. 24, 1996, unless otherwise noted.

§ 33.1 Purpose.

These rules clarify procedures for the administration of Section 7 of the Fishermen's Protective Act of 1967. Section 7 of the Act establishes a Fishermen's Guaranty Fund to reimburse owners and charterers of United States commercial fishing vessels for certain losses and costs caused by the seizure and detention of their vessels by foreign countries under certain claims to jurisdiction not recognized by the United States.

§ 33.2 Definitions.

For the purpose of this part, the following terms mean:

Act. The Fishermen's Protective Act of 1967 (22 U.S.C. 1971 *et seq.*).

Capital equipment. Equipment or other property which may be depreciated for income tax purposes.

Depreciated replacement costs. The present replacement cost of capital equipment after being depreciated on a straight line basis over the equipment's depreciable life, which is standardized at ten years.

Downtime. The time a vessel normally would be in port or transiting to and from the fishing grounds.

Expendable items. Any property, excluding that which may be depreciated for income tax purposes, which is maintained in inventory or expensed for tax purposes.

Fund. The Fishermen's Guaranty Fund established in the U.S. Treasury under section 7(c) of the Act (22 U.S.C. 1977(c)).

Market value. The price property would command in a market, at the time of property loss, assuming a seller willing to sell and buyer willing to buy.

Other direct charge. Any levy which is imposed in addition to, or in lieu of any fine, license fee, registration fee, or other charge.

Owner. The owner or charterer of a commercial fishing vessel.

Secretary. The Secretary of State or the designee of the Secretary of State.

Seizure. Arrest of a fishing vessel by a foreign country for allegedly illegal fishing.

U.S. fishing vessel. Any private vessel documented or certified under the laws of the United States as a commercial fishing vessel.

§ 33.3 Eligibility.

Any owner or charterer of a U.S. fishing vessel is eligible to apply for an agreement with the Secretary providing for a guarantee in accordance with section 7 of the Act.

§ 33.4 Applications.

(a) *Applicant*. An eligible applicant for a guaranty agreement must:

(1) Own or charter a U.S. fishing vessel; and

(2) Submit with his application the fee specified in § 33.6 below.

(b) *Application forms*. Application forms may be obtained by contacting the Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818; Telephone 202–647–3941.

(c) *Where to apply*. Applications must be submitted to the Director, Office of marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818.

(d) *Application approval.* Application approval will be by execution of the guaranty agreement by the Secretary or by the Secretary's designee.

§ 33.5 Guaranty agreements.

(a) *Period in effect.* Agreements are effective for a Fiscal Year beginning October 1 and ending on the next September 30. Applications submitted after October 1 are effective from the date the application and fee are mailed (determined by the postmark) through September 30.

(b) *Guaranty agreement transfer.* A guaranty agreement may, with the Secretary's prior consent, be transferred when a vessel which is the subject of a guaranty agreement is transferred to a new owner if the transfer occurs during the agreement period.

(c) *Guaranty agreement renewal.* A guaranty agreement may be renewed for the next agreement year by submitting an application form with the appropriate fee for the next year in accordance with the Secretary's annually published requirements regarding fees. Renewals are subject to the Secretary's approval.

(d) *Provisions of the agreement.* The agreement will provide for reimbursement for certain losses caused by foreign countries' seizure and detention of U.S. fishing vessels on the basis of claims to jurisdiction which are not recognized by the United States. Recent amendments to the Magnuson Fishery Conservation and Management Act (16 U.S.C. (1801 *et seq.*) assert U.S. jurisdiction over highly migratory species of tuna in the U.S. exclusive economic zone (EEZ). Accordingly, as a matter of international law, the United States now recognizes other coastal states' claims to jurisdiction over tuna in their EEZ'S. This change directly affect certification of claims filed under the Fishermen's Protective Act. Participants are advised that this means that the Department will no longer certify for payment claims resulting from the seizure of a U.S. vessel while such vessel was fishing for tuna within the exclusive economic zone of another country in violation of that country's laws. Claims for detentions or seizures based on other claims to jurisdiction not recognized by the United States, or on the basis of claims to jurisdiction recognized by the United States but exercised in a manner inconsistent with international law as recognized by the United states, may still be certified by the Department.

§ 33.6 Fees.

(a) *General.* Fees provide for administrative costs and payment of claims. Fees are set annually on the basis of past and anticipated claim experience. The annual agreement year for which fees are payable starts on October 1 and ends on September 30 of the following year.

(b) *Amount and payment.* The amount of each annual fee or adjusted fee will be established by the Office Director of the Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, by publication of a notice in the FEDERAL REGISTER. Each notice will establish the amount of the fee, when the fee is due, when the fee is payable, and any special conditions surrounding extension of prior agreements or execution of new agreements. Unless otherwise specified in such notices, agreement coverage will commence with the postmarked date of the fee payment and application.

(c) *Adjustment and refund.* Fees may be adjusted at any time to reflect actual seizure and detention experience for which claims are anticipated. Failure to submit adjusted fees will result in agreement termination as of the date the adjusted fee is payable. No fees will be refunded after an agreement is executed by the Secretary.

(d) *Disposition.* All fees will be deposited in the Fishermen's Guaranty Fund. They will remain available without fiscal year limitation to carry out section 7 of the Act. Claims will be paid from fees and from appropriated funds, if any. Fees not required to pay administrative costs or claims may be invested in U.S. obligations. All earnings will be credited to the Fishermen's Guaranty Fund.

§ 33.7 Conditions for claims.

(a) Unless there is clear and convincing credible evidence that the seizure did not meet the requirements of

the Act, payment of claims will be made when:

(1) A covered vessel is seized by a foreign country under conditions specified in the Act and the guaranty agreement; and

(2) The incident occurred during the period the guaranty agreement was in force for the vessel involved.

(b) Payments will be made to the owner for:

(1) All actual costs (except those covered by section 3 of the Act or reimbursable from some other source) incurred by the owner during the seizure or detention period as a direct result thereof, including:

(i) Damage to, or destruction of, the vessel or its equipment; or

(ii) Loss or confiscation of the vessel or its equipment; and

(iii) Dockage fees or utilities;

(2) The market value of fish or shellfish caught before seizure of the vessel and confiscated or spoiled during the period of detention; and

(3) Up to 50 percent of the vessel's gross income lost as a direct result of the seizure and detention.

(c) The exceptions are that no payment will be made from the Fund for a seizure which is:

(1) Covered by any other provision of law (for example, fines, license fees, registration fees, or other direct charges payable under section 3 of the Act);

(2) Made by a country at war with the United States;

(3) In accordance with any applicable convention or treaty, if that treaty or convention was made with the advice and consent of the Senate and was in force and effect for the United States and the seizing country at the time of the seizure;

(4) Which occurs before the guaranty agreement's effective date or after its termination;

(5) For which other sources of alternative reimbursement have not first been fully pursued (for example, the insurance coverage required by the agreement and valid claims under any law);

(6) For which material requirements of the guaranty agreement, the Act, or the program regulations have not been fully fulfilled; or

(7) In the view of the Department of State occurred because the seized vessel was undermining or diminishing the effectiveness of international conservation and management measures recognized by the United States, or otherwise contributing to stock conservation problems pending the establishment of such measures.

§ 33.8 Claim procedures.

(a) *Where and when to apply*. Claims must be submitted to the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818. Claims must be submitted within ninety (90) days after the vessel's release. Requests for extension of the filing deadline must be in writing and approved by the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs.

(b) *Contents of claim.* All material allegations of a claim must be supported by documentary evidence. Foreign language documents must be accompanied by an authenticated English translation. Claims must include:

(1) The captain's sworn statement about the exact location and activity of the vessel when seized;

(2) Certified copies of charges, hearings, and findings by the government seizing the vessel;

(3) A detailed computation of all actual costs directly resulting from the seizure and detention, supported by receipts, affidavits, or other documentation acceptable to the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs;

(4) A detailed computation of lost income claimed, including:

(i) The date and time seized and released;

(ii) The number of miles and running time from the point of seizure to the point of detention;

(iii) The total fishing time lost (explain in detail if lost fishing time claimed is any greater than the elapsed time from seizure to the time required after release to return to the point of seizure);

(iv) The tonnage of catch on board at the time of seizure;

(v) The vessel's average catch-per-day's fishing for the three calendar years preceding the seizure;

(vi) The vessel's average downtime between fishing trips for the three calendar years preceding the seizure; and

(vii) The price-per-pound for the catch on the first day the vessel returns to port after the seizure and detention unless there is a pre-negotiated price-per-pound with a processor, in which case the pre-negotiated price must be documented; and

(5) Documentation for confiscated, damaged, destroyed, or stolen equipment, including:

(i) The date and cost of acquisition supported by invoices or other acceptable proof of ownership; and

(ii) An estimate from a commercial source of the replacement or repair cost.

(c) *Burden of proof*. The claimant has the burden of proving all aspects of the claim, except in cases of dispute over the facts of the seizure where the claimant shall have the presumption that the seizure was eligible unless there is clear and convincing credible evidence that the seizure did not meet the eligibility standards of the Act.

§ 33.9 Amount of award.

(a) *Lost fishing time*. Compensation is limited to 50 percent of the gross income lost as a direct result of the seizure and detention, based on the value of the average catch-per-day's fishing during the three most recent calendar years immediately preceding the seizure as determined by the Secretary, based on catch rates on comparable vessels in comparable fisheries. The compensable period for cases of seizure and detention not resulting in vessels confiscation is limited to the elapsed time from seizure to the time after release when the vessel could reasonably be expected to return to the point of seizure. The compensable period in cases where the vessel is confiscated is limited to the elapsed time from seizure through the date of confiscation, plus an additional period to purchase a replacement vessel and return to the point of seizure. In no case can the additional period exceed 120 days.

(1) Compensation for confiscation of vessels, where no buy-back has occurred, will be based on market value which will be determined by averaging estimates of market value obtained from as many vessel surveyors or brokers as the Secretary deems practicable;

(2) Compensation for capital equipment other than vessel, will be based on depreciated replacement cost;

(3) Compensation for expendable items and crew's belongings will be 50 percent of their replacement costs; and

(4) Compensation for confiscated catch will be for full value, based on the price-per-pound.

(b) *Fuel expense*. Compensation for fuel expenses will be based on the purchase price, the time required to run to and from the fishing grounds, the detention time in port, and the documented fuel consumption of the vessel.

(c) *Stolen or confiscated property*. If the claimant was required to buy back confiscated property from the foreign country, the claimant may apply for reimbursement of such charges under section 3 of the Act. Any other property confiscated is reimbursable from this Guaranty Fund. Confiscated property is divided into the following categories:

(1) Compensation for confiscation of vessels, where no buy-back has occurred, will be based on market value which will be determined by averaging estimates of market value obtained from as many vessel surveyors or brokers as the Secretary deems practicable;

(2) Compensation for capital equipment other than a vessel, will be based on depreciated replacement cost;

(3) Compensation for expendable items and crew's belongings will be 50 percent of their replacement cost; and

(4) Compensation for confiscated catch will be for full value, based on the price-per-pound.

(d) *Insurance proceeds*. No payments will be made from the Fund for losses covered by any policy of insurance or other provisions of law.

(e) [Reserved]

(f) *Appeals*. All determinations under this section are final and are not subject to arbitration or appeal.

§ 33.10 Payments.

The Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, will pay the claimant the amount calculated under § 33.9. Payment will be made as promptly as practicable, but may be delayed pending the appropriation of sufficient funds, should fee collections not be adequate to sustain the operation of the Fund. The Director shall notify the claimant of the amount approved for payment as promptly as practicable and the same shall thereafter constitute a valid, but non-interest bearing obligation of the Government. Delays in payments are not a direct consequence of seizure and detention and cannot therefore be construed as increasing the compensable period for lost fishing time. If there is a question about distribution of the proceeds of the claim, the Director may request proof of interest from all parties, and will settle this issue.

§ 33.11 Records.

The Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs will have the right to inspect claimants' books and records as a precondition to approving claims. All claims must contain written authorization of the guaranteed party for any international, federal, state, or local governmental Agencies to provide the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs any data or information pertinent to a claim.

§ 33.12 Penalties.

Persons who willfully make any false or misleading statement or representation to obtain compensation from the Fund are subject to criminal prosecution under 22 U.S.C. 1980(g). This provides penalties up to $25,000 or imprisonment for up to one year, or both. Any evidence of criminal conduct will be promptly forwarded to the United States Department of Justice for action. Additionally, misrepresentation, concealment, or fraud, or acts intentionally designed to result in seizure, may void the guaranty agreement.

PART 34—DEBT COLLECTION

Subpart A—General Provision

Sec.
34.1 Purpose.
34.2 Scope.
34.3 Exceptions.
34.4 Definitions.
34.5 Other procedures or actions.
34.6 Interest, penalties, and administrative costs.
34.7 Collection in installments.

Subpart B—Collection Actions

34.8 Notice and demand for payment.
34.9 Request for internal administrative review.
34.10 Collection methods.

Subpart C—Salary Offset

34.11 Scope.
34.12 Coordinating offset with another Federal agency.
34.13 Notice requirements before offset.
34.14 Request for an outside hearing for certain debts.
34.15 Outside hearing.
34.16 Procedures for salary offset.
34.17 Non-waiver of rights by payment.

Subpart D—Collection Adjustments

34.18 Waivers of indebtedness.
34.19 Compromise.
34.20 Suspension.
34.21 Termination.
34.22 Discharge.
34.23 Bankruptcy.
34.24 Refunds.

AUTHORITY: 31 U.S.C. 3701–3719; 5 U.S.C. 5514; 31 CFR part 285; 31 CFR parts 900–904; 5 CFR 550 subpart K.

SOURCE: 71 FR 16482, Apr. 3, 2006, unless otherwise noted.

Subpart A—General Provisions

§ 34.1 Purpose.

These regulations prescribe the procedures to be used by the United States Department of State (STATE) in the collection of debts owed to STATE and to the United States.

§ 34.2 Scope.

(a) Except as set forth in this part or otherwise provided by law, STATE will conduct administrative actions to collect debts (including offset, compromise, suspension, termination, disclosure and referral) in accordance

with the Federal Claims Collection Standards (FCCS) of the Department of the Treasury and Department of Justice, 31 CFR parts 900–904.

(b) This part is not applicable to STATE claims against another Federal agency, any foreign country or any political subdivision thereof, or any public international organization.

§ 34.3 Exceptions.

(a) Debts arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with the regulations published at 41 CFR part 102–118.

(b) Debts arising out of acquisition contracts subject to the Federal Acquisition Regulation (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations (see 48 CFR part 32).

(c) Debts based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice for compromise, suspension, or termination of collection action.

(d) Tax debts are excluded from the coverage of this regulation.

§ 34.4 Definitions.

For purposes of the section:

(a) *Administrative offset* means withholding funds payable by the United States to, or held by the United States for, a person to satisfy a debt owed by the person to the United States.

(b) *Administrative wage garnishment* means the process by which a Federal agency orders a non-Federal employer to withhold amounts from a debtor's wages to satisfy a debt owed to the United States.

(c) *Compromise* means that the creditor agency accepts less than the full amount of an outstanding debt in full satisfaction of the entire amount of the debt.

(d) *Creditor agency* means the Federal agency to which a debt is owed.

(e) *Debt* or *claim* means an amount of money which has been determined to be owed to the United States from any person. A debtor's liability arising from a particular contract or transaction shall be considered a single claim for purposes of the monetary ceilings of the FCCS.

(f) *Debtor* means a person who owes the Federal government money.

(g) *Delinquent debt* means a debt that has not been paid by the date specified in STATE's written notification or applicable contractual agreement, unless other satisfactory arrangements have been made by that date, or that has not been paid in accordance with a payment agreement with STATE.

(h) *Discharge* means the release of a debtor from personal liability for a debt. Further collection action is prohibited.

(i) *Disposable pay* means the amount that remains from an employee's current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after required deductions for Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; normal premiums for life and health insurance benefits and such other deductions that are required by law to be withheld, excluding garnishments.

(j) *FCCS* means the Federal Claims Collection Standards published jointly by the Departments of the Treasury and Justice and codified at 31 CFR parts 900–904.

(k) *Person* means an individual, corporation, partnership, association, organization, State or local government, or any other type of entity other than a Federal agency, Foreign Government, or public international organization.

(l) *Salary offset* means the withholding of amounts from the current pay account of a Federal employee to satisfy a debt owed by that employee to the United States.

(m) *Suspension* means the temporary cessation of active debt collection pending the occurrence of an anticipated event.

(n) *Termination* means the cessation of all active debt collection action for the foreseeable future.

(o) *Waiver* means a decision to forgo collection of a debt owed to the United

States, as provided for by a specific statute and according to the standards set out under that statute.

§ 34.5 Other procedures or actions.

(a) Nothing contained in this regulation is intended to require STATE to duplicate administrative proceedings required by contract or other laws or regulations.

(b) Nothing in this regulation is intended to preclude utilization of informal administrative actions or remedies which may be available.

(c) Nothing contained in this regulation is intended to deter STATE from demanding the return of specific property or from demanding the return of the property or the payment of its value.

(d) The failure of STATE to comply with any provision in this regulation shall not serve as defense to the debt.

§ 34.6 Interest, penalties, and administrative costs.

Except as otherwise provided by statute, contract or excluded in accordance with the FCCS, STATE will assess:

(a) Interest on delinquent debts in accordance with 31 CFR 901.9.

(b) Penalties at the rate of 6 percent a year or such other rate as authorized by law on any portion of a debt that is delinquent for more than 90 days.

(c) Administrative costs to cover the costs of processing and calculating delinquent debts.

(d) Late payment charges under paragraphs (a) and (b) of this section shall be computed from the date of delinquency.

(e) When a debt is paid in partial or installment payments, amounts received shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and then to outstanding principal.

(f) STATE shall consider waiver of interest, penalties and/or administrative costs in accordance with the FCCS, 31 CFR 901.9(g).

§ 34.7 Collection in installments.

Whenever feasible, and except as required otherwise by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by this regulation, should be collected in one lump sum. This is true whether the debt is being collected under administrative offset, including salary offset, or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. If STATE agrees to accept payment in installments, it may require a legally enforceable written agreement from the debtor that specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of the payments should bear a reasonable relation to the size of the debt and ability of the debtor to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government's claim within 3 years.

Subpart B—Collection Actions

§ 34.8 Notice and demand for payment.

(a) STATE shall promptly hand deliver or send by first-class mail to the debtor at the debtor's most current address in the records of STATE at least one written notice. Written demand under this subpart may be preceded by other appropriate actions under this part and or the FCCS, including but not limited to actions taken under the procedures applicable to administrative offset, including salary offset.

(b) The written notice shall inform the debtor of:

(1) The basis of the debt;

(2) The amount of the debt;

(3) The date by which payment should be made to avoid the imposition of interest, penalties and administrative costs, and the enforced collection actions described in paragraph (b)(7) of this section;

(4) The applicable standards for imposing of interest, penalties and administrative costs to delinquent debts;

(5) STATE's readiness to discuss alternative payment arrangements and how the debtor may offer to enter into a written agreement to repay the debt under terms acceptable to STATE;

(6) The name, address and telephone number of a contact person or office within STATE;

(7) STATE's intention to enforce collection by taking one or more of the following actions if the debtor fails to pay or otherwise resolve the debt:

(i) Offset from Federal payments otherwise due to the debtor, including income tax refunds, salary, certain benefit payments, retirement, vendor payments, travel reimbursement and advances, and other Federal payments due from STATE, other Federal agencies, or through centralized disbursing from the Department of the Treasury;

(ii) Referral to private collection agency

(iii) Report to credit bureaus

(iv) Administrative Wage Garnishment

(v) Litigation by the Department of Justice

(vi) Referral to the Financial Management Service of the Department of the Treasury for collection

(vii) Liquidation of collateral

(viii) Other actions as permitted by the FCCS and applicable law;

(8) The debtor's right to inspect and copy records related to the debt;

(9) The debtor's right to an internal review of STATE's determination that the debtor owes a debt or the amount of the debt;

(10) The debtor's right, if any, to request waiver of collection of certain debts, as applicable (see § 34.18);

(11) Requirement that the debtor advise STATE of any bankruptcy proceeding of the debtor; and

(12) Provision for refund of amounts collected if later decision finds that the amount of the debt is not owed or is waived.

(c) *Exceptions to notice requirements.* STATE may omit from a notice to a debtor one or more of the provisions contained in paragraphs (b)(7) through (b)(12) of this section if STATE determines that any provision is not legally required given the collection remedies to be applied to a particular debt, or which have already been provided by prior notice, applicable agreement, or contract.

§ 34.9 Requests for internal administrative review.

(a) For all collection methods for debts owed to STATE, the debtor may request a review within State of the existence or the amount of the debt. For offset of current Federal salary under 5 U.S.C. 5514 for certain debts, debtors may also request an outside hearing. See subpart C of this part. This subpart rather than subpart C applies to collections by salary offset for debts arising under 5 U.S.C. 5705 (travel advances), 5 U.S.C. 4108 (training expenses), and other statutes specifically providing for collection by salary offset.

(b) A debtor requesting an internal review shall do so in writing to the contact office by the payment due date stated within the initial notice sent under 34.8(b) or other applicable provision. The debtor's written request shall state the basis for the dispute and include any relevant documentation in support.

(1) STATE will provide for an internal review of the debt by an appropriate official. The review may include examination of documents, internal discussions with relevant officials and discussion by letter or orally with the debtor, at STATE's discretion. An oral hearing may be provided when the matter cannot be decided on the documentary record because it involves issues of credibility or veracity. Unless otherwise required by law, such oral hearing shall not be a formal evidentiary hearing. If an oral hearing is appropriate, the time and location of the hearing shall be established by STATE. An oral hearing may be conducted, at the debtor's option, either in-person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of STATE. During the period of review, STATE may suspend collection activity, including the accrual of interest and penalties, on any disputed portion of the debt if STATE determines that suspension is in the Department's best interest or would serve equity and good conscience.

(2) If after review STATE either sustains or amends its determination, it shall notify the debtor of its intent to collect the sustained or amended debt. If previously suspended, collection actions will be re-instituted unless payment of the sustained or amended amount is received or the debtor has

made a proposal for a payment plan to which STATE agrees, by the date specified in the notification of STATE's decision.

§ 34.10 Collection methods.

Upon completion of notice and provision of all due process rights as listed in 34.8(b) of this section and upon final determination of the existence and amount of a debt, unless other acceptable payment arrangements have been made or procedures under a specific statute apply, STATE shall collect the debt by one or more of the following methods:

(a) *Administrative offset*. (1) Payments otherwise due the debtor from the United States shall be offset from the debt in accordance with 31 CFR 901.3. These may be funds under the control of the Department of State or other Federal agencies. Collection may be made through centralized offset by the Financial Management Service (''FMS'') of the Department of the Treasury.

(2) Such payments include but are not limited to vendor payments, salary, retirement, lump sum payments due upon Federal employment separation, travel reimbursements, tax refunds, loans or other assistance. For offset of Federal salary payments under 5 U.S.C. 5514 for certain types of debt see subpart C of this part.

(3) Administrative offset under this subsection does not apply to debts specified in the FCCS, 31 CFR 901.3(a)(2).

(4) Before administrative offset is instituted by another Federal agency or the FMS, STATE shall certify in writing to that entity that the debt is past due and legally enforceable and that STATE has complied with all applicable due process and other requirements as described in this part and other Federal law and regulations.

(5) Administrative offset of anticipated or future benefit payments under the Civil Service Retirement and Disability Fund will be requested by STATE pursuant to 5 CFR 831.1801–1808.

(6) *Expedited offset*. STATE may effect an offset against a debtor prior to sending a notice to the debtor as described in § 34.8, when:

(i) The offset is in the nature of a recoupment,

(ii) Offset is executed pursuant to procedures set out in the Contracts Disputes Act,

(iii) Previous notice and opportunity for review have been given, or

(iv) There is insufficient time before payment would be made to the debtor/payee to allow prior notice and an opportunity for review. In such case, STATE shall give the debtor notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the Government.

(7) Unless otherwise provided by law, administrative offset of payments under the authority of 31 U.S.C. 3716 to collect a debt may not be conducted more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official charged with the responsibility to discover and collect such debts. This limitation does not apply to debts reduced to a judgment.

(b) *Referral to private collection agency*. STATE may contract for collection services to recover delinquent debts, or transfer a delinquent debt to FMS for private collection action, pursuant to 31 U.S.C. 3718, 22 U.S.C. 2716 and the FCCS, 31 CFR 901.5, as applicable. STATE will not use a collection agency to collect a debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

(c) *Disclosure to consumer reporting agencies*. STATE may disclose delinquent debts to consumer reporting agencies and other automated databases in accordance with 31 U.S.C. 3711(e) and the FCCS, 31 CFR 901.4, and in compliance with the Bankruptcy Code and the Privacy Act 5 U.S.C. 552a.

(d) Liquidation of Collateral, if applicable, in accordance with the FCCS, 31 CFR 901.7.

(e) Suspension or revocation of eligibility for loans and loan guaranties, licenses, permits, or privileges in accordance with the FCCS, 31 CFR 901.6.

(f) *Litigation*. Debts may be referred to the Department of Justice for litigation for collection in accordance with the standards set forth in the FCCS, 31 CFR part 904.

(g) *Transfer to FMS*. Debts delinquent more than 180 days shall be transferred to the Financial Management Service of the Department of the Treasury for collection by all available means. Debts delinquent less that 180 days may also be so transferred.

(h) *Administrative wage garnishment*. STATE may collect debts from a non-Federal employee's wages by means of administrative wage garnishment in accordance with the requirements of 31 U.S.C. 3720D and 31 CFR 285.11. All parts of 31 CFR 285.11 are incorporated by reference into these regulations, including the hearing procedures described in 31 CFR 285.11(f).

(i) *Salary offset*. See subpart C of this part.

Subpart C—Salary Offset

§ 34.11 Scope.

(a) This subpart sets forth STATE's procedures for the collection of a Federal employee's current pay by salary offset to satisfy certain debts owed to the United States.

(b) This subpart applies to:

(1) Current employees of STATE and other agencies who owe debts to STATE;

(2) Current employees of STATE who owe debts to other agencies.

(c) This subpart does not apply to

(1) Offset of a separating employee's final payments or Foreign Service annuity payments which are covered under administrative offset (See § 34.10(a)),

(2) Debts or claims arising under the Internal Revenue Code of 1954 (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 301 *et seq.*); the tariff laws of the United States.

(3) Any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over 4 pay periods or less.

(4) Any routine intra-agency adjustment of pay that is made to correct an overpayment of pay attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred within the 4 pay periods preceding the adjustment and, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and point of contact for contesting such adjustment.

(5) Any adjustment to collect a debt amounting to $50 or less, if, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and a point of contact for contesting such adjustment.

(d) These regulations do not preclude an employee from requesting waiver of the debt, if waiver is available under subpart D of this part or by other regulation or statute.

(e) Nothing in these regulations precludes the compromise, suspension or termination of collection actions where appropriate under subpart D of this part or other regulations or statutes.

§ 34.12 Coordinating offset with another Federal agency.

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

(b) When another agency is owed the debt, STATE may use salary offset against one of its employees who is indebted to another agency, if requested to do so by that agency. Such request must be accompanied by a certification that the person owes the debt (including the amount and basis of the debt and the due date of payment) and that the agency has complied with its regulations as required by 5 U.S.C. 5514 and 5 CFR part 550, subpart K.

§ 34.13 Notice requirements before offset.

Except as provided in § 34.16, salary offset deductions will not be made unless STATE first provides the employee with a written notice that he/she owes a debt to the Federal Government at least 30 calendar days before salary offset is to be initiated. When STATE is the creditor agency, this notice of intent to offset an employee's salary shall be hand-delivered or sent by first class mail to the last known address that is available to the Department and will state:

(a) That STATE has reviewed the records relating to the debt and has determined that the debt is owed, its origin and nature, and the amount due;

(b) The intention of STATE to collect the debt by means of deduction from the employee's current pay until the debt and any and all accumulated interest, penalties and administrative costs are paid in full;

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

(d) The requirement to assess and collect interest, penalties, and administrative costs in accordance with § 34.6, unless waived in accordance with § 34.6(f);

(e) The employee's right to inspect and copy any STATE records relating to the debt, or, if the employee or their representative cannot personally inspect the records, to request and receive a copy of such records;

(f) The opportunity to voluntarily repay the debt or to enter into a written agreement (under terms agreeable to STATE) to establish a schedule for repayment of the debt in lieu of offset;

(g) *Right to an internal review or outside hearing.* (1) An internal review under § 34.9 may be requested in cases of collections by salary offset for debts arising under 5 U.S.C. 5705 (travel advances), 5 U.S.C. 4108 (training expenses), and other statutes specifically providing for collection by salary offset.

(2) For all other debts, an internal review or an outside hearing conducted by an official not under the supervision or control of STATE may be requested with respect to the existence of the debt, the amount of the debt, or the repayment schedule (*i.e.*, the percentage of disposable pay to be deducted each pay period);

(h) That the timely filing of a request for an outside hearing or internal review within 30 calendar days after the date of the notice of intent to offset will stay the commencement of collection proceedings;

(i) The method and time period for requesting an internal review or outside hearing;

(j) That a final decision on the internal review or outside hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 days after the filing of the request, unless the employee requests and the outside hearing official grants a delay in the proceedings;

(k) That any knowingly false or frivolous statements, representation, or evidence may subject the employee to disciplinary procedures (5 U.S.C. Chapter 75, 5 CFR part 752 or other applicable statutes or regulations); penalties (31 U.S.C. 3729–3731 or other applicable statutes or regulations); or criminal penalties (18 U.S.C. 286, 287, 1001, and 1002 or other applicable statutes or regulations);

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

(m) That the amounts paid on the debt which are later waived or found not owed to the United States will be promptly refunded to the employee, unless there are applicable contractual or statutory provisions to the contrary; and

(n) The name and address of the STATE official to whom communications should be directed.

§ 34.14 Request for an outside hearing for certain debts.

(a) Except as provided in paragraph (d) of this section, an employee must file a request that is received by STATE not later than 30 calendar days from the date of STATE's notice described in § 34.13 if an employee wants an outside hearing pursuant to § 34.13(g)(2) concerning:

(1) The existence or amount of the debt; or

(2) STATE's proposed offset schedule.

(b) The request must be signed by the employee and should identify and explain with reasonable specificity and brevity the facts, evidence and witnesses which the employee believes support his or her position. If the employee objects to the percentage of disposable pay to be deducted from each check, the request should state the objection and the reasons for it.

(c) The employee must also specify whether an oral or paper hearing is requested. If an oral hearing is desired, the request should explain why the matter cannot be resolved by review of the documentary evidence alone.

(d) If the employee files a request for an outside hearing later than the required 30 calendar days as described in paragraph (a) of this section, STATE may accept the request if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the filing deadline (unless the employee has actual notice of the filing deadline).

(e) An employee waives the right to an outside hearing and will have his or her pay offset if the employee fails to file a petition for a hearing as prescribed in paragraph (a) of this section.

§ 34.15 Outside hearings.

(a) If an employee timely files a request for an outside hearing under § 34.13(g)(2), pursuant to 5 U.S.C. 5514(a)(2), STATE shall select the time, date, and location of the hearing.

(b) Outside hearings shall be conducted by a hearing official not under the supervision or control of STATE.

(c) *Procedure.* (1) After the employee requests a hearing, the hearing official shall notify the employee of the form of the hearing to be provided. If the hearing will be oral, notice shall set forth the date, time and location of the hearing. If the hearing will be paper, the employee shall be notified that he or she should submit arguments in writing to the hearing official by a specified date after which the record shall be closed. This date shall give the employee reasonable time to submit documentation.

(2) *Oral hearing.* An employee who requests an oral hearing shall be provided an oral hearing if the hearing official determines that the matter cannot be resolved by review of documentary evidence alone (e.g., when an issue of credibility or veracity is involved). The hearing is not an adversarial adjudication, and need not take the form of an evidentiary hearing.

(3) *Paper hearing.* If the hearing official determines that an oral hearing is not necessary, he or she will make a decision based upon a review of the available written record.

(4) *Record.* The hearing official must maintain a summary record of any hearing provided by this subpart. Witnesses who provide testimony will do so under oath or affirmation.

(5) *Content of decision.* The written decision shall include:

(i) A statement of the facts presented to support the origin, nature, and amount of the debt;

(ii) The hearing official's findings, analysis, and conclusions; and

(iii) The terms of any repayment schedules, or the date salary offset will commence, if applicable.

(6) *Failure to appear.* In the absence of good cause shown (e.g., excused illness), an employee who fails to appear at a hearing shall be deemed, for the purpose of this subpart, to admit the existence and amount of the debt as described in the notice of intent. The hearing official shall schedule a new hearing date upon the request of the creditor agency representative when good cause is shown.

(d) A hearing official's decision is considered to be an official certification regarding the existence and amount of the debt for purposes of executing salary offset under 5 U.S.C. 5514 only. It does not supersede the finding by STATE that a debt is owed and does not affect the Government's ability to recoup the indebtedness through alternative collection methods under § 34.10.

§ 34.16 Procedures for salary offset.

Unless otherwise provided by statute or contract, the following procedures apply to salary offset:

(a) *Method.* Salary offset will be made by deduction at one or more officially established pay intervals from the current pay account of the employee without his or her consent.

(b) *Source*. The source of salary offset is current disposable pay.

(c) *Types of collection*. (1) Lump sum payment. Ordinarily debts will be collected by salary offset in one lump sum if possible. However, if the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, the collection by salary offset must be made in installment deductions.

(2) *Installment deductions*. (i) The size of installment deductions must bear a reasonable relation to the size of the debt and the employee's ability to pay. If possible, the size of the deduction will be that necessary to liquidate the debt in no more than 1 year. However, the amount deducted for any period must not exceed 15 percent of the disposable pay from which the deduction is made, except as provided by other regulations or unless the employee has agreed in writing to a greater amount.

(ii) Installment payments of less than $25 per pay period will be accepted only in the most unusual circumstances.

(iii) Installment deductions will be made over a period of not greater than the anticipated period of employment.

§ 34.17 Non-waiver of rights by payments.

So long as there are no statutory or contractual provisions to the contrary, no employee payment (of all or a portion of a debt) collected under this subpart will be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514.

Subpart D—Collection Adjustments

§ 34.18 Waivers of indebtedness.

(a) Waivers of indebtedness may be granted only as provided for certain types of debt by specific statutes and according to the standards set out under those statutes.

(b) *Authorities*—(1) *Debts arising out of erroneous payments of pay and allowances*. 5 U.S.C. 5584 provides authority for waiving in whole or in part debts arising out of erroneous payments of pay and allowances, and travel, transportation and relocation expenses and allowances, if collection would be against equity and good conscience and not in the best interests of the United States.

(i) Waiver may not be granted if there exists in connection with the claim an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver.

(ii) Fault is considered to exist if in light of the circumstances the employee knew or should have known through the exercise of due diligence that an error existed but failed to take corrective action. What an employee should have known is evaluated under a reasonable person standard. Employees are, however, expected to have a general understanding of the Federal pay system applicable to them.

(iii) An employee with notice that a payment may be erroneous is expected to make provisions for eventual repayment. Financial hardship is not a basis for granting a waiver for an employee who was on notice of an erroneous payment.

(iv) If the deciding official finds no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, the employee is not automatically entitled to a waiver. Before a waiver can be granted, the deciding official must also determine that collection of the claim against an employee would be against equity and good conscience and not in the best interests of the United States. Factors to consider when determining if collection of a claim against an employee would be against equity and good conscience and not in the best interests of the United States include, but are not limited to:

(A) Whether collection of the claim would cause serious financial hardship to the employee from whom collection is sought.

(B) Whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances.

(C) The time elapsed between the erroneous payment and discovery of the error and notification of the employee;

(D) Whether failure to make restitution would result in unfair gain to the employee;

(E) Whether recovery of the claim would be unconscionable under the circumstances.

(2) *Debts arising out of advances in pay*. 5 U.S.C. 5524a provides authority for waiving in whole or in part a debt arising out of an advance in pay if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(3) *Debts arising out of advances in situations of authorized or ordered departures*. 5 U.S.C. 5522 provides authority for waiving in whole or in part a debt arising out of an advance payment of pay, allowances, and differentials provided under this section if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(4) *Debts arising out of advances of allowances and differentials for employees stationed abroad*. 5 U.S.C. 5922 provides authority for waiving in whole or in part a debt arising out of an advance of allowances and differentials provided under this subchapter if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(5) *Debts arising out of employee training expenses*. 5 U.S.C. 4108 provides authority for waiving in whole or in part a debt arising out of employee training expenses if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of a debt arising out of employee training expenses would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(6) *Under-withholding of life insurance premiums*. 5 U.S.C. 8707(d) provides authority for waiving the collection of unpaid deductions resulting from under-withholding of Federal Employees' Group Life Insurance Program premiums if the individual is without fault and recovery would be against equity and good conscience.

(i) Fault is considered to exist if in light of the circumstances the employee knew or should have known through the exercise of due diligence

that an error existed but failed to take corrective action.

(ii) Factors to be considered when determining whether recovery of unpaid deduction resulting from under-withholding would be against equity and good conscience include, but are not limited to:

(A) Whether collection of the claim would cause serious financial hardship to the individual from whom collection is sought.

(B) The time elapsed between the failure to properly withhold and discovery of the failure and notification of the individual;

(C) Whether failure to make restitution would result in unfair gain to the individual;

(D) Whether recovery of the claim would be unconscionable under the circumstances.

(7) *Overpayments of Foreign Service annuities*. For waiver of debts arising from overpayments from the Foreign Service Retirement and Disability Fund under the Foreign Service Retirement and Disability System or the Foreign Service Pension System see 22 CFR part 17.

(8) As otherwise provided by law.

(c) Waiver of indebtedness is an equitable remedy and as such must be based on an assessment of the facts involved in the individual case under consideration.

(d) The burden is on the employee to demonstrate that the applicable waiver standard has been met.

(e) *Requests*. A debtor requesting a waiver shall do so in writing to the contact office by the payment due date stated within the initial notice sent under § 34.8(b) or other applicable provision. The debtor's written response shall state the basis for the dispute and include any relevant documentation in support.

(f) While a waiver request is pending, STATE may suspend collection, including the accrual of interest and penalties, on the debt if STATE determines that suspension is in the Department's best interest or would serve equity and good conscience.

§ 34.19 Compromise.

STATE may attempt to effect compromise in accordance with the standards set forth in the FCCS, 31 CFR part 902.

§ 34.20 Suspension.

The suspension of collection action shall be made in accordance with the standards set forth in the FCCS, 31 CFR 903.1–903.2

§ 34.21 Termination.

The termination of collection action shall be made in accordance with the standards set forth in the FCCS, 31 CFR 903.1 and 903.3–903.4.

§ 34.22 Discharge.

Once a debt has been closed out for accounting purposes and collection has been terminated, the debt is discharged. STATE must report discharged debt as income to the debtor to the Internal Revenue Service per 26 U.S.C. 6050P and 26 CFR 1.6050P–1.

§ 34.23 Bankruptcy.

A debtor should notify STATE at the contact office provided in the original notice of the debt, if the debtor has filed for bankruptcy. STATE will require documentation from the applicable court indicating the date of filing and type of bankruptcy. Pursuant to the laws of bankruptcy, STATE will suspend debt collection upon such filing unless the automatic stay is no longer in effect or has been lifted. In general, collection of a debt discharged in bankruptcy shall be terminated unless otherwise provided for by bankruptcy law.

§ 34.24 Refunds.

(a) STATE will refund promptly to the appropriate individual amounts offset under this regulation when:

(1) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(2) STATE is directed by an administrative or judicial order to make a refund.

(b) Refunds do not bear interest unless required or permitted by law or contract.

PART 35—PROGRAM FRAUD CIVIL REMEDIES

Sec.
35.1 General.
35.2 Definitions.
35.3 Basis for civil penalties and assessments.
35.4 Investigation.
35.5 Review by the reviewing official.
35.6 Prerequisites for issuing a complaint.
35.7 Complaint.
35.8 Service of complaint.
35.9 Answer.
35.10 Default upon failure to file an answer.
35.11 Referral of complaint and answer to the ALJ.
35.12 Notice of hearing.
35.13 Parties to the hearing.
35.14 Separation of functions.
35.15 Ex parte contacts.
35.16 Disqualification of reviewing official or ALJ.
35.17 Rights of parties.
35.18 Authority of the ALJ.
35.19 Prehearing conferences.
35.20 Disclosure of documents.
35.21 Discovery.
35.22 Exchange of witness lists, statements and exhibits.
35.23 Subpoenas for attendance at hearing.
35.24 Protective order.
35.25 Fees.
35.26 Form, filing and service of papers.
35.27 Computation of time.
35.28 Motions.
35.29 Sanctions.
35.30 The hearing and burden of proof.
35.31 Determining the amount of penalties and assessments.
35.32 Location of hearing.
35.33 Witnesses.
35.34 Evidence.
35.35 The record.
35.36 Post-hearing briefs.
35.37 Initial decision.
35.38 Reconsideration of initial decision.
35.39 Appeal to authority head.
35.40 Stays ordered by the Department of Justice.
35.41 Stay pending appeal.
35.42 Judicial review.
35.43 Collection of civil penalties and assessments.
35.44 Right to administrative offset.
35.45 Deposit in Treasury of United States.
35.46 Compromise or settlement.
35.47 Limitations.

AUTHORITY: 31 U.S.C. 3801–3812.

SOURCE: 55 FR 23424, June 8, 1990, unless otherwise noted.

§ 35.1 General.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law 99–509, sections. 6101–6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false fictitious, or fraudulent claims or written statements to authorities or to their agents; and specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

(c) *Special considerations abroad.* Where a party, witness or material evidence in a proceeding under these regulations is located abroad, the investigating official, reviewing official or ALJ, as the case may be, may adjust the provisions below for service, filing of documents, time limitations, and related matters to meet special problems arising out of that location.

§ 35.2 Definitions.

(a) *ALJ* means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

(b) *Authority* means the United States Department of State.

(c) *Authority head* means the Under Secretary for Management.

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

(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 § 35.7.

(g) *Defendant* means any person alleged in a complaint under § 35.7 to be liable for a civil penalty or assessment under § 35.3.

(h) *Department* means the Department of State.

(i) *Government* means the United States Government.

(j) *Individual* means a natural person.

(k) *Initial decision* means the written decision of the ALJ required by § 35.10 or § 35.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(l) *Investigating official* means the Inspector General of the Department of State or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(m) *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.

(n) *Makes*, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

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

(p) *Representative* means an attorney who is a member in good standing of the bar of any state, territory, or possession of the United States, or of the District of Columbia, or the Commonwealth of Puerto Rico.

(q) *Representative for the Authority* means the Counsel to the Inspector General.

(r) *Reviewing official* means the chief Financial Officer of the Department or her or his designee who is—

(1) Not subject to supervision by, or required to report to, the investigating official;

(2) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(3) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(s) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

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

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

(i) A contract with, or a bid or proposal for a contract with; or

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

§ 35.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know the following shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim:

(i) Is false, fictitious, or fraudulent;

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

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

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

(C) Is a statement in which the person making the statement has a duty to include such material fact; or

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

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

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the authority, recipient, or party.

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

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

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

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

(B) Is false, fictitious, or fraudulent because it omits a mateial fact that the person making the statment has a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

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

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the authority.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 35.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued (and, in the case of a subpoena to be served outside the jurisdiction of the United States, the basis

for such service), and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that 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 Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion 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.

§ 35.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 35.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 35.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 35.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

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

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 35.3;

(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.

§ 35.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 35.7 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 § 35.3(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 § 35.3(a) does not exceed $150,000.

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

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person'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.

§ 35.7 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 § 35.8.

(b) The complaint shall 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 § 35.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 35.8 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 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;

(3) Written acknowledgment of receipt by the defendant or his or her representative; or

(4) In case of service abroad authenticated in accordance with the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters.

§ 35.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

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

(4) Shall state the name, address and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 35.10. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 35.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 35.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 35.8, a notice that an initial decision will be issued under this section.

(c) If the defendant fails to answer, the ALJ shall assume the facts alleged in the complaint to be true, and, if such facts established liability under § 35.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it was issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 35.38.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 35.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 35.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 35.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Authority.

(b) Such notice shall include—

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

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

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

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

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

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

§ 35.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Authority.

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

§ 35.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

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

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of the investigating official or the reviewing official.

(c) 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.

§ 35.15 Ex parte contacts.

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

§ 35.16 Disqualification of reviewing official or ALJ.

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

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

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

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

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f) If the ALJ—

(1) Determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice;

(2) Disqualifies himself or herself, the case shall be reassigned promptly to another ALJ; or

(3) Denies a motion to disqualify, the authority head may determine the mater only as part of his or her review of the initial decision upon appeal, if any.

§ 35.17 Rights of parties.

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

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

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

(c) Conduct discovery;

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

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

(f) Present and cross-examine witnesses;

(g) Present oreal 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.

§ 35.18 Authority of the ALJ.

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

(b) The ALJ has the authority to—

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

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

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

(4) Administer oaths and affirmations;

(5) Issue subpoenas to be served within the United States requiring the attendance of witnesses and the production of documents at depositions or at hearings. Subpoenas to be served outside the jurisdiction of the United States shall state on their face the authority therefore;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

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

(9) Examine witnesses;

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

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

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

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

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

(c) The ALJ does not have the authority to find treaties and other international agreements or federal statutes or regulations invalid.

§ 35.19 Prehearing conferences.

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

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

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

(1) Simplification of the issues;

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

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

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

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

(6) Limitation of the number of witnesses;

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

(8) Discovery;

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

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

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

§ 35.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 35.4(b) are based, unless such materials are subject to a privilege under federal law or classified pursuant to Executive Order. 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 § 35.5 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 with the ALJ following the filing of an answer pursuant to § 35.9.

§ 35.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 35.22 and 35.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

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

(d) Motions for discovery. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 35.24.

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

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

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged or classified 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 § 35.24.

(e) Depositions. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 35.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

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

(f) Each party shall bear its own costs of discovery.

§ 35.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 35.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

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

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

§ 35.23 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.

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

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the day fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

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

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 35.8. A subpoena on a party or upon an individual under the control of a party may be served within the United States by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 35.24 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 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

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

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

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

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

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

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

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

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

§ 35.25 Fees.

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

§ 35.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, a designation of the paper (e.g., motion to quash subpoena), and shall be in English or accompanied by an English translation.

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

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

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing, shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting

forth the manner of service, shall be proof of service.

§ 35.27 Computation of time.

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

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

(c) Where a document has been served or issued by mail, or by airmail abroad, an additional five days will be added to the time permitted for any response.

§ 35.28 Motions.

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

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

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

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

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 35.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for—

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

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

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

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

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

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

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

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

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 35.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 35.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 35.31 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, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the 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 shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 35.32 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 within the United States as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 35.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the

hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 35.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to make—

(1) The interrogation and presentation effective for the ascertainment of the truth;

(2) To avoid needless consumption of time; and

(3) To protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 35.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided herein, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is classified or otherwise privileged under Federal law.

(f) Evidence concerning offers or compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 35.24.

§ 35.35 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 § 35.24.

§ 35.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief.

The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 35.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 35.3; and

(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 § 35.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all defendants with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 35.38 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 within the United States, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration of the initial decision, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 35.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 35.39.

§ 35.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 35.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be

filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 35.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of the defendant 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 § 35.3 is final and is not subject to judicial review.

§ 35.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 35.41 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.

§ 35.42 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.

§ 35.43 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.

§ 35.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 35.42 or § 35.43, or any amount agreed upon in a compromise or settlement under § 35.46, may be collected by

administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of federal taxes, then or later owing by the United States to the defendant.

§ 35.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 35.46 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 § 35.42 or during the pendency of any action to collect penalties and assessments under § 35.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 35.42 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.

§ 35.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 35.8 within six years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 35.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

SUBCHAPTER E—VISAS

PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

Subpart A—General Provisions

Sec.
40.1 Definitions.
40.2 Documentation of nationals.
40.3 Entry into areas under U.S. administration.
40.4 Furnishing records and information from visa files for court proceedings.
40.5 Limitations on the use of National Crime Information Center (NCIC) criminal history information.
40.6 Basis for refusal.
40.7–40.8 [Reserved]
40.9 Classes of inadmissible aliens.

Subpart B—Medical Grounds of Ineligibility

40.11 Medical grounds of ineligibility.
40.12–40.19 [Reserved]

Subpart C—Criminal and Related Grounds—Conviction of Certain Crimes

40.21 Crimes involving moral turpitude and controlled substance violators.
40.22 Multiple criminal convictions.
40.23 Controlled substance traffickers. [Reserved]
40.24 Prostitution and commercialized vice.
40.25 Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. [Reserved]
40.26–40.29 [Reserved]

Subpart D—Security and Related Grounds

40.31 General. [Reserved]
40.32 Terrorist activities. [Reserved]
40.33 Foreign policy. [Reserved]
40.34 Immigrant membership in totalitarian party.
40.35 Participants in Nazi persecutions or genocide. [Reserved]
40.36–40.39 [Reserved]

Subpart E—Public Charge

40.41 Public charge.
40.42–40.49 [Reserved]

Subpart F—Labor Certification and Qualification for Certain Immigrants

40.51 Labor certification.
40.52 Unqualified physicians.
40.53 Uncertified foreign health-care workers.
40.54–40.59 [Reserved]

Subpart G—Illegal Entrants and Immigration Violators

40.61 Aliens present without admission or parole.
40.62 Failure to attend removal proceedings.
40.63 Misrepresentation; Falsely claiming citizenship.
40.64 Stowaways.
40.65 Smugglers.
40.66 Subject of civil penalty.
40.67 Student visa abusers.
40.68 Aliens subject to INA 222(g).
40.69 [Reserved]

Subpart H—Documentation Requirements

40.71 Documentation requirements for immigrants.
40.72 Documentation requirements for nonimmigrants.
40.73–40.79 [Reserved]

Subpart I—Ineligible for Citizenship

40.81 Ineligible for citizenship.
40.82 Alien who departed the United States to avoid service in the Armed Forces.
40.83–40.89 [Reserved]

Subpart J—Aliens Previously Removed

40.91 Certain aliens previously removed.
40.92 Aliens unlawfully present.
40.93 Aliens unlawfully present after previous immigration violation.
40.94–40.99 [Reserved]

Subpart K—Miscellaneous

40.101 Practicing polygamists.
40.102 Guardian required to accompany excluded alien.
40.103 International child abduction.
40.104 Unlawful voters.
40.105 Former citizens who renounced citizenship to avoid taxation.
40.106–40.110 [Reserved]

Subpart L—Failure to Comply with INA

40.201 Failure of application to comply with INA.
40.202 Certain former exchange visitors.
40.203 Alien entitled to A, E, or G nonimmigrant classification.
40.204 [Reserved]
40.205 Applicant for immigrant visa under INA 203(c).

40.206 Frivolous applications. [Reserved]
40.207–40.210 [Reserved]

Subpart M—Waiver of Ground of Ineligibility

40.301 Waiver for ineligible nonimmigrants under INA 212(d)(3)(A).

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Subpart A—General Provisions

§40.1 Definitions.

The following definitions supplement definitions contained in the Immigration and Nationality Act (INA). As used in the regulations in parts 40, 41, 42, 43 and 45 of this subchapter, the term:

(a)(1) *Accompanying or accompanied by* means not only an alien in the physical company of a principal alien but also an alien who is issued an immigrant visa within 6 months of:

(i) The date of issuance of a visa to the principal alien;

(ii) The date of adjustment of status in the United States of the principal alien; or

(iii) The date on which the principal alien personally appears and registers before a consular officer abroad to confer alternate foreign state chargeability or immigrant status upon a spouse or child.

(2) An ''accompanying'' relative may not precede the principal alien to the United States.

(b) *Act* means the Immigration and Nationality Act (or INA), as amended.

(c) *Competent officer*, as used in INA 101(a)(26), means a ''consular officer'' as defined in INA 101(a)(9).

(d) *Consular officer*, as defined in INA 101(a)(9) includes commissioned consular officers and the Deputy Assistant Secretary for Visa Services, and such other officers as the Deputy Assistant Secretary may designate for the purpose of issuing nonimmigrant and immigrant visas, but does not include a consular agent, an attaché or an assistant attaché. For purposes of this regulation, the term ''other officers'' includes civil service visa examiners employed by the Department of State for duty at visa-issuing offices abroad, upon certification by the chief of the consular section under whose direction such examiners are employed that the examiners are qualified by knowledge and experience to perform the functions of a consular officer in the issuance or refusal of visas. The designation of visa examiners shall expire upon termination of the examiners' employment for such duty and may be terminated at any time for cause by the Deputy Assistant Secretary. The assignment by the Department of any foreign service officer to a diplomatic or consular office abroad in a position administratively designated as requiring, solely, partially, or principally, the performance of consular functions, and the initiation of a request for a consular commission, constitutes designation of the officer as a ''consular officer'' within the meaning of INA 101(a)(9).

(e) *Department* means the Department of State of the United States of America.

(f) *Dependent area* means a colony or other component or dependent area overseas from the governing foreign state.

(g) *DHS* means the Department of Homeland Security.

(h) *Documentarily qualified* means that the alien has reported that all the documents specified by the consular officer as sufficient to meet the requirements of INA 222(b) have been obtained, and the consular office has completed the necessary clearance procedures. This term is used only with respect to the alien's qualification to apply formally for an immigrant visa; it bears no connotation that the alien is eligible to receive a visa.

(i) *Entitled to immigrant classification* means that the alien:

(1) Is the beneficiary of an approved petition granting immediate relative or preference status;

(2) Has satisfied the consular officer as to entitlement to special immigrant status under INA 101(a)(27) (A) or (B);

(3) Has been selected by the annual selection system to apply under INA 203(c); or

(4) Is an alien described in §40.51(c).

(j) *Foreign state*, for the purposes of alternate chargeability pursuant to INA 202(b), is not restricted to those areas to which the numerical limitation prescribed by INA 202(a) applies but includes dependent areas, as defined in this section.

(k) *INA* means the Immigration and Nationality Act, as amended.

(l) *Make or file an application for a visa* means:

(1) For a nonimmigrant visa applicant, submitting for formal adjudication by a consular officer of an electronic application, Form DS–160, signed electronically by clicking the box designated ''Sign Application'' in the certification section of the application or, as directed by a consular officer, a completed Form DS–156, with any required supporting documents and biometric data, as well as the requisite processing fee or evidence of the prior payment of the processing fee when such documents are received and accepted for adjudication by the consular officer.

(2) For an immigrant visa applicant, personally appearing before a consular officer and verifying by oath or affirmation the statements contained on Form DS–230 or Form DS–260 and in all supporting documents, having previously submitted all forms and documents required in advance of the appearance and paid the visa application processing fee.

(m) *Native* means born within the territory of a foreign state, or entitled to be charged for immigration purposes to that foreign state pursuant to INA section 202(b).

(n) *Not subject to numerical limitation* means that the alien is entitled to immigrant status as an immediate relative within the meaning of INA 201(b)(2)(i), or as a special immigrant within the meaning of INA 101(a)(27)(A) and (B), unless specifically subject to a limitation other than under INA 201(a), (b), or (c).

(o) *Parent, father, and mother*, as defined in INA 101(b)(2), are terms which are not changed in meaning if the child becomes 21 years of age or marries.

(p) *Port of entry* means a port or place designated by the DHS at which an alien may apply to DHS for admission into the United States.

(q) *Principal alien* means an alien from whom another alien derives a privilege or status under the law or regulations.

(r) *Regulation* means a rule which is established under the provisions of INA 104(a) and is duly published in the FEDERAL REGISTER.

(s) *Son or daughter* includes only a person who would have qualified as a ''child'' under INA 101(b)(1) if the person were under 21 and unmarried.

(t) *Western Hemisphere* means North America (including Central America), South America and the islands immediately adjacent thereto including the places named in INA 101(b)(5).

[56 FR 30422, July 2, 1991, as amended at 56 FR 43552, Sept. 3, 1991; 59 FR 15300, Mar. 31, 1994; 61 FR 1835, Jan. 24, 1996; 64 FR 55418, Oct. 13, 1999; 65 FR 54413, Sept. 8, 2000; 71 FR 34520, June 15, 2006; 73 FR 23068, Apr. 29, 2008; 75 FR 45476, Aug. 3, 2010]

§ 40.2 Documentation of nationals.

(a) *Nationals of the United States*. A national of the United States shall not be issued a visa or other documentation as an alien for entry into the United States.

(b) *Former Nationals of the United States*. A former national of the United States who seeks to enter the United States must comply with the documentary requirements applicable to aliens under the INA.

§ 40.3 Entry into areas under U.S. administration.

An immigrant or nonimmigrant seeking to enter an area which is under U.S. administration but which is not within the ''United States'', as defined in INA 101(a)(38), is not required by the INA to be documented with a visa unless the authority contained in INA 215 has been invoked.

§ 40.4 Furnishing records and information from visa files for court proceedings.

Upon receipt of a request for information from a visa file or record for use in court proceedings, as contemplated in INA 222(f), the consular officer must, prior to the release of the information, submit the request together with a full report to the Department.

§40.5 Limitations on the use of National Crime Information Center (NCIC) criminal history information.

(a) *Authorized access.* The FBI's National Crime Information Center (NCIC) criminal history records are law enforcement sensitive and can only be accessed by authorized consular personnel with visa processing responsibilities.

(b) *Use of information.* NCIC criminal history record information shall be used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States. All third party requests for access to NCIC criminal history record information shall be referred to the FBI.

(c) *Confidentiality and protection of records.* To protect applicants' privacy, authorized Department personnel must secure all NCIC criminal history records, automated or otherwise, to prevent access by unauthorized persons. Such criminal history records must be destroyed, deleted or overwritten upon receipt of updated versions.

[67 FR 8478, Feb. 25, 2002]

§40.6 Basis for refusal.

A visa can be refused only upon a ground specifically set out in the law or implementing regulations. The term ''reason to believe'', as used in INA 221(g), shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations. Consideration shall be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist. The burden of proof is upon the applicant to establish eligibility to receive a visa under INA 212 or any other provision of law or regulation.

§§40.7–40.8 [Reserved]

§40.9 Classes of inadmissible aliens.

Subparts B through L describe classes of inadmissible aliens who are ineligible to receive visas and who shall be ineligible for admission into the United States, except as otherwise provided in the Immigration and Nationality Act, as amended.

[61 FR 59184, Nov. 21, 1996]

Subpart B—Medical Grounds of Ineligibility

§40.11 Medical grounds of ineligibility.

(a) *Decision on eligibility based on findings of medical doctor.* A finding of a panel physician designated by the post in whose jurisdiction the examination is performed pursuant to INA 212(a)(1) shall be binding on the consular officer, except that the officer may refer a panel physician finding in an individual case to USPHS for review.

(b) *Waiver of ineligibility—INA 212(g).* If an immigrant visa applicant is inadmissible under INA 212(a)(1)(A)(i), (ii), or (iii) but is qualified to seek the benefits of INA 212(g)(1)(A) or (B), 212(g)(2)(C), or 212(g)(3), the consular officer shall inform the alien of the procedure for applying to DHS for relief under the applicable provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(g), unless the consular officer has been delegated authority by the Secretary of Homeland Security to grant the particular waiver under INA 212(g).

(c) *Waiver authority—INA 212(g)(2)(A) and (B).* The consular officer may waive section 212(a)(1)(A)(ii) visa ineligibility if the alien qualifies for such waiver under the provisions of INA 212(g)(2)(A) or (B).

[56 FR 30422, July 2, 1991, as amended at 62 FR 67567, Dec. 29, 1997]

§§40.12–40.19 [Reserved]

Subpart C—Criminal and Related Grounds—Conviction of Certain Crimes

§40.21 Crimes involving moral turpitude and controlled substance violators.

(a) *Crimes involving moral turpitude—*(1) *Acts must constitute a crime under criminal law of jurisdiction where they occurred.* A Consular Officer may make a

finding of ineligibility under INA 212(a)(2)(A)(i)(I) based upon an alien's admission of the commission of acts which constitute the essential elements of a crime involving moral turpitude, only if the acts constitute a crime under the criminal law of the jurisdiction where they occurred. However, a Consular Officer must base a determination that a crime involves moral turpitude upon the moral standards generally prevailing in the United States.

(2) *Conviction for crime committed under age 18.* (i) An alien will not be ineligible to receive a visa under INA 212(a)(2)(A)(i)(I) by reason of any offense committed:

(A) Prior to the alien's fifteenth birthday, or

(B) Between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code.

(ii) An alien tried and convicted as an adult for a violent felony offense, as so defined, committed after having attained the age of fifteen years, will be subject to the provisions of INA 212(a)(2)(A)(i)(I) regardless of whether at the time of conviction juvenile courts existed within the convicting jurisdiction.

(3) *Two or more crimes committed under age 18.* An alien convicted of a crime involving moral turpitude or admitting the commission of acts which constitute the essential elements of such a crime and who has committed an additional crime involving moral turpitude shall be ineligible under INA 212(a)(2)(A)(i)(I), even though the crimes were committed while the alien was under the age of 18 years.

(4) *Conviction in absentia.* A conviction in absentia of a crime involving moral turpitude does not constitute a conviction within the meaning of INA 212(a)(2)(A)(i)(I).

(5) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(A)(i)(I) by reason of a conviction of a crime involving moral turpitude for which a full and unconditional pardon has been granted by the President of the United States, by the Governor of a State of the United States, by the former High Commissioner for Germany acting pursuant to Executive Order 10062, or by the United States Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. A legislative pardon or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(A)(i)(I).

(6) *Political offenses.* The term ''purely political offense'', as used in INA 212(a)(2)(A)(i)(I), includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.

(7) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(A)(i)(I) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

(b) *Controlled substance violators*—(1) *Date of conviction not pertinent.* An alien shall be ineligible under INA 212(a)(2)(A)(i)(II) irrespective of whether the conviction for a violation of or for conspiracy to violate any law or regulation relating to a controlled substance, as defined in the Controlled Substance Act (21 U.S.C. 802), occurred before, on, or after October 27, 1986.

(2) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(A)(i)(II) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

[56 FR 30422, July 2, 1991, as amended at 64 FR 55418, Oct. 13, 1999]

§ 40.22 Multiple criminal convictions.

(a) *Conviction(s) for crime(s) committed under age 18.* An alien shall not be ineligible to receive a visa under INA 212(a)(2)(B) by reason of any offense committed prior to the alien's fifteenth birthday. Nor shall an alien be ineligible under INA 212(a)(2)(B) by reason of any offense committed between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(l) and section 16 of Title 18 of the United States Code. An alien, tried and convicted as an adult for a violent felony offense, as so defined, committed after having attained the age of fifteen years, and who has also been convicted of at least one other such offense or any other offense committed as an adult, shall be subject to the provisions of INA 212(a)(2)(B) regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

(b) *Conviction in absentia.* A conviction in absentia shall not constitute a conviction within the meaning of INA 212(a)(2)(B).

(c) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(B) by reason in part of having been convicted of an offense for which a full and unconditional pardon has been granted by the President of the United States, by the Governor of a State of the United States, by the former High Commissioner for Germany acting pursuant to Executive Order 10062, or by the United States Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. A legislative pardon or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(B).

(d) *Political offense.* The term ''purely political offense'', as used in INA 212(a)(2)(B), includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.

(e) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(B) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

[56 FR 30422, July 2, 1991, as amended at 62 FR 67567, Dec. 29, 1997]

§ 40.23 Controlled substance traffickers. [Reserved]

§ 40.24 Prostitution and commercialized vice.

(a) *Activities within 10 years preceding visa application.* An alien shall be ineligible under INA 212(a)(2)(D) only if—

(1) The alien is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution, or the alien directly or indirectly procures or attempts to procure, or procured or attempted to procure or to import prostitutes or persons for the purposes of prostitution, or receives or received, in whole or in part, the proceeds of prostitution; and

(2) The alien has performed one of the activities listed in § 40.24(a)(1) within the last ten years.

(b) *Prostitution defined.* The term ''prostitution'' means engaging in promiscuous sexual intercourse for hire. A finding that an alien has ''engaged'' in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.

(c) *Where prostitution not illegal.* An alien who is within one or more of the classes described in INA 212(a)(2)(D) is ineligible to receive a visa under that section even if the acts engaged in are not prohibited under the laws of the foreign country where the acts occurred.

(d) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(D) but is qualified to seek the benefits of INA

212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

§ 40.25 Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. [Reserved]

§§ 40.26–40.29 [Reserved]

Subpart D—Security and Related Grounds

§ 40.31 General. [Reserved]

§ 40.32 Terrorist activities. [Reserved]

§ 40.33 Foreign policy. [Reserved]

§ 40.34 Immigrant membership in totalitarian party.

(a) *Definition of affiliate.* The term *affiliate,* as used in INA 212(a)(3)(D), means an oganization which is related to, or identified with, a proscribed association or party, including any section, subsidiary, branch, or subdivision thereof, in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party. An organization which gives, loans, or promises support, money, or other thing of value for any purpose to any proscribed association or party is presumed to be an *affiliate* of such association or party, but nothing contained in this paragraph shall be construed as an exclusive definition of the term *affiliate.*

(b) *Service in Armed Forces.* Service, whether voluntary or not, in the armed forces of any country shall not be regarded, of itself, as constituting or establishing an alien's membership in, or affiliation with, any proscribed party or organization, and shall not, of itself, constitute a ground of ineligibility to receive a visa.

(c) *Voluntary Service in a Political Capacity.* Voluntary service in a political capacity shall constitute affiliation with the political party or organization in power at the time of such service.

(d) *Voluntary Membership After Age 16.* If an alien continues or continued membership in or affiliation with a proscribed organization on or after reaching 16 years of age, only the alien's activities after reaching that age shall be pertinent to a determination of whether the continuation of membership or affiliation is or was voluntary.

(e) *Operation of Law Defined.* The term *operation of law,* as used in INA 212(a)(3)(D), includes any case wherein the alien automatically, and without personal acquiescence, became a member of or affiliated with a proscribed party or organization by official act, proclamation, order, edict, or decree.

(f) *Membership in Organization Advocating Totalitarian Dictatorship in the United States.* In accordance with the definition of *totalitarian party* contained in INA 101(a)(37), a former or present voluntary member of, or an alien who was, or is, voluntarily affiliated with a noncommunist party, organization, or group, or of any section, subsidiary, branch, affiliate or subdivision thereof, which during the time of its existence did not or does not advocate the establishment in the United States of a totalitarian dictatorship, is not considered ineligible under INA 212(a)(3)(D) to receive a visa.

(g) *Waiver of ineligibility—212(a)(3)(D)(iv).* If an immigrant visa applicant is ineligible under INA 212(a)(3)(D) but is qualified to seek the benefits of INA 212(a)(3)(D)(iv), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(a)(3)(D)(iv).

§ 40.35 Participants in Nazi persecutions or genocide.

(a) *Participation in Nazi persecutions.* [Reserved]

(b) *Participation in genocide.* [Reserved]

§§40.36–40.39 [Reserved]

Subpart E—Public Charge

§40.41 Public charge.

(a) *Basis for Determination of Ineligibility*. Any determination that an alien is ineligible under INA 212(a)(4) must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien's behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement of INA 212(a)(4)(C).

(b) *Affidavit of support*. Any alien seeking an immigrant visa under INA 201(b)(2), 203(a), or 203(b), based upon a petition filed by a relative of the alien (or in the case of a petition filed under INA 203(b) by an entity in which a relative has a significant ownership interest), shall be required to present to the consular officer an affidavit of support (AOS) on a form that complies with terms and conditions established by the Secretary of Homeland Security. Petitioners for applicants at a post designated by the Deputy Assistant Secretary for Visa Services for initial review of and assistance with such an AOS will be charged a fee for such review and assistance pursuant to Item 61 of the Schedule of Fees for Consular Services (22 CFR 22.1).

(c) *Joint Sponsors*. Submission of one or more additional affidavits of support by a joint sponsor/sponsors is required whenever the relative sponsor's household income and significant assets, and the immigrant's assets, do not meet the Federal poverty line requirements of INA 213A.

(d) *Posting of Bond*. A consular officer may issue a visa to an alien who is within the purview of INA 212(a)(4) (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 213A), upon receipt of a notice from DHS of the giving of a bond or undertaking in accordance with INA 213 and INA 221(g), and provided further that the officer is satisfied that the giving of such bond or undertaking removes the likelihood that the alien will become a public charge within the meaning of this section of the law and that the alien is otherwise eligible in all respects.

(e) *Prearranged Employment*. An immigrant visa applicant relying on an offer of prearranged employment to establish eligibility under INA 212(a)(4), other than an offer of employment certified by the Department of Labor pursuant to INA 212(a)(5)(A), must provide written confirmation of the relevant information sworn and subscribed to before a notary public by the employer or an authorized employee or agent of the employer. The signer's printed name and position or other relationship with the employer must accompany the signature.

(f) *Use of Federal Poverty Line Where INA 213A Not Applicable*. An immigrant visa applicant, not subject to the requirements of INA 213A, and relying solely on personal income to establish eligibility under INA 212(a)(4), who does not demonstrate an annual income above the Federal poverty line, as defined in INA 213A (h), and who is without other adequate financial resources, shall be presumed ineligible under INA 212(a)(4).

[62 FR 67564, Dec. 29, 1997, as amended at 65 FR 78094, Dec. 14, 2000]

§§40.42–40.49 [Reserved]

Subpart F—Labor Certification and Qualification for Certain Immigrants

§40.51 Labor certification.

(a) *INA 212(a)(5) applicable only to certain immigrant aliens*. INA 212(a)(5)(A) applies only to immigrant aliens described in INA 203(b)(2) or (3) who are seeking to enter the United States for the purpose of engaging in gainful employment.

(b) *Determination of need for alien's labor skills*. An alien within one of the classes to which INA 212(a)(5) applies as described in §40.51(a) who seeks to enter the United States for the purpose of engaging in gainful employment, shall be ineligible under INA 212(a)(5)(A) to receive a visa unless the Secretary of Labor has certified to the Secretary of Homeland Security and the Secretary of State, that

(1) There are not sufficient workers in the United States who are able, willing, qualified, (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts) and available at the time of application for a visa and at the place to which the alien is destined to perform such skilled or unskilled labor, and

(2) The employment of such alien will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

(c) *Labor certification not required in certain cases.* A spouse or child accompanying or following to join an alien spouse or parent who is a beneficiary of a petition approved pursuant to INA 203(b)(2) or (3) is not considered to be within the purview of INA 212(a)(5).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.52 Unqualified physicians.

INA 212(a)(5)(B) applies only to immigrant aliens described in INA 203(b) (2) or (3).

[61 FR 1835, Jan. 24, 1996, as amended at 62 FR 67567, Dec. 29, 1997]

§ 40.53 Uncertified foreign health-care workers.

(a) Subject to paragraph (b) of this section, a consular officer must not issue a visa to any alien seeking admission to the United States for the purpose of performing services in a health care occupation, other than as a physician, unless, in addition to meeting all other requirements of law and regulation, the alien provides to the officer a certification issued by the Commission On Graduates of Foreign Nursing Schools (CGFNS) or another credentialing service that has been approved by the Secretary of Homeland Security for such purpose, which certificate complies with the provisions of sections 212(a)(5)(C) and 212(r) of the Act, 8 U.S.C. 1182(a)(5)(C) and 8 U.S.C. 1182(r), respectively, and the regulations found at 8 CFR 212.15.

(b) Paragraph (a) of this section does not apply to an alien:

(1) Seeking to enter the United States in order to perform services in a non-clinical health care occupation as described in 8 CFR 212.15(b)(1); or

(2) Who is the immigrant or nonimmigrant spouse or child of a foreign health care worker and who is seeking to accompany or follow to join as a derivative applicant the principal alien to whom this section applies; or

(3) Who is applying for an immigrant or a nonimmigrant visa for any purpose other than for the purpose of seeking entry into the United States in order to perform health care services as described in 8 CFR 212.15.

[67 FR 77159, Dec. 17, 2002]

§§ 40.54–40.59 [Reserved]

Subpart G—Illegal Entrants and Immigration Violators

§ 40.61 Aliens present without admission or parole.

INA 212(a)(6)(A)(i) does not apply at the time of visa issuance.

[62 FR 67567, Dec. 29, 1997]

§ 40.62 Failure to attend removal proceedings.

An alien who without reasonable cause failed to attend, or to remain in attendance at, a hearing initiated on or after April 1, 1997, under INA 240 to determine inadmissibility or deportability shall be ineligible for a visa under INA 212(a)(6)(B) for five years following the alien's subsequent departure or removal from the United States.

[62 FR 67567, Dec. 29, 1997]

§ 40.63 Misrepresentation; Falsely claiming citizenship.

(a) *Fraud and misrepresentation and INA 212(a)(6)(C) applicability to certain refugees.* An alien who seeks to procure, or has sought to procure, or has procured a visa, other documentation, or entry into the United States or other benefit provided under the INA by fraud or by willfully misrepresenting a material fact at any time shall be ineligible under INA 212(a)(6)(C); *Provided*, That the provisions of this paragraph are not applicable if the fraud or misrepresentation was committed by an alien at the time the alien sought entry into a country other than the

United States or obtained travel documents as a bona fide refugee and the refugee was in fear of being repatriated to a former homeland if the facts were disclosed in connection with an application for a visa to enter the United States: *Provided further*, That the fraud or misrepresentation was not committed by such refugee for the purpose of evading the quota or numerical restrictions of the U.S. immigration laws, or investigation of the alien's record at the place of former residence or elsewhere in connection with an application for a visa.

(b) *Misrepresentation in application under Displaced Persons Act or Refugee Relief Act*. Subject to the conditions stated in INA 212(a)(6)(c)(i), an alien who is found by the consular officer to have made a willful misrepresentation within the meaning of section 10 of the Displaced Persons Act of 1948, as amended, for the purpose of gaining admission into the United States as an eligible displaced person, or to have made a material misrepresentation within the meaning of section 11(e) of the Refugee Relief Act of 1953, as amended, for the purpose of gaining admission into the United States as an alien eligible thereunder , shall be considered ineligible under the provisions of INA 212(a)(6)(C).

(c) *Waiver of ineligibility—INA 212(i)*. If an immigrant applicant is ineligible under INA 212(a)(6)(C) but is qualified to seek the benefits of INA 212(i), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(i).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.64 Stowaways.

INA 212(a)(6)(D) is not applicable at the time of visa application.

§ 40.65 Smugglers.

(a) *General*. A visa shall not be issued to an alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

(b) *Waiver of ineligibility—INA 212(d)(11)*. If an immigrant applicant is ineligible under INA 212(a)(6)(E) but is qualified to seek the benefits of INA 212(d)(11), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(d)(11).

§ 40.66 Subject of civil penalty.

(a) *General*. An alien who is the subject of a final order imposing a civil penalty for a violation under INA 274C shall be ineligible for a visa under INA 212(a)(6)(F).

(b) *Waiver of ineligibility*. If an applicant is ineligible under paragraph (a) of this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(d)(12), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(d)(12).

[62 FR 67567, Dec. 29, 1997]

§ 40.67 Student visa abusers.

An alien ineligible under the provisions of INA 212(a)(6)(G) shall not be issued a visa unless the alien has complied with the time limitation set forth therein.

[62 FR 67568, Dec. 29, 1997]

§ 40.68 Aliens subject to INA 222(g).

An alien who, under the provisions of INA 222(g), has voided a nonimmigrant visa by remaining in the United States beyond the period of authorized stay is ineligible for a new nonimmigrant visa unless the alien complies with the requirements in 22 CFR 41.101 (b) or (c) regarding the place of application.

[63 FR 671, Jan. 7, 1998]

§ 40.69 [Reserved]

Subpart H—Documentation Requirements

§ 40.71 Documentation requirements for immigrants.

INA 212(a)(7)(A) is not applicable at the time of visa application. (For waiver of documentary requirements for immigrants see 22 CFR 42.1 and 42.2.)

§ 40.72 Documentation requirements for nonimmigrants.

A passport which is valid indefinitely for the return of the bearer to the country whose government issued such passport shall be deemed to have the required minimum period of validity as specified in INA 212(a)(7)(B).

§§ 40.73–40.79 [Reserved]

Subpart I—Ineligible for Citizenship.

§ 40.81 Ineligible for citizenship.

An alien will be ineligible to receive an immigrant visa under INA 212(a)(8)(A) if the alien is ineligible for citizenship, including as provided in INA 314 or 315.

[64 FR 55418, Oct. 13, 1999]

§ 40.82 Alien who departed the United States to avoid service in the armed forces.

(a) *Applicability to immigrants*. INA 212(a)(8)(A) applies to immigrant visa applicants who have departed from or remained outside the United States between September 8, 1939 and September 24, 1978, to avoid or evade training or service in the United States Armed Forces.

(b) *Applicability to nonimmigrants*. INA 212(a)(8)(B) applies to nonimmigrant visa applicants who have departed from or remained outside the United States between September 8, 1939 and September 24, 1978 to avoid or evade training or service in the U.S. Armed Forces except an alien who held nonimmigrant status at the time of such departure.

§§ 40.83–40.89 [Reserved]

Subpart J—Aliens Previously Removed

SOURCE: 61 FR 59184, Nov. 21, 1996, unless otherwise noted.

§ 40.91 Certain aliens previously removed.

(a) *5-year bar*. An alien who has been found inadmissible, whether as a result of a summary determination of inadmissibility at the port of entry under INA 235(b)(1) or of a finding of inadmissibility resulting from proceedings under INA 240 initiated upon the alien's arrival in the United States, shall be ineligible for a visa under INA 212(a)(9)(A)(i) for 5 years following such alien's first removal from the United States.

(b) *10-year bar*. An alien who has otherwise been removed from the United States under any provision of law, or who departed while an order of removal was in effect, is ineligible for a visa under INA 212(a)(9)(A)(ii) for 10 years following such removal or departure from the United States.

(c) *20-year bar*. An alien who has been removed from the United States two or more times shall be ineligible for a visa under INA 212(a)(9)(A)(i) or INA 212(a)(9)(A)(ii), as appropriate, for 20 years following the most recent such removal or departure.

(d) *Permanent bar*. If an alien who has been removed has also been convicted of an aggravated felony, the alien is permanently ineligible for a visa under INA 212(a)(9)(A)(i) or 212(a)(9)(A)(ii), as appropriate.

(e) *Exceptions*. An alien shall not be ineligible for a visa under INA 212(a)(9)(A)(i) or (ii) if the Secretary of Homeland Security has consented to the alien's application for admission.

[62 FR 67568, Dec. 29, 1997, as amended at 63 FR 64628, Nov. 23, 1998]

§ 40.92 Aliens unlawfully present.

(a) *3-year bar*. An alien described in INA 212(a)(9)(B)(i)(I) shall be ineligible for a visa for 3 years following departure from the United States.

(b) *10-year bar*. An alien described in INA 212(a)(9)(B)(i)(II) shall be ineligible

for a visa for 10 years following departure from the United States.

(c) *Waiver*. If a visa applicant is inadmissible under paragraph (a) or (b) of this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(a)(9)(B)(v), the alien shall be informed of the procedure for applying to DHS for relief under that provision of law.

[62 FR 67568, Dec. 29, 1997]

§ 40.93 Aliens unlawfully present after previous immigration violation.

An alien described in INA 212(a)(9)(C)(i) is permanently ineligible for a visa unless the Secretary of Homeland Security consents to the alien's application for readmission not less than 10 years following the alien's last departure from the United States. Such application for readmission shall be made prior to the alien's reembarkation at a place outside the United States.

[62 FR 67568, Dec. 29, 1997]

§§ 40.94–40.99 [Reserved]

Subpart K—Miscellaneous

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996.

§ 40.101 Practicing polygamists.

An immigrant alien shall be ineligible under INA 212(a)(9)(A) only if the alien is coming to the United States to practice polygamy.

§ 40.102 Guardian required to accompany excluded alien.

INA 212(a)(9)(B) is not applicable at the time of visa application.

§ 40.103 International child abduction.

An alien who would otherwise be ineligible under INA 212(a)(9)(C)(i) shall not be ineligible under such paragraph if the U.S. citizen child in question is physically located in a foreign state which is party to the Hague Convention on the Civil Aspects of International Child Abduction.

[61 FR 1833, Jan. 24, 1996]

§ 40.104 Unlawful voters.

(a) Subject to paragraph (b) of this section, an alien is ineligible for a visa if the alien has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation.

(b) Such alien shall not be considered to be ineligible under paragraph (a) of this section if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen.

[70 FR 35527, June 21, 2005]

§ 40.105 Former citizens who renounced citizenship to avoid taxation.

An alien who is a former citizen of the United States, who on or after September 30, 1996, has officially renounced United States citizenship and who has been determined by the Secretary of Homeland Security to have renounced citizenship to avoid United States taxation, is ineligible for a visa under INA 212(a)(10)(E).

[62 FR 67568, Dec. 29, 1997]

§§ 40.106–40.110 [Reserved]

Subpart L—Failure to Comply with INA

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996.

§ 40.201 Failure of application to comply with INA.

(a) *Refusal under INA 221(g)*. The consular officer shall refuse an alien's visa application under INA 221(g)(2) as failing to comply with the provisions of INA or the implementing regulations if:

(1) The applicant fails to furnish information as required by law or regulations;

(2) The application contains a false or incorrect statement other than one

which would constitute a ground of ineligibility under INA 212(a)(6)(C);

(3) The application is not supported by the documents required by law or regulations;

(4) The applicant refuses to be fingerprinted as required by regulations;

(5) The necessary fee is not paid for the issuance of the visa or, in the case of an immigrant visa, for the application therefor;

(6) In the case of an immigrant visa application, the alien fails to swear to, or affirm, the application before the consular officer; or

(7) The application otherwise fails to meet specific requirements of law or regulations for reasons for which the alien is responsible.

(b) *Reconsideration of refusals.* A refusal of a visa application under paragraph (a)(1) of this section does not bar reconsideration of the application upon compliance by the applicant with the requirements of INA and the implementing regulations or consideration of a subsequent application submitted by the same applicant.

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.202 Certain former exchange visitors.

An alien who was admitted into the United States as an exchange visitor, or who acquired such status after admission, and who is within the purview of INA 212(e) as amended by the Act of April 7, 1970, (84 Stat. 116) and by the Act of October 12, 1976, (90 Stat. 2301), is not eligible to apply for or receive an immigrant visa or a nonimmigrant visa under INA 101(a)(15) (H), (K), or (L), notwithstanding the approval of a petition on the alien's behalf, unless:

(a) It has been established that the alien has resided and has been physically present in the country of the alien's nationality or last residence for an aggregate of at least 2 years following the termination of the alien's exchange visitor status as required by INA 212(e), or

(b) The foreign residence requirement of INA 212(e) has been waived by the Secretary of Homeland Security in the alien's behalf.

§ 40.203 Alien entitled to A, E, or G nonimmigrant classification.

An alien entitled to nonimmigrant classification under INA 101(a)(15) (A), (E), or (G) who is applying for an immigrant visa and who intends to continue the activities required for such nonimmigrant classification in the United States is not eligible to receive an immigrant visa until the alien executes a written waiver of all rights, privileges, exemptions and immunities which would accrue by reason of such occupational status.

§ 40.204 [Reserved]

§ 40.205 Applicant for immigrant visa under INA 203(c).

An alien shall be ineligible to receive a visa under INA 203(c) if the alien does not have a high school education or its equivalent, as defined in 22 CFR 42.33(a)(2), or does not have, within the five years preceding the date of application for such visa, at least two years of work experience in an occupation which requires at least two years of training or experience.

[59 FR 55045, Nov. 3, 1994. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.206 Frivolous applications. [Reserved]

§§ 40.207–40.210 [Reserved]

Subpart M—Waiver of Ground of Ineligibility

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.301 Waiver for ineligible nonimmigrants under INA 212(d)(3)(A).

(a) *Report or recommendation to Department.* Except as provided in paragraph (b) of this section, consular officers may, upon their own initiative, and shall, upon the request of the Secretary of State or upon the request of the alien, submit a report to the Department for possible transmission to the Secretary of Homeland Security pursuant to the provisions of INA 212(d)(3)(A) in the case of an alien who is classifiable as a nonimmigrant but

who is known or believed by the consular officer to be ineligible to receive a nonimmigrant visa under the provisions of INA 212(a), other than INA 212(a) (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

(b) *Recommendation to designated DHS officer abroad*. A consular officer may, in certain categories defined by the Secretary of State, recommend directly to designated DHS officers that the temporary admission of an alien ineligible to receive a visa be authorized under INA 212(d)(3)(A).

(c) *Secretary of Homeland Security may impose conditions*. When the Secretary of Homeland Security authorizes the temporary admission of an ineligible alien as a nonimmigrant and the consular officer is so informed, the consular officer may proceed with the issuance of a nonimmigrant visa to the alien, subject to the conditions, if any, imposed by the Secretary of Homeland Security.

[56 FR 30422, July 2, 1991. Redesignated at 61 FR 59184, Nov. 21, 1996, as amended at 75 FR 82243, Dec. 30, 2010]

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

Subpart A—Passport and Visas Not Required for Certain Nonimmigrants

Sec.
41.0 Definitions.
41.1 Exemption by law or treaty from passport and visa requirements.
41.2 Exemption or waiver by Secretary of State and Secretary of Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants.
41.3 Waiver by joint action of consular and immigration officers of passport and/or visa requirements.

Subpart B—Classification of Nonimmigrants

41.11 Entitlement to nonimmigrant status.
41.12 Classification symbols.

Subpart C—Foreign Government Officials

41.21 Foreign Officials—General.
41.22 Officials of foreign governments.
41.23 Accredited officials in transit.
41.24 International organization aliens.
41.25 NATO representatives, officials, and employees.
41.26 Diplomatic visas.
41.27 Official visas.

Subpart D—Temporary Visitors

41.31 Temporary visitors for business or pleasure.
41.32 Nonresident alien Mexican border crossing identification cards; combined border crossing identification cards and B–1/B–2 visitor visa.
41.33 Nonresident alien Canadian border crossing identification card (BCC).

Subpart E—Crewman and Crew-List Visas

41.41 Crewmen.
41.42 [Reserved]

Subpart F—Business and Media Visas

41.51 Treaty trader, treaty investor, or treaty alien in a specialty occupation.
41.52 Information media representative.
41.53 Temporary workers and trainees.
41.54 Intracompany transferees (executives, managers, and specialized knowledge employees).
41.55 Aliens with extraordinary ability.
41.56 Athletes, artists and entertainers.
41.57 International cultural exchange visitors and visitors under the Irish Peace Process Cultural and Training Program Act (IPPCTPA).
41.58 Aliens in religious occupations.
41.59 Professionals under the North American Free Trade Agreement.

Subpart G—Students and Exchange Visitors

41.61 Students—academic and nonacademic.
41.62 Exchange visitors.
41.63 Two-year home-country physical presence requirement.

Subpart H—Transit Aliens

41.71 Transit aliens.

Subpart I—Fiance(e)s and Other Nonimmigrants

41.81 Fiancé or spouse of a U.S. citizen and derivative children.
41.82 Certain parents and children of section 101(a)(27)(I) special immigrants. [Reserved]
41.83 Certain witnesses and informants.
41.84 Victims of trafficking in persons.
41.86 Certain spouses and children of lawful permanent resident aliens.

Subpart J—Application for Nonimmigrant Visa

41.101 Place of application.
41.102 Personal appearance of applicant.

41.103 Filing an application.
41.104 Passport requirements.
41.105 Supporting documents and fingerprinting.
41.106 Processing.
41.107 Visa fees.
41.108 Medical examination.

Subpart K—Issuance of Nonimmigrant Visa

41.111 Authority to issue visa.
41.112 Validity of visa.
41.113 Procedures in issuing visas.

Subpart L—Refusals and Revocations

41.121 Refusal of individual visas.
41.122 Revocation of visas.

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SOURCE: 52 FR 42597, Nov. 5, 1987, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 41 appear at 71 FR 34521 and 34522, June 15, 2006.

Subpart A—Passport and Visas Not Required for Certain Nonimmigrants

§ 41.0 Definitions.

For purposes of this part and part 53:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

United States means ''United States'' as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards.

[73 FR 18418, Apr. 3, 2008]

§ 41.1 Exemption by law or treaty from passport and visa requirements.

Nonimmigrants in the following categories are exempt from the passport and visa requirements of INA 212(a)(7)(B)(i)(I), (i)(II):

(a) *Alien members of the U.S. Armed Forces*. An alien member of the U.S. Armed Forces in uniform or bearing proper military identification, who has not been lawfully admitted for permanent residence, coming to the United States under official orders or permit of such Armed Forces (Sec. 284, 86 Stat. 232; 8 U.S.C. 1354).

(b) [Reserved]

(c) *Aliens entering from Guam, Puerto Rico, or the Virgin Islands*. An alien departing from Guam, Puerto Rico, or the Virgin Islands of the United States, and seeking to enter the continental United States or any other place under the jurisdiction of the United States (Sec. 212, 66 Stat. 188; 8 U.S.C. 1182.)

(d) *Armed Services personnel of a NATO member*. Personnel belonging to the armed services of a government which is a Party to the North Atlantic Treaty and which has ratified the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, and entering the United States under Article III of that Agreement pursuant to an individual or collective movement order issued by an appropriate agency of the sending state or of NATO (TIAS 2846; 4 U.S.T. 1792.)

(e) *Armed Services personnel attached to a NATO headquarters in the United States*. Personnel attached to a NATO Headquarters in the United States set up pursuant to the North Atlantic Treaty, belonging to the armed services of a government which is a Party to the Treaty and entering the United States in connection with their official duties under the provisions of the Protocol on the Status of International

Military Headquarters Set Up Pursuant to the North Atlantic Treaty (TIAS 2978; 5 U.S.T. 875.)

(f) *Aliens entering pursuant to International Boundary and Water Commission Treaty.* All personnel employed either directly or indirectly on the construction, operation, or maintenance of works in the United States undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission, and entering the United States temporarily in connection with such employment (59 Stat. 1252; TS 994.)

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 61 FR 1835, Jan. 24, 1996; 71 FR 68430, Nov. 24, 2006; 73 FR 18418, Apr. 3, 2008]

§41.2 Exemption or waiver by Secretary of State and Secretary of Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants.

Pursuant to the authority of the Secretary of State and the Secretary of Homeland Security under the INA, as amended, a passport and/or visa is not required for the following categories of nonimmigrants:

(a) *Canadian citizens.* A visa is not required for an American Indian born in Canada having at least 50 percentum of blood of the American Indian race. A visa is not required for other Canadian citizens except for those who apply for admission in E, K, V, or S nonimmigrant classifications as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Canadian citizens applying for admission to the United States, except when one of the following exceptions applies:

(1) *NEXUS program.* A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a NEXUS program card.

(2) *FAST program.* A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(3) *SENTRI program.* A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(4) *Canadian Indians.* If designated by the Secretary of Homeland Security, a Canadian citizen holder of an Indian and Northern Affairs Canada (''INAC'') card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (LTS) in conformance with security standards agreed upon by the Governments of Canada and the United States, and containing a machine readable zone, and who is arriving from Canada, may present the card prior to entering the United States at a land port-of-entry.

(5) *Children.* A child who is a Canadian citizen who is seeking admission to the United States when arriving from contiguous territory at a sea or land port-of-entry, may present certain other documents if the arrival meets the requirements described in either paragraph (i) or (ii) of this section.

(i) *Children under age 16.* A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(ii) *Groups of children under age 19.* A Canadian citizen who is under age 19 and who is traveling with a public or

private school group, religious group, social or cultural organization, or team associated with a youth sport organization may present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when applying for admission to the United States from contiguous territory at all land and sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older. The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(*1*) The name of the group, organization or team, and the name of the supervising adult;

(*2*) A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;

(*3*) A list of the children on the trip;

(*4*) For each child, the primary address, primary phone number, date of birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(5)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team that are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part and 8 CFR parts 212 and 235.

(6) *Enhanced driver's license programs.* Upon the designation by the Secretary of Homeland Security of an enhanced driver's license as an acceptable document to denote identity and citizenship for purposes of entering the United States, Canadian citizens may be permitted to present these documents in lieu of a passport when seeking admission to the United States according to the terms of the agreements entered between the Secretary of Homeland Security and the entity. The Secretary of Homeland Security will announce, by publication of a notice in the FEDERAL REGISTER, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

(b) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required, except for Citizens of the British Overseas Territory of Bermuda who apply for admission in E, K, V, or S nonimmigrant visa classification as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Citizens of the British Overseas Territory of Bermuda applying for admission to the United States.

(c) *Bahamian nationals and British subjects resident in the Bahamas.* A passport is required. A visa is not required if, prior to the embarkation of such an alien for the United States on a vessel or aircraft, the examining U.S. immigration officer at Freeport or Nassau determines that the individual is clearly and beyond a doubt entitled to admission.

(d) *British subjects resident in the Cayman Islands or in the Turks and Caicos Islands.* A passport is required. A visa is not required if the alien arrives directly from the Cayman Islands or the Turks and Caicos Islands and presents a current certificate from the Clerk of Court of the Cayman Islands or the Turks and Caicos Islands indicating no criminal record.

(e) *British, French, and Netherlands nationals and nationals of certain adjacent islands of the Caribbean which are independent countries.* A passport is required. A visa is not required of a British, French or Netherlands national, or of a national of Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or has residence in Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, if the alien:

(1) Is proceeding to the United States as an agricultural worker; or

(2) Is the beneficiary of a valid, unexpired, indefinite certification granted

by the Department of Labor for employment in the Virgin Islands of the United States and is proceeding thereto for employment, or is the spouse or child of such an alien accompanying or following to join the alien.

(f) *Nationals and residents of the British Virgin Islands.* (1) A national of the British Virgin Islands and resident therein requires a passport but not a visa if proceeding to the United States Virgin Islands.

(2) A national of the British Virgin Islands and resident therein requires a passport but does not require a visa to apply for entry into the United States if such applicant:

(i) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;

(ii) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);

(iii) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and

(iv) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

(g) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who is applying for admission from Mexico as a temporary visitor for business or pleasure at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national is in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, issued by the Department of State.

(2) A visa and a passport are not required of a Mexican national who is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I–872 American Indian Card issued by U.S. Citizenship and Immigration Services (USCIS).

(3) A visa is not required of a Mexican national employed as a crew member on an aircraft belonging to a Mexican company authorized to engage in commercial transportation into the United States.

(4) A visa is not required of a Mexican national bearing a Mexican diplomatic or official passport who is a military or civilian official of the Federal Government of Mexico entering the United States for a stay of up to 6 months for any purpose other than on assignment as a permanent employee to an office of the Mexican Federal Government in the United States. A visa is also not required of the official's spouse or any of the official's dependent family members under 19 years of age who hold diplomatic or official passports and are in the actual company of the official at the time of entry. This waiver does not apply to the spouse or any of the official's family members classifiable under INA 101(a)(15) (F) or (M).

(h) *Natives and residents of the Trust Territory of the Pacific Islands.* A visa and a passport are not required of a native and resident of the Trust Territory of the Pacific Islands who has proceeded in direct and continuous transit from the Trust Territory to the United States.

(i) [Reserved]

(j) Except as provided in paragraphs (a) through (i) and (k) through (m) of this section, all aliens are required to present a valid, unexpired visa and passport upon arrival in the United States. An alien may apply for a waiver of the visa and passport requirement if, either prior to the alien's embarkation abroad or upon arrival at a port of entry, the responsible district director of the Department of Homeland Security (DHS) in charge of the port of entry concludes that the alien is unable to present the required documents because of an unforeseen emergency. The DHS district director may grant a waiver of the visa or passport requirement pursuant to INA 212(d)(4)(A), without the prior concurrence of the Department of State, if the district director concludes that the alien's claim of emergency circumstances is legitimate and that approval of the waiver would be appropriate under all of the attendant facts and circumstances.

(k) *Fiance(e) of a U.S. citizen.* Notwithstanding the provisions of paragraphs (a) through (h) of this section, a

visa is required of an alien described in such paragraphs who is classified, or who seeks classification, under INA 101(a)(15)(K).

(l) *Visa waiver program.* (1) A visa is not required of any person who seeks admission to the United States for a period of 90 days or less as a visitor for business or pleasure and who is eligible to apply for admission to the United States as a Visa Waiver Program applicant. (For the list of countries whose nationals are eligible to apply for admission to the United States as Visa Waiver Program applicants, *see* 8 CFR 217.2(a)).

(2) An alien denied admission under the Visa Waiver Program by virtue of a ground of inadmissibility described in INA section 212(a) that is discovered at the time of the alien's application for admission at a port of entry or through use of an automated electronic database may apply for a visa as the only means of challenging such a determination. A consular officer must accept and adjudicate any such application if the alien otherwise fulfills all of the application requirements contained in part 41, § 41.2(l)(1).

(m) *Treaty Trader and Treaty Investor.* Notwithstanding the provisions of paragraph (a) of this section, a visa is required of a Canadian national who is classified, or who seeks classification, under INA 101(a)(15)(E).

[52 FR 42597, Nov. 5, 1987]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 41.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 41.3 Waiver by joint action of consular and immigration officers of passport and/or visa requirements.

Under the authority of INA 212(d)(4), the documentary requirements of INA 212(a)(7)(B)(i)(I), (i)(II) may be waived for any alien in whose case the consular officer serving the port or place of embarkation is satisfied after consultation with, and concurrence by, the appropriate immigration officer, that the case falls within any of the following categories:

(a) *Residents of foreign contiguous territory; visa and passport waiver.* An alien residing in foreign contiguous territory who does not qualify for any waiver provided in § 41.1 and is a member of a visiting group or excursion proceeding to the United States under circumstances which make it impractical to procure a passport and visa in a timely manner.

(b) *Aliens for whom passport extension facilities are unavailable; passport waiver.* As alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and who is embarking for the United States at a port or place remote from any establishment at which the passport could be revalidated.

(c) *Aliens precluded from obtaining passport extensions by foreign government restrictions; passport waiver.* An alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and whose government, as a matter of policy, does not revalidate passports more than 6 months prior to expiration or until the passport expires.

(d) *Emergent circumstances; visa waiver.* An alien well and favorably known at the consular office, who was previously issued a nonimmigrant visa which has expired, and who is proceeding directly to the United States under emergent circumstances which preclude the timely issuance of a visa.

(e) *Members of armed forces of foreign countries; visa and passport waiver.* An alien on active duty in the armed forces of a foreign country and a member of a group of such armed forces traveling to the United States, on behalf of the alien's government or the United Nations, under advance arrangements made with the appropriate military authorities of the United States. The waiver does not apply to a citizen or resident of Cuba, Mongolia, North Korea (Democratic People's Republic of Korea), Vietnam (Socialist Republic of Vietnam), or the People's Republic of China.

(f) *Landed immigrants in Canada; passport waiver.* An alien applying for a visa at a consular office in Canada:

(1) Who is a landed immigrant in Canada;

(2) Whose port and date of expected arrival in the United States are known; and

(3) Who is proceeding to the United States under emergent circumstances

which preclude the timely procurement of a passport or Canadian certificate of identity.

(g) *Authorization to individual consular office; visa and/or passport waiver*. An alien within the district of a consular office which has been authorized by the Department, because of unusual circumstances prevailing in that district, to join with immigration officers abroad in waivers of documentary requirements in specific categories of cases, and whose case falls within one of those categories.

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 60 FR 30188, June 8, 1995; 61 FR 1835, Jan. 24, 1996; 63 FR 48577, Sept. 11, 1998]

Subpart B—Classification of Nonimmigrants

§41.11 Entitlement to nonimmigrant status.

(a) *Presumption of immigrant status and burden of proof*. An applicant for a nonimmigrant visa, other than an alien applying for a visa under INA 101(a)(15)(H)(i) or (L), shall be presumed to be an immigrant until the consular officer is satisfied that the alien is entitled to a nonimmigrant status described in INA 101(a)(15) or otherwise established by law or treaty. The burden of proof is upon the applicant to establish entitlement for nonimmigrant status and the type of nonimmigrant visa for which application is made.

(b) *Aliens unable to establish nonimmigrant status*. (1) A nonimmigrant visa shall not be issued to an alien who has failed to overcome the presumption of immigrant status established by INA 214(b).

(2) In a borderline case in which an alien appears to be otherwise entitled to receive a visa under INA 101(a)(15)(B) or (F) but the consular officer concludes that the maintenance of the alien's status or the departure of the alien from the United States as required is not fully assured, a visa may nevertheless be issued upon the posting of a bond with the Secretary of Homeland Security under terms and conditions prescribed by the consular officer.

[52 FR 42597, Nov. 5, 1987, as amended at 61 FR 1835, Jan. 24, 1996]

§41.12 Classification symbols.

A visa issued to a nonimmigrant alien within one of the classes described in this section shall bear an appropriate visa symbol to show the classification of the alien. The symbol shall be inserted in the space provided on the visa. The following visa symbols shall be used:

Symbol	Class	Section of law
A1	Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family.	101(a)(15)(A)(i).
A2	Other Foreign Government Official or Employee, or Immediate Family.	101(a)(15)(A)(ii).
A3	Attendant, Servant, or Personal Employee of A1 or A2, or Immediate Family.	101(a)(15)(A)(iii).
B1	Temporary Visitor for Business	101(a)(15)(B).
B2	Temporary Visitor for Pleasure	101(a)(15)(B).
B1/B2	Temporary Visitor for Business & Pleasure	101(a)(15)(B).
C1	Alien in Transit	101(a)(15)(C).
C1/D	Combined Transit and Crewmember Visa	101(a)(15)(C) and (D).
C2	Alien in Transit to United Nations Headquarters District Under Sec. 11.(3), (4), or (5) of the Headquarters Agreement.	101(a)(15)(C).
C3	Foreign Government Official, Immediate Family, Attendant, Servant or Personal Employee, in Transit.	212(d)(8).
D	Crewmember (Sea or Air)	101(a)(15)(D).
E1	Treaty Trader, Spouse or Child	101(a)(15)(E)(i).
E2	Treaty Investor, Spouse or Child	101(a)(15)(E)(ii).
E3	Australian Treaty Alien coming to the United States Solely to Perform Services in a Specialty Occupation.	101(a)(15)(E)(iii).
E3D	Spouse or Child of E3	101(a)(15)(E)(iii).
E3R	Returning E3	101(a)(15)(E)(iii).
F1	Student in an academic or language training program	101(a)(15)(F)(i).
F2	Spouse or Child of F1	101(a)(15)(F)(ii).
F3	Canadian or Mexican national commuter student in an academic or language training program.	101(a)(15)(F)(iii).

Symbol	Class	Section of law
G1	Principal Resident Representative of Recognized Foreign Government to International Organization, Staff, or Immediate Family.	101(a)(15)(G)(i).
G2	Other Representative of Recognized Foreign Member Government to International Organization, or Immediate Family.	101(a)(15)(G)(ii).
G3	Representative of Nonrecognized or Nonmember Foreign Government to International Organization, or Immediate Family.	101(a)(15)(G)(iii).
G4	International Organization Officer or Employee, or Immediate Family.	101(a)(15)(G)(iv).
G5	Attendant, Servant, or Personal Employee of G1 through G4, or Immediate Family.	101(a)(15)(G)(v).
H1B	Alien in a Specialty Occupation (Profession)	101(a)(15)(H)(i)(b).
H1B1	Chilean or Singaporean National to Work in a Specialty Occupation.	101(a)(15)(H)(i)(b1).
H1C	Nurse in health professional shortage area	101(a)(15)(H)(i)(c).
H2A	Temporary Worker Performing Agricultural Services Unavailable in the United States.	101(a)(15)(H)(ii)(a).
H2B	Temporary Worker Performing Other Services Unavailable in the United States.	101(a)(15)(H)(ii)(b).
H3	Trainee	101(a)(15)(H)(iii).
H4	Spouse or Child of Alien Classified H1B/B1/C, H2A/B/R, or H–3.	101(a)(15)(H)(iv).
I	Representative of Foreign Information Media, Spouse and Child.	101(a)(15)(I).
J1	Exchange Visitor	101(a)(15)(J).
J2	Spouse or Child of J1	101(a)(15)(J).
K1	Fiance(e) of United States Citizen	101(a)(15)(K)(i).
K2	Child of Fiance(e) of U.S. Citizen	101(a)(15)(K)(iii).
K3	Spouse of U.S. citizen awaiting availability of immigrant visa.	101(a)(15)(K)(ii).
K4	Child of K3	101(a)(15)(K)(iii).
L1	Intracompany Transferee (Executive, Managerial, and Specialized Knowledge Personnel Continuing Employment with International Firm or Corporation).	101(a)(15)(L).
L2	Spouse or Child of Intracompany Transferee	101(a)(15)(L).
M1	Vocational Student or Other Nonacademic Student	101(a)(15)(M)(i).
M2	Spouse or Child of M1	101(a)(15)(M)(ii).
M3	Canadian or Mexican national commuter student (Vocational student or other nonacademic student).	101(a)(15)(M)(iii).
N8	Parent of an Alien Classified SK3 or SN3	101(a)(15)(N)(i).
N9	Child of N8 or of SK1, SK2, SK4, SN1, SN2 or SN4	101(a)(15)(N)(ii).
NATO 1	Principal Permanent Representative of Member State to NATO (including any of its Subsidiary Bodies) Resident in the U.S. and Resident Members of Official Staff; Secretary General, Assistant Secretaries General, and Executive Secretary of NATO; Other Permanent NATO Officials of Similar Rank, or Immediate Family.	Art. 12, 5 UST 1094; Art. 20, 5 UST 1098.
NATO 2	Other Representative of member state to NATO (including any of its Subsidiary Bodies) including Representatives, Advisers, and Technical Experts of Delegations, or Immediate Family; Dependents of Member of a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement or in Accordance with the provisions of the ''Protocol on the Status of International Military Headquarters''; Members of Such a Force if Issued Visas.	Art. 13, 5 UST 1094; Art. 1, 4 UST 1794; Art. 3, 4 UST 1796.
NATO 3	Official Clerical Staff Accompanying Representative of Member State to NATO (including any of its Subsidiary Bodies), or Immediate Family.	Art. 14, 5 UST 1096.
NATO 4	Official of NATO (Other Than Those Classifiable as NATO1), or Immediate Family.	Art. 18, 5 UST 1098.
NATO 5	Experts, Other Than NATO Officials Classifiable Under NATO4, Employed in Missions on Behalf of NATO, and their Dependents.	Art. 21, 5 UST 1100.
NATO 6	Member of a Civilian Component Accompanying a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement; Member of a Civilian Component Attached to or Employed by an Allied Headquarters Under the ''Protocol on the Status of International Military Headquarters'' Set Up Pursuant to the North Atlantic Treaty; and their Dependents.	Art. 1, 4 UST 1794; Art. 3, 5 UST 877.

Symbol	Class	Section of law
NATO 7	Attendant, Servant, or Personal Employee of NATO1, NATO2, NATO 3, NATO4, NATO5, and NATO6 Classes, or Immediate Family.	Arts. 12–20, 5 UST 1094–1098.
O1	Alien with Extraordinary Ability in Sciences, Arts, Education, Business or Athletics.	101(a)(15)(O)(i).
O2	Alien Accompanying and Assisting in the Artistic or Athletic Performance by O1.	101(a)(15)(O)(ii).
O3	Spouse or Child of O1 or O2	101(a)(15)(O)(iii).
P1	Internationally Recognized Athlete or Member of Internationally Recognized Entertainment Group.	101(a)(15)(P)(i).
P2	Artist or Entertainer in a Reciprocal Exchange Program	101(a)(15)(P)(ii).
P3	Artist or Entertainer in a Culturally Unique Program	101(a)(15)(P)(iii).
P4	Spouse or Child of P1, P2, or P3	101(a)(15)(P)(iv).
Q1	Participant in an International Cultural Exchange Program	101(a)(15)(Q)(i).
Q2	Irish Peace Program Participant	101(a)(15)(Q)(ii)(I).
Q3	Spouse or Child of Q2	101(a)(15)(Q)(ii)(II).
R1	Alien in a Religious Occupation	101(a)(15)(R).
R2	Spouse or Child of R1	101(a)(15)(R).
S5	Certain Aliens Supplying Critical Information Relating to a Criminal Organization or Enterprise.	101(a)(15)(S)(i).
S6	Certain Aliens Supplying Critical Information Relating to Terrorism.	101(a)(15)(S)(ii).
S7	Qualified Family Member of S5 or S6	101(a)(15)(S).
T1	Victim of a severe form of trafficking in persons	101(a)(15)(T)(i).
T2	Spouse of T1	101(a)(15)(T)(ii).
T3	Child of T1	101(a)(15)(T)(ii).
T4	Parent of a T1 under 21 years of age	101(a)(15)(T)(ii).
T5	Unmarried Sibling under age 18 of T1 under 21 years of age.	101(a)(15)(T)(ii).
T6	Adult or Minor Child of a Derivative Beneficiary of a T1	101(a)(15)(T)(ii).
TN	NAFTA Professional	214(e)(2).
TD	Spouse or Child of a NAFTA Professional	214(e)(2).
U1	Victim of criminal activity	101(a)(15)(U)(i).
U2	Spouse of U1	101(a)(15)(U)(ii).
U3	Child of U1	101(a)(15)(U)(ii).
U4	Parent of U1 under 21 years of age	101(a)(15)(U)(ii).
U5	Unmarried Sibling under age 18 of U1 under 21 years of age.	101(a)(15)(U)(ii).
V1	Spouse of a Lawful Permanent Resident Alien Awaiting Availability of Immigrant Visa.	101(a)(15)(V)(i) or 101(a)(15)(V)(ii).
V2	Child of a Lawful Permanent Resident Alien Awaiting Availability Of Immigrant Visa.	101(a)(15)(V)(i) or 101(a)(15)(V)(ii).
V3	Child of a V1 or V2	203(d) & 101(a)(15)(V)(i) or 101 (a)(15)(V)(ii).

[78 FR 68992, Nov. 18, 2013]

Subpart C—Foreign Government Officials

§41.21 Foreign Officials—General.

(a) *Definitions*. In addition to pertinent INA definitions, the following definitions are applicable:

(1) *Accredited*, as used in INA 101(a)(15)(A), 101(a)(15)(G), and 212(d)(8), means an alien holding an official position, other than an honorary official position, with a government or international organization and possessing a travel document or other evidence of intention to enter or transit the United States to transact official business for that government or international organization.

(2) *Attendants*, as used in INA 101(a)(15)(A)(iii), 101(a)(15)(G)(v), and 212(d)(8), and in the definition of the NATO–7 visa symbol, means aliens paid from the public funds of a foreign government or from the funds of an international organization, accompanying or following to join the principal alien to whom a duty or service is owed.

(3) *Immediate family*, as used in INA 101(a)(15)(A), 101(a)(15)(G), and 212(d)(8), and in classification under the NATO visa symbols, means the spouse and unmarried sons and daughters, whether by blood or adoption, who are not members of some other household, and who will reside regularly in the household of the principal alien. ''Immediate family'' also includes individuals who:

(i) Are not members of some other household;

(ii) Will reside regularly in the household of the principal alien;

(iii) Are recognized as immediate family members of the principal alien by the sending Government as demonstrated by eligibility for rights and benefits, such as the issuance of a diplomatic or official passport, or travel or other allowances; and

(iv) Are individually authorized by the Department.

(4) *Servants* and *personal employees*, as used in INA 101(a)(15)(A)(iii), 101(a)(15)(G)(v), and 212(d)(8), and in classification under the NATO–7 visa symbol, means aliens employed in a domestic or personal capacity by a principal alien, who are paid from the private funds of the principal alien and seek to enter the United States solely for the purpose of such employment.

(b) *Exception to passport validity requirement for aliens in certain A, G, and NATO classes.* A nonimmigrant alien for whom the passport requirement of INA 212(a)(7)(B)(i)(I) has not been waived and who is within one of the classes:

(1) Described in INA 101(a)(15)(A)(i) and (ii); or

(2) Described in INA 101(a)(15)(G)(i), (ii), (iii), and (iv); or

(3) NATO–1, NATO–2, NATO–3, NATO–4, or NATO–6 may present a passport which is valid only for a sufficient period to enable the alien to apply for admission at a port of entry prior to its expiration.

(c) *Exception to passport validity requirement for foreign government officials in transit.* An alien classified C–3 under INA 212(d)(8) needs to present only a valid unexpired visa and a travel document which is valid for entry into a foreign country for at least 30 days from the date of application for admission into the United States.

(d) *Grounds for refusal of visas applicable to certain A, C, G, and NATO classes.* (1) An A–1 or A–2 visa may not be issued to an alien the Department has determined to be persona non grata.

(2) Only the provisions of INA 212(a) cited below apply to the indicated classes of nonimmigrant visa applicants:

(i) Class A–1: INA 212(a) (3)(A), (3)(B), and (3)(C);

(ii) Class A–2: INA 212(a) (3)(A), (3)(B), and (3)(C);

(iii) Classes C–2 and C–3: INA 212(a) (3)(A), (3)(B), (3)(C), and (7)(B);

(iv) Classes G–1, G–2, G–3, and G–4: INA 212(a) (3)(A), (3)(B), and (3)(C);

(v) Classes NATO–1, NATO–2, NATO–3, NATO–4, and NATO–6: INA 212(a) (3)(A), (3)(B), and (3)(C);

(3) An alien within class A–3 or G–5 is subject to all grounds of refusal specified in INA 212 which are applicable to nonimmigrants in general.

(4) Notwithstanding the visa restrictions imposed by applicable laws and consistent with a provision in such laws providing for a regulatory exception to the visa restrictions contained therein, a visa may be issued to a visa applicant who is otherwise ineligible for a visa under such laws:

(i) To permit the United States to comply with the United Nations Headquarters Agreement and other applicable international obligations; and

(ii) To permit the United States and Burma to operate their diplomatic missions, and to permit the United States to conduct other official United States Government business in Burma.

[52 FR 42597, Nov. 5, 1987; 53 FR 9111, Mar. 21, 1988, as amended at 56 FR 30428, July 2, 1991; 73 FR 56729, Sept. 30, 2008; 74 FR 36113, July 22, 2009; 78 FR 66815, Nov. 6, 2013]

§ 41.22 Officials of foreign governments.

(a) *Criteria for classification of foreign government officials.* (1) An alien is classifiable A–1 or A–2 under INA section 101(a)(15)(A) (i) or (ii) if the principal alien:

(i) Has been accredited by a foreign government recognized de jure by the United States;

(ii) Intends to engage solely in official activities for that foreign government while in the United States; and

(iii) Has been accepted by the President, the Secretary of State, or a consular officer acting on behalf of the Secretary of State.

(2) A member of the immediate family of a principal alien is classifiable A–1 or A–2 under INA section 101(a)(15)(A)(i) or (ii) if the principal alien is so classified.

(b) *Classification under INA section 101(a)(15)(A).* An alien entitled to classification under INA section 101(a)(15)(A) shall be classified under this section even if eligible for another nonimmigrant classification. An exception may be made where an immediate family member classifiable as A–1 or A–2 under paragraph (a)(2) of this section is also independently classifiable as a principal under INA section 101(a)(15)(G)(i), (ii), (iii), or (iv).

(c) *Classification of attendants, servants, and personal employees.* An alien is classifiable as a nonimmigrant under INA 101(a)(15)(A)(iii) if the consular officer is satisfied that the alien qualifies under those provisions.

(d) *Referral to the Department of special cases concerning principal alien applicants.* In any case in which there is uncertainty about the applicability of these regulations to a principal alien applicant requesting such nonimmigrant status, the matter shall be immediately referred to the Department for consideration as to whether acceptance of accreditation will be granted.

(e) *Change of classification to that of a foreign government official.* In the case of an alien in the United States seeking a change of nonimmigrant classification under INA 248 to a classification under INA 101(a)(15)(A) (i) or (ii), the question of acceptance of accreditation is determined by the Department.

(f) *Termination of status.* The Department may, in its discretion, cease to recognize as entitled to classification under INA 101(a)(15)(A) (i) or (ii) any alien who has nonimmigrant status under that provision.

(g) *Classification of foreign government official.* A foreign government official or employee seeking to enter the United States temporarily other than as a representative or employee of a foreign government is not classifiable under the provisions of INA 101(a)(15)(A).

(h) *Courier and acting courier on official business*—(1) *Courier of career.* An alien regularly and professionally employed as a courier by the government of the country to which the alien owes allegiance is classifiable as a nonimmigrant under INA 101(a)(15)(A)(i), if the alien is proceeding to the United States on official business for that government.

(2) *Official acting as courier.* An alien not regularly and professionally employed as a courier by the government of the country to which the alien owes allegiance is classifiable as a nonimmigrant under INA 101(a)(15)(A)(ii), if the alien is holding an official position and is proceeding to the United States as a courier on official business for that government.

(3) *Nonofficial serving as courier.* An alien serving as a courier but not regularly and professionally employed as such who holds no official position with, or is not a national of, the country whose government the alien is serving, shall be classified as a nonimmigrant under INA 101(a)(15)(B).

(i) *Official of foreign government not recognized by the United States.* An official of a foreign government not recognized de jure by the United States, who is proceeding to or through the United States on an official mission or to an international organization shall be classified as a nonimmigrant under INA 101(a)(15) (B), (C), or (G)(iii).

[52 FR 42597, Nov. 5, 1987, as amended at 78 FR 33700, June 5, 2013]

§41.23 Accredited officials in transit.

An accredited official of a foreign government intending to proceed in immediate and continuous transit through the United States on official business for that government is entitled to the benefits of INA 212(d)(8) if that government grants similar privileges to officials of the United States, and is classifiable C–3 under the provisions of INA 101(a)(15)(C). Members of the immediate family, attendants, servants, or personal employees of such an official receive the same classification as the principal alien.

§41.24 International organization aliens.

(a) *Definition of international organization.* ''International organization'' means:

(1) Any public international organization which has been designated by the President by Executive Order as entitled to enjoy the privileges, exemptions, and immunities provided for in

the International Organizations Immunities Act (59 Stat. 669, 22 U.S.C. 288); and

(2) For the purpose of special immigrant status under INA 101(a)(27)(I), INTELSAT or any successor or separated entity thereof.

(b) *Aliens coming to international organizations.* (1) An alien is classifiable under INA 101(a)(15)(G) if the consular officer is satisfied that the alien is within one of the classes described in that section and seeks to enter or transit the United States in pursuance of official duties. If the purpose of the entry or transit is other than pursuance of official duties, the alien is not classifiable under INA *section* 101(a)(15)(G).

(2) An alien applying for a visa under the provisions of INA *section* 101(a)(15)(G) may not be refused solely on the grounds that the applicant is not a national of the country whose government the applicant represents.

(3) An alien seeking to enter the United States as a foreign government representative to an international organization, who is also proceeding to the United States on official business as a foreign government official within the meaning of INA *section* 101(a)(15)(A), shall be issued a visa under that section, if otherwise qualified.

(4) An alien not classified under INA *section* 101(a)(15)(A) but entitled to classification under INA *section* 101(a)(15)(G) shall be classified under the latter section, even if also eligible for another nonimmigrant classification. An alien classified under INA *section* 101(a)(15)(G) as an immediate family member of a principal alien classifiable G–1 or G–2, G–3 or G–4, may continue to be so classified even if he or she obtains employment subsequent to his or her initial entry into the United States that would allow classification under INA *section* 101(a)(15)(A). Such alien shall not be classified in a category other than A or G, even if also eligible for another nonimmigrant classification.

(c) *Officers and employees of privatized INTELSAT, their family members and domestic servants.* (1) Officers and employees of privatized INTELSAT who both were employed by INTELSAT, and held status under INA 101(a)(15)(G)(iv) for at least six months prior to privatization on July 17, 2001, will continue to be so classifiable for so long as they are officers or employees of INTELSAT or a successor or separated entity thereof.

(2) Aliens who had had G–4 status as officers and employees of INTELSAT but became officers or employees of a successor or separated entity of INTELSAT after at least six months of such employment, but prior to and in anticipation of privatization and subsequent to March 17, 2000, will also continue to be classifiable under INA 101(a)(15)(G)(iv) for so long as that employment continues.

(3) Family members of officers and employees described in paragraphs (c)(1) and (2) of this section who qualify as ''immediate family'' under § 41.21(a)(3) and who are accompanying or following to join the principal are also classifiable under INA 1010(a)(15)(G)(iv) for so long as the principal is so classified.

(4) Attendants, servants, and personal employees of officers and employees described in paragraphs (c)(1) and (2) of this section are not eligible for classification under INA 101(a)(15)(G)(v), given that the officers and employees described in paragraphs (c)(1) and (2) of this section are not officers or employees of an ''international organization'' for purposes of INA 101(a)(15)(G).

[52 FR 42597, Nov. 5, 1987, as amended at 67 FR 1414, Jan. 11, 2002; 67 FR 18822, Apr. 17, 2002; 78 FR 33700, June 5, 2013]

§ 41.25 NATO representatives, officials, and employees.

(a) *Classification.* An alien shall be classified under the symbol NATO–1, NATO–2, NATO–3, NATO–4, or NATO–5 if the consular officer is satisfied that the alien is seeking admission to the United States under the applicable provision of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, or is a member of the immediate family of an alien classified NATO–1 through NATO–5. (See § 41.12 for classes of aliens entitled to classification under each symbol.)

(b) *Armed services personnel.* Armed services personnel entering the United

States in accordance with the provisions of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces or in accordance with the provisions of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty may enter the United States under the appropriate treaty waiver of documentary requirements contained in §41.1 (d) or (e). If a visa is issued it is classifiable under the NATO–2 symbol.

(c) *Dependents of armed services personnel.* Dependents of armed services personnel referred to in paragraph (b) of this section shall be classified under the symbol NATO–2.

(d) *Members of civilian components and dependents.* Alien members of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, and dependents, or alien members of a civilian component attached to or employed by an Allied Headquarters under the Protocol on the Status of International Military Headquarters, and dependents shall be classified under the symbol NATO–6.

(e) *Attendant, servant, or personal employee of an alien classified NATO–1 through NATO–6.* An alien attendant, servant, or personal employee of an alien classified NATO–1 through NATO–6, and any member of the immediate family of such attendant, servant, or personal employee, shall be classified under the symbol NATO–7.

§41.26 Diplomatic visas.

(a) *Definitions.* (1) *Diplomatic passport* means a national passport bearing that title and issued by a competent authority of a foreign government.

(2) *Diplomatic visa* means any nonimmigrant visa, regardless of classification, which bears that title and is issued in accordance with the regulations of this section.

(3) *Equivalent of a diplomatic passport* means a national passport, issued by a competent authority of a foreign government which does not issue diplomatic passports to its career diplomatic and consular officers, indicating the career diplomatic or consular status of the bearer.

(b) *Place of application.* With the exception of certain aliens in the United States issued nonimmigrant visas by the Department under the provisions of §41.111(b), application for a diplomatic visa shall be made at a diplomatic mission or at a consular office authorized to issue diplomatic visas, regardless of the nationality or residence of the applicant.

(c) *Classes of aliens eligible to receive diplomatic visas.* (1) A nonimmigrant alien who is in possession of a diplomatic passport or its equivalent shall, if otherwise qualified, be eligible to receive a diplomatic visa irrespective of the classification of the visa under §41.12 if within one of the following categories:

(i) Heads of states and their alternates;

(ii) Members of a reigning royal family;

(iii) Governors-general, governors, high commissioners, and similar high administrative or executive officers of a territorial unit, and their alternates;

(iv) Cabinet ministers and their assistants holding executive or administrative positions not inferior to that of the head of a departmental division, and their alternates;

(v) Presiding officers of chambers of national legislative bodies;

(vi) Justices of the highest national court of a foreign country;

(vii) Ambassadors, public ministers, other officers of the diplomatic service and consular officers of career;

(viii) Military officers holding a rank not inferior to that of a brigadier general in the United States Army or Air Force and Naval officers holding a rank not inferior to that of a rear admiral in the United States Navy;

(ix) Military, naval, air and other attaché and assistant attaché assigned to a foreign diplomatic mission;

(x) Officers of foreign-government delegations to international organizations so designated by Executive Order;

(xi) Officers of foreign-government delegations to, and officers of, international bodies of an official nature, other than international organizations so designated by Executive Order;

(xii) Officers of a diplomatic mission of a temporary character proceeding to

or through the United States in the performance of their official duties;

(xiii) Officers of foreign-government delegations proceeding to or from a specific international conference of an official nature;

(xiv) Members of the immediate family of a principal alien who is within one of the classes described in paragraphs (c)(1)(i) to (c)(1)(xi) inclusive, of this section;

(xv) Members of the immediate family accompanying or following to join the principal alien who is within one of the classes described in paragraphs (c)(1)(xii) and (c)(1)(xiii) of this section;

(xvi) Diplomatic couriers proceeding to or through the United States in the performance of their official duties.

(2) Aliens Classifiable G–4, who are otherwise qualified, are eligible to receive a diplomatic visa if accompanying these officers:

(i) The Secretary General of the United Nations;

(ii) An Under Secretary General of the United Nations;

(iii) An Assistant Secretary General of the United Nations;

(iv) The Administrator or the Deputy Administrator of the United Nations Development Program;

(v) An Assistant Administrator of the United Nations Development Program;

(vi) The Executive Director of the:

(A) United Nation's Children's Fund;

(B) United Nations Institute for Training and Research;

(C) United Nations Industrial Development Organization;

(vii) The Executive Secretary of the:

(A) United Nations Economic Commission for Africa;

(B) United Nations Economic Commission for Asia and the Far East;

(C) United Nations Economic Commission for Latin America;

(D) United Nations Economic Commission for Europe;

(viii) The Secretary General of the United Nations Conference on Trade and Development;

(ix) The Director General of the Latin American Institute for Economic and Social Planning;

(x) The United Nations High Commissioner for Refugees;

(xi) The United Nations Commissioner for Technical Cooperation;

(xii) The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East;

(xiii) The spouse or child of any nonimmigrant alien listed in paragraphs (c)(2)(i) through (c)(2)(xii) of this section.

(3) Other individual aliens or classes of aliens are eligible to receive diplomatic visas upon authorization of the Department, the Chief of a U.S. Diplomatic Mission, the Deputy Chief of Mission, the Counselor for Consular Affairs or the principal officer of a consular post not under the jurisdiction of a diplomatic mission.

[52 FR 42597, Nov. 5, 1987; 53 FR 9111, Mar. 21, 1988]

§ 41.27 Official visas.

(a) *Definition*. *Official visa* means any nonimmigrant visa, regardless of classification, which bears that title and is issued in accordance with these regulations.

(b) *Place of application*. Official visas are ordinarily issued only when application is made in the consular district of the applicant's residence. When directed by the Department, or in the discretion of the consular officer, official visas may be issued when application is made in a consular district in which the alien is physically present but does not reside. Certain aliens in the United States may be issued official visas by the Department under the provisions of § 41.111(b).

(c) *Classes of aliens eligible to receive official visas*. (1) A nonimmigrant within one of the following categories who is not eligible to receive a diplomatic visa shall, if otherwise qualified, be eligible to receive an official visa irrespective of classification of the visa under § 41.12:

(i) Aliens within a class described in § 41.26(c)(2) who are ineligible to receive a diplomatic visa because they are not in possession of a diplomatic passport or its equivalent;

(ii) Aliens classifiable under INA 101(a)(15)(A);

(iii) Aliens, other than those described in § 41.26(c)(3) who are classifiable under INA 101(a)(15)(G), except those classifiable under INA 101(a)(15)(G)(iii) unless the government

of which the alien is an accredited representative is recognized *de jure* by the United States;

(iv) Aliens classifiable under INA 101(a)(15)(C) as nonimmigrants described in INA 212(d)(8);

(v) Members and members-elect of national legislative bodies;

(vi) Justices of the lesser national and the highest state courts of a foreign country;

(vii) Officers and employees of national legislative bodies proceeding to or through the United States in the performance of their official duties;

(viii) Clerical and custodial employees attached to foreign-government delegations to, and employees of, international bodies of an official nature, other than international organizations so designated by Executive Order, proceeding to or through the United States in the performance of their official duties;

(ix) Clerical and custodial employees attached to a diplomatic mission of a temporary character proceeding to or through the United States in the performance of their official duties;

(x) Clerical and custodial employees attached to foreign-government delegations proceeding to or from a specific international conference of an official nature;

(xi) Officers and employees of foreign governments recognized *de jure* by the United States who are stationed in foreign contiguous territories or adjacent islands;

(xii) Members of the immediate family, attendants, servants and personal employees of, when accompanying or following to join, a principal alien who is within one of the classes referred to or described in paragraphs (c)(1)(i) through (c)(1)(xi) inclusive of this section;

(xiii) Attendants, servants and personal employees accompanying or following to join a principal alien who is within one of the classes referred to or described in paragraphs (c)(1)(i) through (c)(1)(xiii) inclusive of §41.26(c)(2).

(2) Other individual aliens or classes of aliens are eligible to receive official visas upon the authorization of the Department, the Chief of a U.S. Diplomatic Mission, the Deputy Chief of Mission, the Counselor for Consular Affairs, or the principal officer of a consular post not under the jurisdiction of a diplomatic mission.

[52 FR 42597, Nov. 5, 1987; 53 FR 9111, Mar. 21, 1988]

Subpart D—Temporary Visitors

§41.31 Temporary visitors for business or pleasure.

(a) *Classification.* An alien is classifiable as a nonimmigrant visitor for business (B–1) or pleasure (B–2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(B), and that:

(1) The alien intends to leave the United States at the end of the temporary stay (consular officers are authorized, if departure of the alien as required by law does not seem fully assured, to require the posting of a bond with the Secretary of Homeland Security in a sufficient sum to ensure that at the end of the temporary visit, or upon failure to maintain temporary visitor status, or any status subsequently acquired under INA 248, the alien will depart from the United States);

(2) The alien has permission to enter a foreign country at the end of the temporary stay; and

(3) Adequate financial arrangements have been made to enable the alien to carry out the purpose of the visit to and departure from the United States.

(b) *Definitions.* (1) The term ''business,'' as used in INA 101(a)(15)(B), refers to conventions, conferences, consultations and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire. For the purposes of this section building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire; provided that the supervision or training of others engaged in building or construction work (but not the actual performance of any such building or construction work) shall not be deemed to constitute purely local employment or labor for hire if the alien is otherwise qualified as a B–1 nonimmigrant. An alien seeking to enter as a nonimmigrant for employment or

labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53. An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.

(2) The term *pleasure*, as used in INA 101(a)(15)(B), refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature.

[52 FR 42597, Nov. 5, 1987; 53 FR 9172, Mar. 21, 1988]

§ 41.32 Nonresident alien Mexican border crossing identification cards; combined border crossing identification cards and B–1/B–2 visitor visas.

(a) *Combined B–1/B–2 visitor visa and border crossing identification card (B–1/B–2 Visa/BCC)*—(1) *Authorization for issuance*. Consular officers assigned to a consular office in Mexico designated by the Deputy Assistant Secretary for Visa Services for such purpose may issue a border crossing identification card, as that term is defined in INA 101(a)(6), in combination with a B–1/B–2 nonimmigrant visitor visa (B–1/B–2 Visa/BCC), to a nonimmigrant alien who:

(i) Is a citizen and resident of Mexico;

(ii) Seeks to enter the United States as a temporary visitor for business or pleasure as defined in INA 101(a)(15)(B) for periods of stay not exceeding six months;

(iii) Is otherwise eligible for a B–1 or a B–2 temporary visitor visa.

(2) *Procedure for application*. Mexican applicants shall apply for a B–1/B–2 Visa/BCC at any U.S. consular office in Mexico designated by the Deputy Assistant Secretary of State for Visa Services pursuant to paragraph (a) of this section to accept such applications. The application shall be submitted electronically on Form DS–160 or, as directed by a consular officer, on Form DS–156. If submitted electronically, it must be signed electronically by clicking the box designated ''Sign Application'' in the certification section of the application.

(3) *Personal appearance*. Each applicant shall appear in person before a consular officer to be interviewed regarding eligibility for a visitor visa, unless the consular officer waives personal appearance.

(4) *Issuance and format*. A B–1/B–2 Visa/BCC issued on or after April 1, 1998, shall consist of a card, Form DSP–150, containing a machine-readable biometric identifier. It shall contain the following data:

(i) Post symbol;

(ii) Number of the card;

(iii) Date of issuance;

(iv) Indicia ''B–1/B–2 Visa and Border Crossing Card'';

(v) Name, date of birth, and sex of the person to whom issued; and

(vi) Date of expiration.

(b) *Validity*. A BCC previously issued by a consular officer in Mexico on Form I–186, Nonresident Alien Mexican Border Crossing Card, or Form I–586, Nonresident Alien Border Crossing Card, is valid until the expiration date on the card (if any) unless previously revoked, but not later than the date, currently October 1, 2001, on which a machine-readable, biometric identifier in the card is required in order for the card to be usable for entry. The BCC portion of a B–1/B–2 Visa/BCC issued to a Mexican national pursuant to provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998 is valid until the date of expiration, unless previously revoked, but not later than the date, currently October 1, 2001, on which a machine-readable, biometric identifier in the card is required in order for the card to be usable for entry.

(c) *Revocation*. A consular or immigration officer may revoke a BCC issued on Form I–186 or Form I–586, or a B–1/B–2 Visa/BCC under the provisions of § 41.122, or if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a resident and/or a citizen of Mexico. Upon revocation, the consular or immigration officer shall notify the issuing consular or immigration office. If the revoked

document is a card, the consular or immigration officer shall take possession of the card and physically cancel it under standard security conditions. If the revoked document is a stamp in a passport the consular or immigration officer shall write or stamp ''canceled'' on the face of the document.

(d) *Voidance*. (1) The voiding pursuant to INA 222(g) of the visa portion of a B–1/B–2 Visa/BCC issued at any time by a consular officer in Mexico under provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, also voids the BCC portion of that document.

(2) A BCC issued at any time by a consular officer in Mexico under any provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, is void if a consular or immigration officer determines that the alien has violated the conditions of the alien's admission into the United States, including the period of stay authorized by the Secretary of Homeland Security.

(3) A consular or immigration officer shall immediately take possession of a card determined to be void under paragraphs (d) (1) or (2) of this section and physically cancel it under standard security conditions. If the document voided in paragraphs (d) (1) or (2) is in the form of a stamp in a passport the officer shall write or stamp ''canceled'' across the face of the document.

(e) *Replacement*. When a B–1/B–2 Visa/BCC issued under the provisions of this section, or a BCC or B–1/B–2 Visa/BCC issued under any provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, has been lost, mutilated, destroyed, or expired, the person to whom such card was issued may apply for a new B–1/B–2 Visa/BCC as provided in this section.

[64 FR 45163, Aug. 19, 1999, as amended at 71 FR 30591, May 30, 2006; 71 FR 34521, June 15, 2006; 73 FR 23068, Apr. 29, 2008]

§41.33 Nonresident alien Canadian border crossing identification card (BCC).

(a) *Validity of Canadian BCC*. A Canadian BCC or the BCC portion of a Canadian B–1/B–2 Visa/BCC issued to a permanent resident of Canada pursuant to provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, is valid until the date of expiration, if any, unless previously revoked, but not later than the date, currently October 1, 2001, on which a machine readable biometric identifier is required in order for a BCC to be usable for entry.

(b) *Revocation of Canadian BCC*. A consular or immigration officer may revoke a BCC or a B–1/B–2 Visa/BCC issued in Canada at any time under the provisions of §41.122, or if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a permanent resident of Canada. Upon revocation, the consular or immigration officer shall notify the issuing consular office and if the revoked document is a card, the consular or immigration officer shall take possession of the card and physically cancel it under standard security conditions. If the revoked document is a stamp in a passport the consular or immigration officer shall write or stamp ''canceled'' on the face of the document.

(c) *Voidance*. (1) The voiding pursuant to INA 222(g) of the visa portion of a B–1/B–2 Visa/BCC issued at any time by a consular officer in Canada under provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, also voids the BCC portion of that document.

(2) A BCC issued at any time by a consular officer in Canada under any provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998, is void if a consular or immigration officer finds that the alien has violated the conditions of the alien's admission into the United States, including the period of stay authorized by the Secretary of Homeland Security.

(3) A consular or immigration officer shall immediately take possession of a card determined to be void under paragraphs (c) (1) or (2) of this section and physically cancel it under standard security conditions. If the document voided under paragraphs (c) (1) or (2) is in the form of a stamp in a passport the officer shall write or stamp ''canceled'' across the face of the document.

[64 FR 45164, Aug. 19, 1999]

Subpart E—Crewman and Crew-List Visas

§ 41.41 Crewmen.

(a) *Alien classifiable as crewman.* An alien is classifiable as a nonimmigrant crewman upon establishing to the satisfaction of the consular officer the qualifications prescribed by INA 101(a)(15)(D), provided that the alien has permission to enter some foreign country after a temporary landing in the United States, unless the alien is barred from such classification under the provisions of INA 214(f).

(b) *Alien not classifiable as crewman.* An alien employed on board a vessel or aircraft in a capacity not required for normal operation and service, or an alien employed or listed as a regular member of the crew in excess of the number normally required, shall not be classified as a crewman.

[52 FR 42597, Nov. 5, 1987, as amended at 66 FR 10364, Feb. 15, 2001]

§ 41.42 [Reserved]

Subpart F—Business and Media Visas

§ 41.51 Treaty trader, treaty investor, or treaty alien in a specialty occupation.

(a) *Treaty trader*—(1) *Classification.* An alien is classifiable as a nonimmigrant treaty trader (E–1) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(i) and that the alien:

(i) Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, principally between the United States and the foreign state of which the alien is a national, (consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade); and

(ii) Intends to depart from the United States upon the termination of E–1 status.

(2) *Employee of treaty trader.* An alien employee of a treaty trader may be classified E–1 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:

(i) A person having the nationality of the treaty country, who is maintaining the status of treaty trader if in the United States or, if not in the United States, would be classifiable as a treaty trader; or

(ii) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty trader status if residing in the United States or, if not residing in the United States, who would be classifiable as treaty traders.

(3) *Spouse and children of treaty trader.* The spouse and children of a treaty trader accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty trader is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).

(4) *Representative of foreign information media.* Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of INA 101(a)(15)(I), before consideration is given to their possible classification as treaty traders under the provisions of INA 101(a)(15)(E) and of this section.

(5) *Treaty country.* A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).

(6) *Nationality of the treaty country.* The authorities of the foreign state of which the alien claims nationality determine the nationality of an individual treaty trader. In the case of an organization, ownership must be traced

as best as is practicable to the individuals who ultimately own the organization.

(7) *Trade.* The term ''trade'' as used in this section means the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties that call for the immediate exchange of items of trade. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.

(8) *Item of trade.* Items that qualify for trade within these provisions include but are not limited to goods, services, technology, monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.

(9) *Substantial trade.* Substantial trade for the purposes of this section entails the quantum of trade sufficient to ensure a continuous flow of trade items between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight is given to more numerous exchanges of larger value. In the case of smaller businesses, an income derived from the value of numerous transactions that is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.

(10) *Principal trade.* Trade shall be considered to be principal trade between the United States and the treaty country when over 50% of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.

(11) *Executive or supervisory character.* The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.

(i) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(ii) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

(12) *Special qualifications.* Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(i) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(ii) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States.

(13) *Labor disputes.* Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

(i) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and

(ii) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

(b) *Treaty investor*—(1) *Classification*. An alien is classifiable as a nonimmigrant treaty investor (E'2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:

(i) Has invested or is actively in the process of investing a substantial amount of capital in bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and

(ii) Is seeking entry solely to develop and direct the enterprise; and

(iii) Intends to depart from the United States upon the termination of E'2 status.

(2) *Employee of treaty investor*. An alien employee of a treaty investor may be classified E–2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:

(i) A person having the nationality of the treaty country, who is maintaining the status of treaty investor if in the United States or, if not in the United States, who would be classifiable as a treaty investor; or

(ii) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty investor status if residing in the United States or, if not residing in the United States, who would be classifiable as treaty investors.

(3) *Spouse and children of treaty investor*. The spouse and children of a treaty investor accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty investor is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).

(4) *Representative of foreign information media*. Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of INA 101(a)(15)(I), before consideration is given to their possible classification as nonimmigrants under the provisions of INA 101(a)(15)(E) and of this section.

(5) *Treaty country*. A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).

(6) *Nationality of the treaty country*. The authorities of the foreign state of which the alien claims nationality determine the nationality of an individual treaty investor. In the case of an organization, ownership must be traced as best as is practicable to the individuals who ultimately own the organization.

(7) *Investment*. Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might

also extend some personal liability protection to the treaty investor.

(8) *Bona fide enterprise*. The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(9) *Substantial amount of capital*. A substantial amount of capital constitutes that amount that is:

(i)(A) Substantial in the proportional sense, *i.e.*, in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

(B) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(C) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

(ii) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; *i.e.*, the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

(10) *Marginal enterprise*. A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.

(11) *Solely to develop and direct*. The business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.

(12) *Executive or supervisory character*. The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.

(i) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(ii) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

(13) *Special qualifications*. Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(i) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(ii) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a

service not generally available in the United States.

(14) *Labor disputes*. Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

(i) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and

(ii) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

(c) *Nonimmigrant E–3 treaty aliens in specialty occupations*—(1) *Classification*. An alien is classifiable as a nonimmigrant treaty alien in a specialty occupation if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(iii) and that the alien:

(i) Possesses the nationality of the country statutorily designated for treaty aliens in specialty occupation status;

(ii) Satisfies the requirements of INA 214(i)(1) and the corresponding regulations defining specialty occupation promulgated by the Department of Homeland Security;

(iii) Presents to a consular officer a copy of the Labor Condition Application signed by the employer and approved by the Department of Labor, and meeting the attestation requirements of INA Section 212(t)(1);

(iv) Presents to a consular officer evidence of the alien's academic or other qualifying credentials as required under INA 214(i)(1), and a job offer letter or other documentation from the employer establishing that upon entry into the United States the applicant will be engaged in qualifying work in a specialty occupation, as defined in paragraph (c)(1)(ii) of this section, and that the alien will be paid the actual or prevailing wage referred to in INA 212(t)(1);

(v) Has a visa number allocated under INA 214(g)(11)(B); and,

(vi) Intends to depart upon the termination of E–3 status.

(2) *Spouse and children of treaty alien in a specialty occupation*. The spouse and children of a treaty alien in a specialty occupation accompanying or following to join the principal alien are, if otherwise admissible, entitled to the same classification as the principal alien. A spouse or child of a principal E–3 treaty alien need not have the same nationality as the principal in order to be classifiable under the provisions of INA 101(a)(15)(E). Spouses and children of E–3 principals are not subject to the numerical limitations of INA 214(g)(11)(B).

[70 FR 52293, Sept. 2, 2005]

§ 41.52 Information media representative.

(a) *Representative of foreign press, radio, film, or other information media*. An alien is classifiable as a nonimmigrant information media representative if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(I) and is a representative of a foreign press, radio, film, or other information medium having its home office in a foreign country, the government of which grants reciprocity for similar privileges to representatives of such a medium having home offices in the United States.

(b) *Classification when applicant eligible for both I visa and E visa*. An alien who will be engaged in foreign information media activities in the United States and meets the criteria set forth in paragraph (a) of this section shall be classified as a nonimmigrant under INA 101(a)(15)(I) even if the alien may also be classifiable as a nonimmigrant under the provisions of INA 101(a)(15)(E).

(c) *Spouse and children of information media representative*. The spouse or child of an information media representative is classifiable under INA 101(a)(15)(I) if accompanying or following to join the principal alien.

§ 41.53 Temporary workers and trainees.

(a) *Requirements for H classification*. An alien shall be classifiable under INA 101(a)(15)(H) if:

(1) The consular officer is satisfied that the alien qualifies under that section; and either

(2) With respect to the principal alien, the consular officer has received official evidence of the approval by DHS, or by the Department of Labor in the case of temporary agricultural workers, of a petition to accord such classification or of the extension by DHS of the period of authorized entry in such classification; or

(3) The consular officer is satisfied the alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Petition approval.* The approval of a petition by the Department of Homeland Security or by the Department of Labor does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Validity of visa.* The period of validity of a visa issued on the basis of paragraph (a) to this section must not exceed the period indicated in the petition, notification, or confirmation required in paragraph (a)(2) of this section.

(d) *Alien not entitled to H classification.* The consular officer must suspend action on this alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa under INA 101(a)(15)(H) is not entitled to the classification as approved.

(e) *''Trainee'' defined.* The term *Trainee,* as used in INA 101(a)(15)(H)(iii), means a nonimmigrant alien who seeks to enter the United States temporarily at the invitation of an individual, organization, firm, or other trainer for the purpose of receiving instruction in any field of endeavor (other than graduate medical education or training), including agriculture, commerce, communication, finance, government, transportation, and the professions.

(f) *Former exchange visitor.* Former exchange visitors who are subject to the 2-year residence requirement of INA 212(e) are ineligible to apply for visas under INA 101(a)(15)(H) until they have fulfilled the residence requirement or obtained a waiver of the requirement.

[57 FR 31449, July 16, 1992; as amended at 61 FR 1833, Jan. 24, 1996; 65 FR 52306, Aug. 29, 2000]

§41.54 Intracompany transferees (executives, managers, and specialized knowledge employees).

(a) *Requirements for L classification.* An alien shall be classifiable under the provisions of INA section 101(a)(15)(L) if:

(1) The consular officer is satisfied that the alien qualifies under that section; and either

(2) In the case of an individual petition, the consular officer has received official evidence of the approval by DHS of a petition to accord such classification or of the extension by DHS of the period of authorized stay in such classification; or

(3) In the case of a blanket petition,

(i) The alien has presented to the consular officer official evidence of the approval by DHS of a blanket petition listing only those intracompany relationships and positions found to qualify under INA section 101(a)(15)(L);

(ii) The alien is otherwise eligible for L–1 classification pursuant to the blanket petition; and,

(iii) The alien requests that he or she be accorded such classification for the purpose of being transferred to, or remaining in, qualifying positions identified in such blanket petition; or

(4) The consular officer is satisfied the alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Petition approval.* The approval of a petition by DHS does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Alien not entitled to L–1 classification under individual petition.* The consular officer must suspend action on the alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa as the beneficiary of an approved individual petition under INA section 101(a)(15)(L) is not entitled to such classification as approved.

(d) *Labor disputes*. Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

(1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and,

(2) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

(e) *Alien not entitled to L–1 classification under blanket petition*. The consular officer shall deny L classification based on a blanket petition if the documentation presented by the alien claiming to be a beneficiary thereof does not establish to the satisfaction of the consular officer that

(1) The alien has been continuously employed by the same employer, an affiliate or a subsidiary thereof, for one year within the three years immediately preceding the application for the L visa;

(2) The alien was rendering services in a capacity that is managerial, executive, or involves specialized knowledge throughout that year; or

(3) The alien is destined to render services in such a capacity, as identified in the petition and in an organization listed in the petition.

(f) *Former exchange visitor*. Former exchange visitors who are subject to the two-year foreign residence requirement of INA section 212(e) are ineligible to apply for visas under INA section 101(a)(15)(L) until they have fulfilled the residence requirement or obtained a waiver of the requirement.

[77 FR 8120, Feb. 14, 2012]

§ 41.55 Aliens with extraordinary ability.

(a) *Requirements for O classification*. An alien shall be classifiable under the provisions of INA 101(a)(15)(O) if:

(1) The consular officer is satisfied that the alien qualifies under the provisions of that section; and either

(2) With respect to the principal alien, the consular officer has received official evidence of the approval by DHS of a petition to accord such classification or of the extension by DHS of the period of authorized stay in such classification; or

(3) The consular officer is satisfied the alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Approval of visa*. The approval of a petition by DHS does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Validity of visa*. The period of validity of a visa issued on the basis of paragraph (a) to this section must not exceed the period indicated in the petition, notification, or confirmation required in paragraph (a)(2) of this section.

(d) *Alien not entitled to O classification*. The consular officer must suspend action on the alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa under INA 101(a)(15)(O) is not entitled to the classification as approved.

[57 FR 31450, July 16, 1992; as amended at 61 FR 1833, Jan. 24, 1996]

§ 41.56 Athletes, artists and entertainers.

(a) *Requirements for P classification*. An alien shall be classifiable under the provisions of INA 101(a)(15)(P) if:

(1) The consular officer is satisfied that the alien qualifies under the provisions of that section; and either

(2) With respect to the principal alien, the consular officer has received official evidence of the approval by DHS of a petition to accord such classification or of the extension by DHS of the period of authorized stay in such classification; or

(3) The consular officer is satisfied the alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Approval of visa*. The approval of a petition by DHS does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Validity of visa*. The period of validity of a visa issued on the basis of paragraph (a) to this section must not exceed the period indicated in the petition, confirmation, or extension of stay

required in paragraph (a)(2) of this section.

(d) *Alien not entitled to P classification.* The consular officer must suspend action on the alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa under INA 101(a)(15)(P) is not entitled to the classification as approved.

[57 FR 31450, July 16, 1992; as amended at 61 FR 1833, Jan. 24, 1996]

§41.57 International cultural exchange visitors and visitors under the Irish Peace Process Cultural and Training Program Act (IPPCTPA).

(a) *International cultural exchange visitors*—(1) *Requirements for classification under INA section 101(a)(15)(Q)(i).* A consular officer may classify an alien under the provisions of INA 101(a)(15)(Q)(i) if:

(i) The consular officer is satisfied that the alien qualifies under the provisions of that section, and

(ii) The consular officer has received official evidence of the approval by DHS of a petition or the extension by DHS of the period of authorized stay in such classification.

(2) *Approval of petition.* DHS approval of a petition does not establish that the alien is eligible to receive a nonimmigrant visa.

(3) *Validity of visa.* The period of validity of a visa issued on the basis of this paragraph (a) must not exceed the period indicated in the petition, notification, or confirmation required in paragraph (a)(2) of this section.

(4) *Alien not entitled to Q classification.* The consular officer must suspend action on the alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien does not qualify under INA section 101(a)(15)(Q)(i).

(b) *Trainees under INA section 101(a)(15)(Q)(ii)*—(1) *Requirements for classification under INA section 101(a)(15)(Q)(ii).* A consular officer may classify an alien under the provisions of INA section 101(a)(15)(Q)(ii) if:

(i) The consular officer is satisfied that the alien qualifies under the provisions of that section;

(ii) The consular officer has received a certification letter prepared by a program administration charged by the Department of State in consultation with the Department of Justice with the operation of the Irish Peace Process Cultural and Training Program (IPPCTP) which establishes at a minimum:

(A) The name of the alien's employer in the United States, and, if applicable, in Ireland or Northern Ireland;

(B) If the alien is participating in the IPPCTP as an unemployed alien, that the employment in the United States is in an occupation designated by the employment and training administration of the alien's place of residence as being most beneficial to the local economy;

(C) That the program administrator has accepted the alien into the program;

(D) That the alien has been physically resident in Northern Ireland or in the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal in the Republic of Ireland and the length of time immediately prior to the issuance of the letter that the alien has claimed such place as his or her residence;

(E) The alien's date and place of birth;

(F) If the alien is participating in the IPPCTP as an already employed participant, the length of time immediately prior to the issuance of the letter that the alien has been employed by an employer in the alien's place of physical residence;

(iii) If applicable, the consular officer is satisfied the alien is the spouse or child of an alien classified under INA section 101(a)(15)(Q)(ii), and is accompanying or following to join the principal alien.

(2) *Aliens not entitled to such classification.* The consular officer must suspend action on the alien's application and notify the alien and the designated program administrator described in paragraph (b)(1)(ii) of this section if the consular officer knows or has reason to believe that an alien does not qualify under INA section 101(a)(15)(Q)(ii).

[65 FR 14770, Mar. 17, 2000, as amended at 66 FR 52502, Oct. 16, 2001]

§ 41.58 Aliens in religious occupations.

(a) *Requirements for ''R'' classification.* An alien shall be classifiable under the provisions of INA 101(a)(15)(R) if:

(1) The consular officer is satisfied that the alien qualifies under the provisions of that section; and

(2) With respect to the principal alien, the consular officer has received official evidence of the approval by USCIS of a petition to accord such classification or the extension by USCIS of the period of authorized stay in such classification; or

(3) The alien is the spouse or child of an alien so classified and is accompanying or following to join the principal alien.

(b) *Petition approval.* The approval of a petition by USCIS does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Validity of visa.* The period of validity of a visa issued on the basis of paragraph (a) to this section must not precede or exceed the period indicated in the petition, notification, or confirmation required in paragraph (a)(2) of this section.

(d) *Aliens not entitled to classification under INA 101(a)(15)(R).* The consular officer must suspend action on the alien's application and submit a report to the approving USCIS office if the consular officer knows or has reason to believe that an alien applying for a visa under INA 101(a)(15)(R) is not entitled to the classification as approved.

[74 FR 51237, Oct. 6, 2009]

§ 41.59 Professionals under the North American Free Trade Agreement.

(a) *Requirements for classification as a NAFTA professional.* An alien shall be classifiable under the provisions of INA 214(e) if:

(1) The consular officer is satisfied that the alien qualifies under the provisions of that section; and

(2) The alien shall have presented to the consular officer sufficient evidence of an offer of employment in the United States requiring employment of a person in a professional capacity consistent with NAFTA Chapter 16 Annex 1603 Appendix 1603.D.1 and sufficient evidence that the alien possesses the credentials of that profession as listed in said appendix; or

(3) The alien is the spouse or child of an alien so classified in accordance with paragraph (a)(2) of this section and is accompanying or following to join the principal alien.

(b) *Visa validity.* The period of validity of a visa issued pursuant to paragraph (a) of this section may not exceed the period established on a reciprocal basis.

(c) *Temporary entry.* Temporary entry means an entry into the United States without the intent to establish permanent residence. The alien must satisfy the consular officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment.

(d) *Labor disputes.* Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

(1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and

(2) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

[58 FR 68527, Dec. 28, 1993, as amended at 63 FR 10305, Mar. 3, 1998; 79 FR 7583, Feb. 10, 2014]

Subpart G—Students and Exchange Visitors

§ 41.61 Students—academic and nonacademic.

(a) *Definitions*—(1) *Academic,* in INA 101(a)(15)(F), refers to an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution, or a language training program.

(2) *Nonacademic*, in INA 101(a)(15)(M), refers to an established vocational or other recognized nonacademic institution (other than a language training program).

(b) *Classification*. (1) An alien is classifiable under INA 101(a)(15)(F) (i) or (iii) or INA 101(a)(15)(M) (i) or (iii) if the consular officer is satisfied that the alien qualifies under one of those sections, and:

(i) The alien has been accepted for attendance for the purpose of pursuing a full course of study, or, for students classified under INA 101(a)(15) (F)(iii) and (M)(iii) Border Commuter Students, full or part-time course of study, in an academic institution approved by the Secretary of Homeland Security for foreign students under INA 101(a)(15)(F)(i) or a nonacademic institution approved under 101(a)(15)(M)(i). The alien has presented a SEVIS Form I–20, Form I–20A–B/I–20ID. Certificate of Eligibility For Nonimmigrant Student Status—For Academic and Language Students, or Form I–20M–N/I–20ID, Certificate of Eligibility for Nonimmigrant Student Status—For Vocational Students, properly completed and signed by the alien and a designated official as prescribed in regulations found at 8 CFR 214.2(F) and 214.2(M);

(ii) The alien possesses sufficient funds to cover expenses while in the United States or can satisfy the consular officer that other arrangements have been made to meet those expenses;

(iii) The alien, unless coming to participate exclusively in an English language training program, has sufficient knowledge of the English language to undertake the chosen course of study or training. If the alien's knowledge of English is inadequate, the consular officer may nevertheless find the alien so classifiable if the accepting institution offers English language training, and has accepted the alien expressly for a full course of study (or part-time course of study for Border Commuter Students) in a language with which the alien is familiar, or will enroll the alien in a combination of courses and English instruction which will constitute a full course of study if required; and

(iv) The alien intends, and will be able, to depart upon termination of student status.

(2) An alien otherwise qualified for classification as a student, who intends to study the English language exclusively, may be classified as a student under INA 101(a) (15) (F) (i) even though no credits are given by the accepting institution for such study. The accepting institution, however, must offer a full course of study in the English language and must accept the alien expressly for such study.

(3) The alien spouse and minor children of an alien who has been or will be issued a visa under INA 101(a) (15) (F) (i) or 101(a) (15) (M) (i) may receive nonimmigrant visas under INA 101(a) (15) (F) (ii) or 101(a) (15) (M) (ii) if the consular officer is satisfied that they will be accompanying or following to join the principal alien; that sufficient funds are available to cover their expenses in the United States; and, that they intend to leave the United States upon the termination of the status of the principal alien.

(c) *Posting of bond*. In borderline cases involving an alien otherwise qualified for classification under INA 101(a) (15) (F), the consular officer is authorized to require the posting of a bond with the Secretary of Homeland Security in a sum sufficient to ensure that the alien will depart upon the conclusion of studies or in the event of failure to maintain student status.

(d) *Electronic verification and notification*. A student's acceptance documentation must be verified by a consular official's review of the SEVIS data in the Consolidated Consular Database or via direct access to SEVIS or ISEAS prior to the issuance of an F–1, F–2, M–1 or M–3 visa. Evidence of the payment of any applicable fees, if not presented with other documentation, may also be verified through the Consolidated Consular Database or direct access to SEVIS. Upon issuance of an F or M visa, notification of such issuance must be entered into the SEVIS database.

[52 FR 42597, Nov. 5, 1987, as amended at 67 FR 58695, Sept. 18, 2002; 68 FR 28131, May 23, 2003]

§ 41.62 Exchange visitors.

(a) *J–1 classification.* An alien is classifiable as an exchange visitor if qualified under the provisions of INA 101(a) (15) (J) and the consular officer is satisfied that the alien:

(1) Has been accepted to participate, and intends to participate, in an exchange visitor program designated by the Bureau of Education and Cultural Affairs, Department of State, as evidenced by the presentation of a properly executed Form DS–2019, Certificate of Eligibility for Exchange Visitor (J–1) Status;

(2) Has sufficient funds to cover expenses or has made other arrangements to provide for expenses;

(3) Has sufficient knowledge of the English language to undertake the program for which selected, or, except for an alien coming to participate in a graduate medical education or training program, the sponsoring organization is aware of the language deficiency and has nevertheless indicated willingness to accept the alien; and

(4) Meets the requirements of INA 212(j) if coming to participate in a graduate medical education or training program.

(5) *Electronic verification and notification.* An exchange visitor's acceptance documentation and payment of any applicable fees must be verified by a consular official's review of the SEVIS database or via direct access to SEVIS or ISEAS prior to the issuance of a J–1 or J–2 visa. Evidence of the payment of any applicable fees, if not presented with other documentation, may also be verified through the Consolidated Consular Database or direct access to SEVIS. Upon issuance of a J–1 or J–2 visa, notification of such issuance must be entered into the SEVIS database.

(b) *J–2 Classification.* The spouse or minor child of an alien classified J–1 is classifiable J–2.

(c) *Applicability of INA 212(e).* (1) An alien is subject to the 2-year foreign residence requirement of INA 212(e) if:

(i) The alien's participation in one or more exchange programs was wholly or partially financed, directly or indirectly, by the U.S. Government or by the government of the alien's last legal permanent residence; or

(ii) At the time of the issuance of an exchange visitor visa and admission to the United States, or, if not required to obtain a nonimmigrant visa, at the time of admission as an exchange visitor, or at the time of acquisition of such status after admission, the alien is a national and resident or, if not a national, a legal permanent resident (or has status equivalent thereto) of a country which the Secretary of State has designated, through publication by public notice in the FEDERAL REGISTER, as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien will engage during the exchange visitor program; or

(iii) The alien acquires exchange visitor status in order to receive graduate medical education or training in the United States.

(2) For the purposes of this paragraph the terms *financed directly* and *financed indirectly* are defined as set forth in section § 514.1 of chapter V.

(3) The country in which 2 years' residence and physical presence will satisfy the requirements of INA 212(e) in the case of an alien determined to be subject to such requirements is the country of which the alien is a national and resident, or, if not a national, a legal permanent resident (or has status equivalent thereto).

(4) If an alien is subject to the 2-year foreign residence requirement of INA 212(e), the spouse or child of that alien, accompanying or following to join the alien, is also subject to that requirement if admitted to the United States pursuant to INA 101(a) (15) (J) or if status is acquired pursuant to that section after admission.

(d) *Notification to alien concerning 2-year foreign residence requirement.* Before the consular officer issues an exchange visitor visa, the consular officer must inform the alien whether the alien will be subject to the 2-year residence and physical presence requirement of INA 212(e) if admitted to the United States under INA 101(a) (15) (J) and, if so, the country in which 2 years' residence and physical presence will satisfy the requirement.

[52 FR 42597, Nov. 5, 1987, as amended at 67 FR 58695, Sept. 18, 2002; 68 FR 28132, May 23, 2003; 72 FR 10061, Mar. 7, 2007]

§41.63 Two-year home-country physical presence requirement.

(a) *Statutory basis for rule.* Section 212(e) of the Immigration and Nationality Act, as amended, provides in substance as follows:

(1) No person admitted under Section 101(a) (15)(J) or acquiring such status after admission:

(i) Whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the United States Government or by the government of the country of his nationality or of his last legal permanent residence;

(ii) Who at the time of admission or acquisition of status under 101(a)(15)(J) was a national or legal permanent resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged [See the most recent ''Revised Exchange Visitor Skills List'', at *http://exchanges.state.gov/education/jexchanges/participation/skills_list.pdf*]; or

(iii) Who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until is established that such person has resided and been physically present in the country of his nationality or his last legal permanent residence for an aggregate of at least two years following departure from the United States.

(2) Upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency (or in the case of an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training, pursuant to the request of a State Department of Public Health, or its equivalent), or of the Secretary of Homeland Security after the latter has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a legal permanent resident alien), or that the alien cannot return to the country of his nationality or last legal permanent residence because he would be subject to persecution on account of race, religion, or political opinion, the Secretary of Homeland Security may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Secretary of Homeland Security to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, the waiver shall be subject to the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184).

(3) Except in the case of an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training, the Secretary of Homeland Security, upon the favorable recommendation of the Secretary of State, may also waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last legal permanent residence has furnished the Secretary of State a statement in writing that it has no objection to such waiver in the case of such alien. Notwithstanding the foregoing, an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien meets the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a) (2) and (e) of this section.

(b) *Request for waiver on the basis of exceptional hardship or probable persecution on account of race, religion, or political opinion.* (1) An exchange visitor who seeks a waiver of the two-year home-country residence and physical presence requirement on the grounds that such requirement would impose exceptional hardship upon the exchange visitor's spouse or child (if such spouse or child is a citizen of the United States or a legal permanent resident alien), or on the grounds that

such requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, shall submit the application for waiver (DHS Form I–612) to the jurisdictional office of the Department of Homeland Security.

(2)(i) If the Secretary of Homeland Security (Secretary of DHS) determines that compliance with the two-year home-country residence and physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, or would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Secretary of DHS shall transmit a copy of his determination together with a summary of the details of the expected hardship or persecution, to the Waiver Review Division, in the Department of State's Bureau of Consular Affairs.

(ii) With respect to those cases in which the Secretary of DHS has determined that compliance with the two-year home-country residence and physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, make a recommendation, and forward it to the appropriate office at DHS. If it deems it appropriate, the Waiver Review Division may request the views of each of the exchange visitors' sponsors concerning the waiver application. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(iii) With respect to those cases in which the Secretary of DHS has determined that compliance with the two-year home-country residence and physical presence requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, including consultation if deemed appropriate with the Bureau of Human Rights and Humanitarian Affairs of the United States Department of State, make a recommendation, and forward such recommendation to the Secretary of DHS. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State and such recommendation shall be forwarded to DHS.

(c) *Requests for waiver made by an interested United States Government Department of State.* (1) A United States Government agency may request a waiver of the two-year home-country residence and physical presence requirement on behalf of an exchange visitor if such exchange visitor is actively and substantially involved in a program or activity sponsored by or of interest to such agency.

(2) A United States Government agency requesting a waiver shall submit its request in writing and fully explain why the grant of such waiver request would be in the public interest and the detrimental effect that would result to the program or activity of interest to the requesting agency if the exchange visitor is unable to continue his or her involvement with the program or activity.

(3) A request by a United States Government agency shall be signed by the head of the agency, or his or her designee, and shall include copies of all IAP 66 or DS–2019 forms issued to the exchange visitor, his or her current address, and his or her country of nationality or last legal permanent residence.

(4) A request by a United States Government agency, excepting the Department of Veterans Affairs, on behalf of an exchange visitor who is a foreign medical graduate who entered the United States to pursue graduate medical education or training, and who is willing to provide primary care or specialty medicine in a designated primary care Health Professional shortage Area, or a Medically Underserved Area, or psychiatric care in a Mental Health Professional Shortage Area, shall, in additional to the requirement set forth in paragraphs (c)(2) and (3) of this section, include:

(i) A copy of the employment contract between the foreign medical graduate and the health care facility at which he or she will be employed. Such

contract shall specify a term of employment of not less than three years and that the foreign medical graduate is to be employed by the facility for the purpose of providing not less than 40 hours per week of primary medical care, *i.e.*, general or family practice, general internal medicine, pediatrics, or obstetrics and gynecology, in a designated primary care Health Professional Shortage Area or designated Medically Underserved Area (''MUA'') or psychiatric care in a designated Mental Health Professional Shortage Area. Further, such employment contract shall not include a non-compete clause enforceable against the foreign medical graduate.

(ii) A statement, signed and dated by the head of the health care facility at which the foreign medical graduate will be employed, that the facility is located in an area designated by the Secretary of Health and Human Services as a Medically Underserved Area or Primary Medical Care Health Professional Shortage Area or Mental Health Professional Shortage Area and provides medical care to both Medicaid or Medicare eligible patients and indigent uninsured patients. The statement shall also list the primary care Health Professional Shortage Area, Mental Health Professional Shortage Area, or Medically Underserved Area/Population identifier number of the designation (assigned by the Secretary of Health and Human Services), and shall include the FIPS county code and census tract or block numbering area number (assigned by the Bureau of the Census) or the 9-digit zipcode of the area where the facility is located.

(iii) A statement, signed and dated by the foreign medical graduate exchange visitor that shall read as follows:

I, _____ (name of exchange visitor) hereby declare and certify, under penalty of the provisions of 18 U.S.C. 1001, that I do not now have pending nor am I submitting during the pendency of this request, another request to any United States Government department or agency or any State Department of Public Health, or equivalent, other than _____ (insert name of United States Government Agency requesting waiver) to act on my behalf in any matter relating to a waiver of my two-year home-country physical presence requirement.

(iv) Evidence that unsuccessful efforts have been made to recruit an American physician for the position to be filled.

(5) Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State and such recommendation shall be forwarded to the Secretary of DHS.

(d) *Requests for waiver made on the basis of a statement from the exchange visitor's home-country that it has no objection to the waiver*. (1) Applications for waiver of the two-year home-country residence and physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Secretary of State through diplomatic channels; *i.e.*, from the country's Foreign Office to the Department of State through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Secretary of State in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. If deemed appropriate, the Department of State may request the views of each of the exchange visitor's sponsors concerning the waiver application.

(2) The Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Secretary of DHS. Except as set forth in § 41.63(g)(4), infra, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(3) An exchange visitor who is a graduate of a foreign medical school and who is pursuing a program in graduate medical education or training in the United States is prohibited under section 212(e) of the Immigration and Nationality Act from applying for a waiver solely on the basis of no objection from his or her country of nationality or last legal permanent residence. However, an alien who is a graduate of a

foreign medical school pursuing a program in graduate medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien meets the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a)(2) and (e) of this section.

(e) *Requests for waiver from a State Department of Public Health, or its equivalent, on the basis of Public Law 103–416.* (1) Pursuant to Public Law 103–416, in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, a request for a waiver of the two-year home-country residence and physical presence requirement may be made by a State department of Public Health, or its equivalent. Such waiver shall be subject to the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1194(l)) and this § 41.63.

(2) With respect to such waiver under Public Law 104–416, if such alien is contractually obligated to return to his or her home country upon completion of the graduate medical education or training, the Secretary of State is to be furnished with a statement in writing that the country to which such alien is required to return has no objection to such waiver. The no objection statement shall be furnished to the Secretary of State in the manner and form set forth in paragraph (d) of this section and, additionally, shall bear a notation that it is being furnished pursuant to Public Law 103–416.

(3) The State Department of Public Health, or equivalent agency, shall include in the waiver application the following:

(i) A completed DS–3035. Copies of these forms may be obtained from the Visa Office or online at *http://www.travel.state.gov*.

(ii) A letter from the Director of the designated State Department of Public Health, or its equivalent, which identifies the foreign medical graduate by name, country of nationality or country of last legal permanent residence, and date of birth, and states that it is in the public interest that a waiver of the two-year home residence requirement be granted;

(iii) An employment contract between the foreign medical graduate and the health care facility named in the waiver application, to include the name and address of the health care facility, and the specific geographical area or areas in which the foreign medical graduate will practice medicine. The employment contract shall include a statement by the foreign medical graduate that he or she agrees to meet the requirements set forth in section 214(l) of the Immigration and Nationality Act. The term of the employment contract shall be at least three years and the geographical areas of employment shall only be in areas, within the respective state, designated by the Secretary of Health and Human Services as having a shortage of health care professionals, unless the waiver request is for an alien who will practice medicine in a facility that serves patients who reside in one or more geographic areas so designated by the Secretary of Health and Human Services without regard to whether such facility is located within such a designated geographic area. For the latter situation, which will be referred to as ''non-designated requests'', the contract should also state that the term of the employment contract shall be at least three years and employment shall only be in a facility that serves patients who reside in one or more geographic areas so designed by the Secretary of Health and Human Services as having a shortage of health care professionals.

(iv) Evidence establishing that the geographic area or areas in the state in which the foreign medical graduate will practice medicine or where patients who will be served by the foreign medical graduates reside, are areas which have been designated by the Secretary of Health and Human Services as having a shortage of health care professionals. For purposes of this paragraph, the geographic area or areas must be designated by the Department of Health and Human Services as a Health Professional Shortage Area (''HPSA'') or as a Medically Underserved Area/Medically Underserved Population (''MUA/MUP'').

(v) Copies of all forms IAP 66 or DS–2019 issued to the foreign medical graduate seeking the waiver;

(vi) A copy of the foreign medical graduate's *curriculum vitae*;

(vii) If the foreign medical graduate is otherwise contractually required to return to his or her home country at the conclusion of the graduate medical education or training, a copy of the statement of no objection from the foreign medical graduate's country of nationality or last residence; and,

(viii) Because of the numerical limitations on the approval of waivers under Public Law 103–416, *i.e.*, no more than the maximum number of waivers for each State each fiscal year as mandated by law, each application from a State Department of Public Health, or its equivalent, shall be numbered sequentially, beginning on October 1 of each year. The ''non-designated'' requests will also be numbered sequentially with appropriate identifier.

(4) The Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Secretary of DHS. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(f) *Changed circumstances*. An applicant for a waiver on the grounds of exceptional hardship or probable persecution on account of race, religion, or political opinion, has a continuing obligation to inform the Department of Homeland Security of changed circumstances material to his or her pending application.

(g) *The Waiver Review Board*. (1) The Waiver Review Board (''Board'') shall consist of the following persons or their designees:

(i) The Principal Deputy Assistant Secretary of the Bureau of Consular Affairs;

(ii) The Director of Office of Public Affairs for the Bureau of Consular Affairs;

(iii) The Legislative Management Officer for Consular Affairs, Bureau of Legislative Affairs;

(iv) The Director of the Office of Exchange Coordination and Designation in the Bureau of Educational and Cultural Affairs; and

(v) The Director of the Office of Policy and Evaluation in the Bureau of Educational and Cultural Affairs.

(2) A person who has had substantial prior involvement in a particular case referred to the Board may not be appointed to, or serve on, the Board for that particular case unless the Bureau of Consular Affairs determines that the individual's inclusion on the Board is otherwise necessary or practicably unavoidable.

(3) The Principal Deputy Assistant Secretary of Consular Affairs, or his or her designee, shall serve as Board Chairman. No designee under this paragraph (g)(3) shall serve for more than 2 years.

(4) Cases will be referred to the Board at the discretion of the Chief, Waiver Review Division, of the Visa Office. The Chief, Waiver Review Division, or his or her designee may, at the Chairman's discretion, appear and present facts related to the case but shall not participate in Board deliberations.

(5) The Chairman of the Board shall be responsible for convening the Board and distributing all necessary information to its members. Upon being convened, the Board shall review the case file and weigh the request against the program, policy, and foreign relations aspects of the case.

(6) The Bureau of Consular Affairs shall appoint, on a case-by-case basis, from among the attorneys in the State Department's Office of Legal Advisor one attorney to serve as legal advisor to the Board.

(7) At the conclusion of its review of the case, the Board shall make a written recommendation either to grant or to deny the waiver application. The written recommendation of a majority of the Board shall constitute the recommendation of the Board. Such recommendation shall be promptly transmitted by the Chairman to the Chief, Waiver Review Division.

(8) At the conclusion of its review of the case, the Board shall make a written recommendation either to grant or to deny the waiver application. The written recommendation of a majority

of the Board shall constitute the recommendation of the Board. Such recommendation shall be promptly transmitted by the Chairman to the Chief, Waiver Review Division.

[58 FR 15196, Mar. 19, 1993; 58 FR 18305, Apr. 8, 1993; 58 FR 48448, Sept. 16, 1993; 60 FR 16787, 16788, Apr. 3, 1995; 60 FR 53125, Oct. 12, 1995; 62 FR 19222, Apr. 21, 1997; 62 FR 28803, May 28, 1997. Redesignated and amended at 64 FR 54539, 54540, Oct. 7, 1999; 67 FR 77160, Dec. 17, 2002; 72 FR 10061, Mar. 7, 2007]

Subpart H—Transit Aliens

§ 41.71 Transit aliens.

(a) *Transit aliens—general.* An alien is classifiable as a nonimmigrant transit alien under INA 101(a) (15) (C) if the consular officer is satisfied that the alien:

(1) Intends to pass in immediate and continuous transit through the United States;

(2) Is in possession of a common carrier ticket or other evidence of transportation arrangements to the alien's destination;

(3) Is in possession of sufficient funds to carry out the purpose of the transit journey, or has sufficient funds otherwise available for that purpose; and

(4) Has permission to enter some country other than the United States following the transit through the United States, unless the alien submits satisfactory evidence that such advance permission is not required.

(b) *Certain aliens in transit to United Nations.* An alien within the provisions of paragraph (3), (4), or (5) of section 11 of the Headquarters Agreement with the United Nations, to whom a visa is to be issued for the purpose of applying for admission solely in transit to the United Nations Headquarters District, may upon request or at the direction of the Secretary of State be issued a nonimmigrant visa bearing the symbol C–2. If such a visa is issued, the recipient shall be subject to such restrictions on travel within the United States as may be provided in regulations prescribed by the Secretary of Homeland Security.

Subpart I—Fiance(e)s and Other Nonimmigrants

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

(a) *Fiancé(e).* An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) if:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition filed by a U.S. citizen to confer nonimmigrant status as a fiancé(e) on the alien, which has been approved by the DHS under INA 214(d), or a notification of such approval from that Service;

(2) The consular officer has received from the alien the alien's sworn statement of ability and intent to conclude a valid marriage with the petitioner within 90 days of arrival in the United States; and

(3) The alien has met all other qualifications in order to receive a nonimmigrant visa, including the requirements of paragraph (d) of this section.

(b) *Spouse.* An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the DHS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

(2) If the alien's marriage to the U.S. citizen was contracted outside of the United States, the alien is applying in the country in which the marriage took place, or if there is no consular post in that country, then at a consular post designated by the Deputy Assistant Secretary of State for Visa Services to accept immigrant visa applications for nationals of that country.

(3) If the marriage was contracted in the United States, the alien is applying in a country as provided in part 42, § 42.61 of this chapter.

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, including the requirements of paragraph (d) of this section.

(c) *Child*. An alien is classifiable under INA 101(a)(15)(K)(iii) if:

(1) The consular officer is satisfied that the alien is the child of an alien classified under INA 101(a)(15)(K)(i) or (ii) and is accompanying or following to join the principal alien; and

(2) The alien otherwise has met all other applicable requirements in order to receive a nonimmigrant visa, including the requirements of paragraph (d) of this section.

(d) *Eligibility as an immigrant required*. The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section as if the alien were an applicant for an immigrant visa, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

[66 FR 19393, Apr. 16, 2001]

§41.82 Certain parents and children of section 101(a)(27)(I) special immigrants. [Reserved]

§41.83 Certain witnesses and informants.

(a) *General*. An alien shall be classifiable under the provisions of INA 101(a)(15)(S) if:

(1) The consular officer is satisfied that the alien qualifies under the provisions of that section; and

(2)(i) The consular officer has received verification from the Department of State, Visa Office, that:

(A) in the case of INA 101(a)(15)(S)(i) the DHS has certified that the alien is accorded such classification, or

(B) in the case of INA 101(a)(15)(S)(ii) the Assistant Secretary of State for Consular Affairs on behalf of the Secretary of State and the DHS have certified that the alien is accorded such classification;

(ii) and the alien is granted an INA 212(d)(1) waiver of any INA 212(a) ground of ineligibility known at the time of verification.

(b) *Certification of S visa status*. The certification of status under INA 101(a)(15)(S)(i) by the Secretary of Homeland Security or of status under INA 101(a)(15)(S)(ii) by the Secretary of State and the Secretary of Homeland Security acting jointly does not establish that the alien is eligible to receive a nonimmigrant visa.

(c) *Validity of visa*. The period of validity of a visa authorized on the basis of paragraph (a) of this section shall not exceed the period indicated in the certification required in paragraph (b) and shall not in any case exceed the period of three years.

[61 FR 1838, Jan. 24, 1996, as amended at 71 FR 34521, June 15, 2006]

§41.84 Victims of trafficking in persons.

(a) *Eligibility*. An alien may be classifiable as a parent, spouse or child under INA 101(a)(15)(T)(ii) if:

(1) The consular officer is satisfied that the alien has the required relationship to an alien who has been granted status by the Secretary for Homeland Security under INA 101(a)(15)(T)(i);

(2) The consular officer is satisfied that the alien is otherwise admissible under the immigration laws of the United States; and

(3) The consular officer has received an DHS-approved I–914, Supplement A, evidencing that the alien is the spouse, child, or parent of an alien who has been granted status under INA 101(a)(15)(T)(i).

(b) *Visa validity*. A qualifying family member may apply for a nonimmigrant visa under INA(a)(15)(T)(ii) only during the period in which the principal applicant is in status under INA 101(a)(15)(T)(i). Any visa issued pursuant to such application shall be valid only for a period of three years or until the expiration of the principal alien's status as an alien classified under INA 101(a)(15)(T)(i), whichever is shorter.

[68 FR 37964, June 26, 2003]

§41.86 Certain spouses and children of lawful permanent resident aliens.

(a) *Definition of ''remains pending''*. For the purposes of this section, a visa application ''remains pending'' if the applicant has applied for an immigrant visa in accordance with the definition in part 40, §40.1(l)(2) and the visa has neither been issued, nor refused for any reason under applicable law and regulation.

(b) *Entitlement to classification.* A consular officer may classify an alien as a nonimmigrant under INA 101(a)(15)(V) if:

(1) The consular officer has received notification from the Department of State or the Department of Justice that a petition to accord status to the alien as a spouse or child pursuant to INA 203(a)(2)(A) was filed on or before December 21, 2000; or

(2) The alien is eligible to derive benefits pursuant to INA 203(d) as a child of an alien described in paragraph (b)(1) of this section and such alien has qualified for V classification; and

(3) It has been three years or more since the filing date of the petition described in paragraph (b)(1) of this section and applicable to paragraph (b)(2) of this section and either:

(i) The petition has not been approved; or

(ii) If it has been approved, either no immigrant visa number is immediately available or the alien's application for adjustment of status or the alien's application for a visa remains pending.

(c) *Eligibility as an immigrant required.* The consular officer, insofar as practicable, must determine the eligibility of an alien described in paragraph (b) of this section to receive a nonimmigrant visa under INA 101(a)(15)(V), other than an alien who previously has been granted V status in the United States by DHS, as if the alien were an applicant for an immigrant visa, except that the alien is exempt from the vaccination requirement of INA 212(a)(1), the labor certification requirement of INA 212(a)(5) and the unlawful presence ineligibility of INA 212(a)(9)(B).

(d) *Place of application.* Notwithstanding the requirements of § 41.101, in determining the place of application for an alien seeking a visa pursuant to INA 101(a)(15)(V) the requirements of part 42, §§ 42.61(a) and (b)(1) of this chapter will apply.

[66 FR 19393, Apr. 16, 2001]

Subpart J—Application for Nonimmigrant Visa

§ 41.101 Place of application.

(a) *Application for regular visa made at jurisdictional consular office of alien's residence or physical presence.* (1) An alien applying for a nonimmigrant visa shall make application at a consular office having jurisdiction over the alien's place of residence, or if the alien is a resident of Taiwan, at the American Institute in Taiwan, unless—

(i) The alien is physically present in the United States and is entitled to apply for issuance or reissuance of a visa under the provisions of § 41.111(b); or

(ii) A consular office having jurisdiction over the area in which the alien is physically present but not resident has agreed, as a matter of discretion or at the direction of the Department, to accept the alien's application; or

(iii) The alien is subject to INA 222(g) and must apply as set forth in paragraph (b) or (c) of this section.

(2) The Deputy Assistant Secretary of State for Visa Services is authorized to designate the geographical area for which each consular office possesses jurisdiction to process nonimmigrant visa applications.

(b) *Place of application for persons subject to INA 222(g).* Notwithstanding the requirements of paragraph (a) of this section, an alien whose prior nonimmigrant visa has been voided pursuant to INA 222(g), who is applying for a new nonimmigrant visa, shall make application at a consular office which has jurisdiction in or for the country of the alien's nationality unless extraordinary circumstances have been determined to exist with respect to that alien as set forth in paragraph (c) of this section.

(c) *Exceptions based on extraordinary circumstances.* (1) An alien physician serving in underserved areas of the United States under the provisions of INA 214(l) for whom an application for a waiver of the 2-year foreign residence requirement and/or a petition to accord H–1B status was filed prior to the end of the alien's authorized period of stay and was subsequently approved, but whose authorized stay expired during the adjudication of such application(s), shall make application in accordance with paragraph (a) of this section.

(2) Any other individual or group whose circumstances are determined to be extraordinary, in accordance with paragraph (d)(1) of this section, by the

Deputy Assistant Secretary for Visa Services upon the favorable recommendation of an immigration or consular officer, shall make application in accordance with paragraph (a) of this section.

(3) An alien who has, or immediately prior to the alien's last entry into the United States had, a residence in a country other than the country of the alien's nationality shall apply at a consular office with jurisdiction in or for the country of residence.

(4) An alien who is a national and resident of a country in which there is no United States consular office shall apply at a consular office designated by the Deputy Assistant Secretary for Visa Services to accept immigrant visa applications from persons of that nationality.

(5) An alien who possesses more than one nationality and who has, or immediately prior to the alien's last entry into the United States had, a residence in one of the countries of the alien's nationality shall apply at a consular office in the country of such residence.

(d) *Definitions relevant to INA 222(g).* (1) Extraordinary circumstances—Extraordinary circumstances may be found where compelling humanitarian or national interests exist or where necessary for the effective administration of the immigration laws. Extraordinary circumstances shall not be found upon the basis of convenience or financial burden to the alien, the alien's relative, or the alien's employer.

(2) Nationality—For purposes of paragraph (b) of this section, a stateless person shall be considered to be a national of the country which issued the alien's travel document.

(e) *Regular visa defined.* ''Regular visa'' means a nonimmigrant visa of any classification which does not bear the title ''Diplomatic'' or ''Official.'' A nonimmigrant visa is issued as a regular visa unless the alien falls within one of the classes entitled to a diplomatic or an official visa as described in § 41.26(c) or § 41.27(c).

(f) *Q–2 nonimmigrant visas.* The American Consulate General at Belfast is designated to accept applications for the Q–2 visa from residents of the geographic area of Northern Ireland. The American Embassy at Dublin is designated to accept applications for Q–2 visas from residents of the geographic area of the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal in the Republic of Ireland. Notwithstanding any other provision of this section, an applicant for a Q–2 visa may not apply at any other consular post. Consular officers at the Consulate General at Belfast and at the Embassy at Dublin have discretion to accept applications for Q–2 visas from aliens who are resident in a qualifying geographic area outside of their respective consular districts, but who are physically present in their consular district.

[52 FR 42597, Nov. 5, 1987; 53 FR 9112, Mar. 21, 1988, as amended at 61 FR 1522, Jan. 22, 1996; 61 FR 53058, Oct. 10, 1996; 61 FR 56439, Nov. 1, 1996; 63 FR 671, Jan. 7, 1998; 63 FR 36366, July 6, 1998; 65 FR 14771, Mar. 17, 2000; 66 FR 38542, July 25, 2001; 67 FR 66046, Oct. 30, 2002]

§ 41.102 Personal appearance of applicant.

(a) *Personal* appearance before a consular officer is required except as otherwise provided in this section. Except when the requirement of personal appearance has been waived pursuant to paragraph (b) or (c) of this section, each applicant for a nonimmigrant visa must personally appear before and be interviewed by a consular officer, who shall determine on the basis of the applicant's representations, the visa application and other relevant documentation:

(1) The proper nonimmigrant classification, if any, of the alien; and

(2) The alien's eligibility to receive a visa.

(b) *Waivers of personal appearance by consular officers.* Except as provided in paragraph (d) of this section or as otherwise instructed by the Deputy Assistant Secretary of State for Visa Services, a consular officer may waive the requirement of personal appearance in the case of any alien who the consular officer concludes presents no national security concerns requiring an interview and who:

(1) Is a child under 14 years of age;

(2) Is a person over 79 years of age;

(3) Is within a class of nonimmigrants classifiable under the visa

symbols A–1, A–2, C–2, C–3 (except attendants, servants, or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 and who is seeking a visa in such classification;

(4) Is an applicant for a diplomatic or official visa as described in §§ 41.26 or 41.27 of this chapter, respectively;

(5) Is an applicant who within 12 months of the expiration of the applicant's previously issued visa is seeking re-issuance of a nonimmigrant biometric visa in the same classification at the consular post of the applicant's usual residence, and for whom the consular officer has no indication of visa ineligibility or of noncompliance with U.S. immigration laws and regulations; or

(6) Is an alien for whom a waiver of personal appearance is warranted in the national interest or because of unusual circumstances.

(c) *Waivers of personal appearance by the Deputy Assistant Secretary of State.* Except as provided in paragraph (d) of this section, the Deputy Assistant Secretary for Visa Services may waive the personal appearance before a consular officer of an individual applicant or a class of applicants if the Deputy Assistant Secretary finds that the waiver of personal appearance is warranted in the national interest or because of unusual circumstances and that national security concerns do not require an interview.

(d) *Cases in which personal appearance may not be waived.* A consular officer or the Deputy Assistant Secretary of State may not waive personal appearance for:

(1) Any NIV applicant who is not a national or resident of the country in which he or she is applying, unless the applicant is eligible for a waiver of the interview under paragraphs (b)(3) or (b)(4) of this section.

(2) Any NIV applicant who was previously refused a visa, is listed in CLASS, or who otherwise requires a Security Advisory Opinion, unless:

(i) The visa was refused temporarily and the refusal was subsequently overcome;

(ii) The alien was found inadmissible, but the inadmissibility was waived; or

(iii) The applicant is eligible for a waiver of the interview under paragraphs (b)(3) or (b)(4) of this section.

(3) Any NIV applicant who is from a country designated by the Secretary of State as a state sponsor of terrorism, regardless of age, or in a group designated by the Secretary of State under section 222(h)(2)(F) of the Immigration and Nationality Act, unless the applicant is eligible for a waiver under paragraphs (b)(3) or (b)(4) of this section.

(e) *Unusual circumstances.* As used in this section, unusual circumstances shall include, but not be limited to, an emergency or unusual hardship.

[68 FR 40128, July 7, 2003, as amended at 71 FR 75663, Dec. 18, 2006]

§ 41.103 Filing an application.

(a) *Filing an application*—(1) *Filing of application required.* Every alien seeking a nonimmigrant visa must make an electronic application on Form DS–160 or, as directed by a consular officer, an application on Form DS–156. The Form DS–160 must be signed electronically by clicking the box designated ''Sign Application'' in the certification section of the application.

(2) *Filing of an electronic application (Form DS–160) or Form DS–156 by alien under 16 or physically incapable.* The application for an alien under 16 years of age or one physically incapable of completing an application may be completed and executed by the alien's parent or guardian, or if the alien has no parent or guardian, by any person having legal custody of, or a legitimate interest in, the alien.

(3) *Waiver of filing of application when personal appearance is waived.* Even if personal appearance of a visa applicant is waived pursuant to 22 CFR 41.102, the requirement for filing an application is not waived.

(b) *Application*—(1) *Preparation of Electronic Nonimmigrant Visa Application (Form DS–160) or, alternatively, Form DS–156.* The consular officer shall ensure that the application is fully and properly completed in accordance with the applicable regulations and instructions.

(2) *Additional requirements and information as part of application.* Applicants

who are required to appear for a personal interview must provide a biometric, which will serve to authenticate identity and additionally verify the accuracy and truthfulness of the statements in the application at the time of interview. The consular officer may require the submission of additional necessary information or question an alien on any relevant matter whenever the consular officer believes that the information provided in the application is inadequate to permit a determination of the alien's eligibility to receive a nonimmigrant visa. Additional statements made by the alien become a part of the visa application. All documents required by the consular officer under the authority of § 41.105(a) are considered papers submitted with the alien's application within the meaning of INA 221(g)(1).

(3) *Signature*. The Form DS–160 shall be signed electronically by clicking the box designated ''Sign Application'' in the certification section of the application. This electronic signature attests to the applicant's familiarity with and intent to be bound by all statements in the NIV application under penalty of perjury. Alternatively, except as provided in paragraph (a)(2) of this section, the Form DS–156 shall be signed by the applicant, with intent to be bound by all statement in the NIV application under penalty of perjury.

(4) *Registration*. The Form DS–160 or the Form DS–156, when duly executed, constitutes the alien's registration for the purposes of INA 221(b).

[73 FR 23068, Apr. 29, 2008]

§ 41.104 Passport requirements.

(a) *Passports defined*. ''Passport'' as defined in INA 101(a)(30) is not limited to a national passport or to a single document. A passport may consist of two or more documents which, when considered together, fulfill the requirements of a passport, provided that the documentary evidence of permission to enter a foreign country has been issued by a competent authority and clearly meets the requirements of INA 101(a)(30).

(b) *Passport requirement*. Except for certain persons in the A, C–3, G, and NATO classifications and persons for whom the passport requirement has been waived pursuant to the provisions of INA 212(d)(4), every applicant for a nonimmigrant visa is required to present a passport, as defined above and in INA 101(a)(30), which is valid for the period required by INA 212(a)(7)(B)(i)(I).

(c) *A single passport including more than one person*. The passport requirement for a nonimmigrant visa may be met by the presentation of a passport including more than one person, if such inclusion is authorized under the laws or regulations of the issuing authority and if a photograph of each visa applicant 16 years of age or over has been attached to the passport by the issuing authority.

(d) *Applicants for diplomatic visas*. Every applicant for a diplomatic visa must present a diplomatic passport, or the equivalent thereof, having the period of validity required by INA 212(a)(7)(B)(i)(I), unless such requirement has been waived pursuant to the authority contained in INA 212(d)(4) or unless the case falls within the provisions of § 41.21(b).

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 61 FR 1522, Jan. 22, 1996; 61 FR 53058, Oct. 10, 1996; 66 FR 38543, July 25, 2001; 67 FR 66046, Oct. 30, 2002]

§ 41.105 Supporting documents and fingerprinting.

(a) *Supporting documents*—(1) *Authority to require documents*. The consular officer is authorized to require documents considered necessary to establish the alien's eligibility to receive a nonimmigrant visa. All documents and other evidence presented by the alien, including briefs submitted by attorneys or other representatives, shall be considered by the consular officer.

(2) *Unobtainable documents*. If the consular officer is satisfied that a document or record required under the authority of this section is unobtainable, the consular officer may accept satisfactory alternative pertinent evidence. A document or other record shall be considered unobtainable if it cannot be procured without causing the applicant or a member of the applicant's family actual hardship as distinct from normal delay and inconvenience.

(3) *Photographs required.* Every applicant for a nonimmigrant visa must furnish a photograph in such numbers as the consular officer may require. Photographs must be a reasonable likeness, 1½ by 1½ inches in size, unmounted, and showing a full, front-face view of the applicant against a light background. At the discretion of the consular officer, head coverings may be permitted provided they do not interfere with the full, front-face view of the applicant. The applicant must sign (full name) on the reverse side of the photographs. The consular officer may use a previously submitted photograph, if he is satisfied that it bears a reasonable likeness to the applicant.

(4) *Police certificates.* A police certificate is a certification by the police or other appropriate authorities stating what, if anything, their records show concerning the alien. An applicant for a nonimmigrant visa is required to present a police certificate if the consular officer has reason to believe that a police or criminal record exists, except that no police certificate is required in the case of an alien who is within a class of nonimmigrants classifiable under visa symbols A–1, A–2, C–3, G–1 through G–4, NATO–1 through NATO–4 or NATO–6.

(b) *Fingerprinting.* Every applicant for a nonimmigrant visa must furnish fingerprints, as required by the consular officer.

[52 FR 42597, Nov. 5, 1987; 53 FR 9112, 9172, Mar. 21, 1988, as amended at 61 FR 1522, Jan. 22, 1996; 61 FR 53058, Oct. 10, 1996; 64 FR 13510, Mar. 19, 1999; 67 FR 8478, Feb. 25, 2002; 72 FR 74175, Dec. 31, 2007; 73 FR 49092, Aug. 20, 2008]

§ 41.106 Processing.

Consular officers must ensure that the Form DS–160 or, alternatively, Form DS–156 is properly and promptly processed in accordance with the applicable regulations and instructions.

[73 FR 23069, Apr. 29, 2008]

§ 41.107 Visa fees.

(a) *Fees based on reciprocity.* The fees for the issuance of visas, including official visas, to nonimmigrant nationals or stateless residents of each foreign country shall be collected in the amounts prescribed by the Secretary of State unless, on the basis of reciprocity, no fee is chargeable. If practicable, fees will correspond to the total amount of all visa, entry, residence, or other similar fees, taxes or charges assessed or levied against nationals of the United States by the foreign countries of which such nonimmigrants are nationals or stateless residents.

(b) *Fees when more than one alien included in visa.* A single nonimmigrant visa may be issued to include all eligible family members if the spouse and unmarried minor children of a principal alien are included in one passport. Each alien must execute a separate application. The name of each family member shall be inserted in the space provided in the visa stamp. The visa fee to be collected shall equal the total of the fees prescribed by the Secretary of State for each alien included in the visa, unless upon a basis of reciprocity a lesser fee is chargeable.

(c) *Certain aliens exempted from fees.* (1) Upon a basis of reciprocity, or as provided in section 13(a) of the Headquarters Agreement with the United Nations (61 Stat. 716; 22 U.S.C. 287, Note), no fee shall be collected for the application for or issuance of a nonimmigrant visa to an alien who is within a class of nonimmigrants classifiable under the visa symbols A, G, C–2, C–3, or NATO, or B–1 issued for participation in an official observer mission to the United Nations, or who is issued a diplomatic visa as defined in § 41.26.

(2) The consular officer shall waive the nonimmigrant visa application and issuance fees for an alien who will be engaging in charitable activities for a charitable organization upon the written request of the charitable organization claiming that it will find the fees a financial burden, if the consular officer is satisfied that:

(i) The organization seeking relief from the fees is, if based in the United States, tax-exempt as a charitable organization under the provisions of section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); if a foreign organization based outside the United States in a country having laws according recognition to charitable institutions, that it establishes that it is recognized as a charitable institution by that government; and if a foreign

organization based in a country without such laws, that it is engaged in activities substantially similar to those underlying section 501(c)(3), and

(ii) The charitable activities in which the alien will engage are specified and will be a part of, or will be related to and in support of, the organization's provision of services, including but not limited to health care, food and housing, job training, and similar direct services and assistance to the poor and needy, and

(iii) The request includes the location of the proposed activities, the number and identifying data of each of the alien(s) who will be applying for visas, and

(iv) The proposed duration of the alien(s)'s temporary stay in the United States is reasonably consistent with the charitable purpose for which the alien(s) seek to enter the United States.

(3) Foreign national employees of the U. S. Government who are travelling to the United States on official business in connection with that employment.

(d) *Refund of fees.* A fee collected for the issuance of a nonimmigrant visa is refundable only if the principal officer at a post or the officer in charge of a consular section determines that the visa was issued in error or could not be used as a result of action taken by the U.S. Government for which the alien was not responsible and over which the alien had no control.

(e)(1) *Visa processing surcharge.* In addition to the collection of the fee prescribed in paragraph (a) of this section, a consular officer shall collect or ensure the collection of a surcharge for the processing of applications for machine readable nonimmigrant visas and for machine readable combined border crossing cards in the amount specified by the Secretary of State from such applicants as the Secretary of State shall designate. Such surcharge is refundable only if, as a result of action taken by the U.S. Government for which the alien was not responsible and over which the alien had no control, the alien's application is not processed.

(2) Notwithstanding paragraph (e)(1) of this section, a consular officer shall collect or insure the collection of a processing fee for a machine-readable combined border crossing card and nonimmigrant visa in an amount determined by the Secretary and set forth in 22 CFR 22.1 to be sufficient only to cover the cost for manufacturing the combined card and visa if:

(i) The alien is a Mexican citizen under the age of 15;

(ii) The alien is applying in Mexico; and

(iii) The alien has at least one parent or guardian who has a visa or is applying for a machine-readable combined border crossing card and visa.

[52 FR 42597, Nov. 5, 1987, as amended at 59 FR 25325, May 16, 1994; 63 FR 24108, May 1, 1998; 63 FR 52970, Oct. 2, 1998; 65 FR 52307, Aug. 29, 2000; 66 FR 17511, Apr. 2, 2001; 66 FR 38543, July 25, 2001; 67 FR 38893, June 6, 2002; 67 FR 66046, Oct. 30, 2002]

§41.108 Medical examination.

(a) *Requirements for medical examination.* An applicant for a nonimmigrant visa shall be required to take a medical examination if:

(1) The alien is an applicant for a K nonimmigrant visa as a fiance(e) of a U.S. citizen or as the child of such an applicant; or,

(2) The alien is seeking admission for medical treatment and the consular officer considers a medical examination advisable; or,

(3) The consular officer has reason to believe that a medical examination might disclose that the alien is medically ineligible to receive a visa.

(b) *Examination by panel physician.* The required examination, which must be carried out in accordance with United States Public Health Service regulations, shall be conducted by a physician selected by the alien from a panel of physicians approved by the consular officer or, if the alien is in the United States, by a medical officer of the United States Public Health Service or by a contract physician from a list of physicians approved by the DHS for the examination of INA 245 adjustment of status applicants.

(c) *Panel physician facility requirements.* A consular officer may not include the name of a physician on the panel of physicians referred to in paragraph (b) of this section unless the physician has facilities to perform required serological and X-ray tests or is

in a position to refer applicants to a qualified laboratory for such tests.

Subpart K—Issuance of Nonimmigrant Visa

§ 41.111 Authority to issue visa.

(a) *Issuance outside the United States.* Any consular officer is authorized to issue regular and official visas. Diplomatic visas may be issued only by:

(1) A consular officer attached to a U.S. diplomatic mission, if authorized to do so by the Chief of Mission; or

(2) A consular officer assigned to a consular office under the jurisdiction of a diplomatic mission, if so authorized by the Department or the Chief, Deputy Chief, or Counselor for Consular Affairs of that mission, or, if assigned to a consular post not under the jurisdiction of a diplomatic mission, by the principal officer of that post.

(b) *Issuance in the United States in certain cases.* The Deputy Assistant Secretary for Visa Services and such officers of the Department as the former may designate are authorized, in their discretion, to issue nonimmigrant visas, including diplomatic visas, to:

(1) Qualified aliens who are currently maintaining status and are properly classifiable in the A, C–2, C–3, G or NATO category and intend to reenter the United States in that status after a temporary absence abroad and who also present evidence that:

(i) They have been lawfully admitted in that status or have, after admission, had their classification changed to that status; and

(ii) Their period of authorized stay in the United States in that status has not expired; and

(2) Other qualified aliens who:

(i) Are currently maintaining status in the E, H, I, L, O, or P nonimmigrant category;

(ii) Intend to reenter the United States in that status after a temporary absence abroad; and

(iii) Who also present evidence that:

(A) They were previously issued visas at a consular office abroad and admitted to the United States in the status which they are currently maintaining; and

(B) Their period of authorized admission in that status has not expired.

[52 FR 42597, Nov. 5, 1987, as amended at 66 FR 12738, Feb. 28, 2001]

§ 41.112 Validity of visa.

(a) *Significance of period of validity of visa.* The period of validity of a nonimmigrant visa is the period during which the alien may use it in making application for admission. The period of visa validity has no relation to the period of time the immigration authorities at a port of entry may authorize the alien to stay in the United States.

(b) *Validity of visa and number of applications for admission.* (1) Except as provided in paragraphs (c) and (d) of this section, a nonimmigrant visa shall have the validity prescribed in schedules provided to consular officers by the Department, reflecting insofar as practicable the reciprocal treatment accorded U.S. nationals, U.S. permanent residents, or aliens granted refugee status in the U.S. by the government of the country of which the alien is a national, permanent resident, refugee or stateless resident.

(2) Notwithstanding paragraph (b)(1) of this section, United States nonimmigrant visas shall have a maximum validity period of 10 years.

(3) An unexpired visa is valid for application for admission even if the passport in which the visa is stamped has expired, provided the alien is also in possession of a valid passport issued by the authorities of the country of which the alien is a national.

(c) *Limitation on validity.* If warranted in an individual case, a consular officer may issue a nonimmigrant visa for:

(1) A period of validity that is less than that prescribed on a basis of reciprocity,

(2) A number of applications for admission within the period of the validity of the visa that is less than that prescribed on a basis of reciprocity,

(3) Application for admission at a specified port or at specified ports of entry, or

(4) Use on and after a given date subsequent to the date of issuance.

(d) *Automatic extension of validity at ports of entry.* (1) Provided that the requirements set out in paragraph (d)(2)

of this section are fully met, the following provisions apply to nonimmigrant aliens seeking readmission at ports of entry:

(i) The validity of an expired nonimmigrant visa issued under INA 101(a)(15) may be considered to be automatically extended to the date of application for readmission; and

(ii) In cases where the original nonimmigrant classification of an alien has been changed by DHS to another nonimmigrant classification, the validity of an expired or unexpired nonimmigrant visa may be considered to be automatically extended to the date of application for readmission, and the visa may be converted as necessary to that changed classification.

(2) The provisions in paragraph (d)(1) of this section are applicable only in the case of a nonimmigrant alien who:

(i) Is in possession of a Form I–94, Arrival-Departure Record, endorsed by DHS to show an unexpired period of initial admission or extension of stay, or, in the case of a qualified F or J student or exchange visitor or the accompanying spouse or child of such an alien, is in possession of a current Form I–20, Certificate of Eligibility for Nonimmigrant Student Status, or Form IAP-66, Certificate of Eligibility for Exchange Visitor Status, issued by the school the student has been authorized to attend by DHS, or by the sponsor of the exchange program in which the alien has been authorized to participate by DHS, and endorsed by the issuing school official or program sponsor to indicate the period of initial admission or extension of stay authorized by DHS;

(ii) Is applying for readmission after an absence not exceeding 30 days solely in contiguous territory, or, in the case of a student or exchange visitor or accompanying spouse or child meeting the stipulations of paragraph (d)(2)(i) of this section, after an absence not exceeding 30 days in contiguous territory or adjacent islands other than Cuba;

(iii) Has maintained and intends to resume nonimmigrant status;

(iv) Is applying for readmission within the authorized period of initial admission or extension of stay;

(v) Is in possession of a valid passport;

(vi) Does not require authorization for admission under INA 212(d)(3); and

(vii) Has not applied for a new visa while abroad.

(3) The provisions in paragraphs (d)(1) and (d)(2) of this section shall not apply to the nationals of countries identified as supporting terrorism in the Department's annual report to Congress entitled Patterns of Global Terrorism.

[52 FR 42597, Nov. 5, 1987; 53 FR 9112, 9172, Mar. 21, 1988, as amended at 55 FR 36028, Oct. 31, 1990; 62 FR 24332, May 5, 1997; 66 FR 38543, July 25, 2001; 67 FR 10323, Mar. 7, 2002; 67 FR 66046, Oct. 30, 2002]

§41.113 Procedures in issuing visas.

(a) *Visa evidenced by stamp placed in passport.* Except as provided in paragraphs (b) of this section, a nonimmigrant visa shall be evidenced by a visa stamp placed in the alien's passport. The appropriate symbol as prescribed in 41.12 , showing the classification of the alien, shall be entered on the visa.

(b) *Cases in which visa not placed in passport.* In the following cases the visa shall be placed on the prescribed Form DS–232. In issuing such a visa, a notation shall be made on the Form DS–232 on which the visa is placed specifying the pertinent subparagraph of this paragraph under which the action is taken.

(1) The alien's passport was issued by a government with which the United States does not have formal diplomatic relations, unless the Department has specifically authorized the placing of the visa in such passport;

(2) The alien's passport does not provide sufficient space for the visa;

(3) The passport requirement has been waived; or

(4) In other cases as authorized by the Department.

(c) *Visa stamp.* A machine-readable nonimmigrant visa foil, or other indicia as directed by the Department, shall constitute a visa ''stamp,'' and shall be in a format designated by the Department, and contain, at a minimum, the following data:

(1) Full name of the applicant;

(2) Visa type/class;

(3) Location of the visa issuing office;

(4) Passport number;

(5) Sex;
(6) Date of birth;
(7) Nationality;
(8) Number of applications for admission or the letter ''M'' for multiple entries;
(9) Date of issuance;
(10) Date of expiration;
(11) Visa control number.

(d) *Insertion of name; petition and derivative status notation.* (1) The surname and given name of the visa recipient shall be shown on the visa in the space provided.

(2) If the visa is being issued upon the basis of a petition approved by the Secretary of Homeland Security, the number of the petition, if any, the period for which the alien's admission has been authorized, and the name of the petitioner shall be reflected in the annotation field on the visa.

(3) In the case of an alien who derives status from a principal alien, the name and position of the principal alien shall be reflected in the annotation field of the visa.

(e) *Period of validity.* If a nonimmigrant visa is issued for an unlimited number of applications for admission within the period of validity, the letter ''M'' shall be shown under the word ''entries''. Otherwise the number of permitted applications for admission shall be identified numerically. The date of issuance and the date of expiration of the visa shall be shown at the appropriate places in the visa by day, month and year in that order. The standard three letter abbreviation for the month shall be used in all cases.

(f) *Restriction to specified port of entry.* If a nonimmigrant visa is valid for admission only at one or more specified ports of entry, the names of those ports shall be entered in the annotation field. In cases where there is insufficient room to list the ports of entry, they shall be listed by hand on a clean passport page. Reference shall be made in the visa's annotation field citing the passport page upon which the ports are listed.

(g) *Delivery of visa.* In issuing a nonimmigrant visa, the consular officer should deliver the visaed passport, or the prescribed Form DS–232, which bears the visa, to the alien or to the alien's authorized representative. Any evidence furnished by the alien in accordance with 41.103(b) should be retained in the consular files, along with Form DS–156, if received.

(h) *Disposition of supporting documents.* Original supporting documents furnished by the alien should be returned for presentation, if necessary, to the immigration authorities at the port of entry. Duplicate copies may be retained in the consular files or scanned into the consular system.

(i) Nonimmigrant visa issuances must be reviewed, in accordance with guidance by the Secretary of State, by consular supervisors, or a designated alternate, to ensure compliance with applicable laws and procedures. Visa issuances must be reviewed without delay; that is, on the day of issuance or as soon as is administratively possible. If the reviewing officer disagrees with the decision and he or she has a consular commission and title, the reviewing officer may assume responsibility and readjudicate the case. If the reviewing officer does not have a consular commission and title, he or she must consult with the adjudicating officer, or with the Visa Office, to resolve any disagreement.

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 61 FR 1523, Jan. 22, 1996; 61 FR 1836, Jan. 24, 1996; 61 FR 53058, Oct. 10, 1996; 62 FR 24334, May 5, 1997; 66 FR 38543, July 25, 2001; 67 FR 66046, Oct. 30, 2002; 71 FR 34522, June 15, 2006; 71 FR 50338, Aug. 25, 2006; 73 FR 23069, Apr. 29, 2008]

Subpart L—Refusals and Revocations

§ 41.121 Refusal of individual visas.

(a) *Grounds for refusal.* Nonimmigrant visa refusals must be based on legal grounds, such as one or more provisions of INA 212(a), INA 212(e), INA 214(b), (f) or (l) (as added by Section 625 of Pub. L. 104–208), INA 221(g), or INA 222(g) or other applicable law. Certain classes of nonimmigrant aliens are exempted from specific provisions of INA 212(a) under INA 102 and, upon a basis of reciprocity, under INA 212(d)(8). When a visa application has been properly completed and executed in accordance with the provisions of INA and

the implementing regulations, the consular officer must either issue or refuse the visa.

(b) *Refusal procedure.* (1) When a consular officer knows or has reason to believe a visa applicant is ineligible and refuses the issuance of a visa, he or she must inform the alien of the ground(s) of ineligibility (unless disclosure is barred under INA 212(b)(2) or (3)) and whether there is, in law or regulations, a mechanism (such as a waiver) to overcome the refusal. The officer shall note the reason for the refusal on the application. Upon refusing the nonimmigrant visa, the consular officer shall retain the original of each document upon which the refusal was based, as well as each document indicating a possible ground of ineligibility, and should return all other supporting documents supplied by the applicant.

(2) If an alien, who has not yet filed a visa application, seeks advice from a consular officer, who knows or has reason to believe that the alien is ineligible to receive a visa on grounds which cannot be overcome by the presentation of additional evidence, the officer shall so inform the alien. The consular officer shall inform the applicant of the provision of law or regulations upon which a refusal of a visa, if applied for, would be based (subject to the exception in paragraph (b)(1) of this section). If practicable, the consular officer should request the alien to execute a nonimmigrant visa application in order to make a formal refusal. If the individual fails to execute a visa application in these circumstances, the consular officer shall treat the matter as if a visa had been refused and create a record of the presumed ineligibility which shall be filed in the consular office.

(c) Nonimmigrant refusals must be reviewed, in accordance with guidance by the Secretary of State, by consular supervisors, or a designated alternate, to ensure compliance with laws and procedures. If the ground(s) of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the refusal must be reviewed without delay; that is, on the day of the refusal or as soon as it is administratively possible. If the ground(s) of ineligibility may be overcome by the presentation of additional evidence, and the applicant has indicated the intention to submit such evidence, a review of the refusal may be deferred for not more than 120 days. If the reviewing officer disagrees with the decision and he or she has a consular commission and title, the reviewing officer can assume responsibility and readjudicate the case. If the reviewing officer does not have a consular commission and title, he or she must consult with the adjudicating officer, or with the Visa Office, to resolve any disagreement.

(d) *Review of refusal by Department.* The Department may request a consular officer in a specific case or in specified classes of cases to submit a report if a visa has been refused. The Department will review each report and may furnish an advisory opinion to the consular officer for assistance in considering the case further. If the officer believes that action contrary to an advisory opinion should be taken, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers.

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 63 FR 671, Jan. 7, 1998; 66 FR 10364, Feb. 15, 2001; 71 FR 50339, Aug. 25, 2006]

§41.122 Revocation of visas.

(a) *Grounds for revocation by consular officers.* A consular officer, the Secretary, or a Department official to whom the Secretary has delegated this authority is authorized to revoke a nonimmigrant visa at any time, in his or her discretion.

(b) *Provisional revocation.* A consular officer, the Secretary, or any Department official to whom the Secretary has delegated this authority may provisionally revoke a nonimmigrant visa while considering information related to whether a visa holder is eligible for the visa. Provisional revocation shall have the same force and effect as any other visa revocation under INA 221(i).

(c) *Notice of revocation.* Unless otherwise instructed by the Department, a consular officer shall, if practicable,

notify the alien to whom the visa was issued that the visa was revoked or provisionally revoked. Regardless of delivery of such notice, once the revocation has been entered into the Department's Consular Lookout and Support System (CLASS), the visa is no longer to be considered valid for travel to the United States. The date of the revocation shall be indicated in CLASS and on any notice sent to the alien to whom the visa was issued.

(d) *Procedure for physically canceling visas.* A nonimmigrant visa that is revoked shall be canceled by writing or stamping the word ''REVOKED'' plainly across the face of the visa, if the visa is available to the consular officer. The failure or inability to physically cancel the visa does not affect the validity of the revocation.

(e) *Revocation of visa by immigration officer.* An immigration officer is authorized to revoke a valid visa by physically canceling it in accordance with the procedure described in paragraph (d) of this section if:

(1) The alien obtains an immigrant visa or an adjustment of status to that of permanent resident;

(2) The alien is ordered excluded from the United States under INA 236, as in effect prior to April 1, 1997, or removed from the United States pursuant to INA 235;

(3) The alien is notified pursuant to INA 235 by an immigration officer at a port of entry that the alien appears to be inadmissible to the United States, and the alien requests and is granted permission to withdraw the application for admission;

(4) A final order of deportation or removal or a final order granting voluntary departure with an alternate order of deportation or removal is entered against the alien;

(5) The alien has been permitted by DHS to depart voluntarily from the United States;

(6) DHS has revoked a waiver of inadmissibility granted pursuant to INA 212(d)(3)(A) in relation to the visa that was issued to the alien;

(7) The visa is presented in connection with an application for admission to the United States by a person other than the alien to whom the visa was issued;

(8) The visa has been physically removed from the passport in which it was issued; or

(9) The visa has been issued in a combined Mexican or Canadian B–1/B–2 visa and border crossing identification card, and the immigration officer makes the determination specified in §41.32(c) with respect to the alien's Mexican citizenship and/or residence or the determination specified in §41.33(b) with respect to the alien's status as a permanent resident of Canada.

[76 FR 23479, Apr. 27, 2011]

PART 42—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

Subpart A—Visa and Passport Not Required for Certain Immigrants

Sec.
42.1 Aliens not required to obtain immigrant visas.
42.2 Aliens not required to present passports.

Subpart B—Classification and Foreign State Chargeability

42.11 Classification symbols.
42.12 Rules of chargeability.

Subpart C—Immigrants Not Subject to Numerical Limitations of INA 201 and 202

42.21 Immediate relatives.
42.22 Returning resident aliens.
42.23 Certain former U.S. citizens.
42.24 Adoption under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Intercountry Adoption Act of 2000.

Subpart D—Immigrants Subject to Numerical Limitations

42.31 Family-sponsored immigrants.
42.32 Employment-based preference immigrants.
42.33 Diversity immigrants.

Subpart E—Petitions

42.41 Effect of approved petition.
42.42 Petitions for immediate relative or preference status.
42.43 Suspension or termination of action in petition cases.

Subpart F—Numerical Controls and Priority Dates

42.51 Department control of numerical limitations.
42.52 Post records of visa applications.
42.53 Priority date of individual applicants.
42.54 Order of consideration.
42.55 Reports on numbers and priority dates of applications on record.

Subpart G—Application for Immigrant Visas

42.61 Place of application.
42.62 Personal appearance and interview of applicant.
42.63 Definitions.
42.64 Passport requirements.
42.65 Supporting documents.
42.66 Medical examination.
42.67 Execution of application, registration, and fingerprinting.
42.68 Informal evaluation of family members if principal applicant precedes them.

Subpart H—Issuance of Immigrant Visas

42.71 Authority to issue visas; visa fees.
42.72 Validity of visas.
42.73 Procedure in issuing visas.
42.74 Issuance of new or replacement visas.

Subpart I—Refusal, Revocation, and Termination of Registration

42.81 Procedure in refusing individual visas.
42.82 Revocation of visas.
42.83 Termination of registration.

AUTHORITY: 8 U.S.C. 1104 and 1182; Pub. L. 105–277; Pub. L. 108–449; 112 Stat. 2681–795 through 2681–801; The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); The Intercountry Adoption Act of 2000, 42 U.S.C. 14901–14954, Pub. L. 106–279; The International Adoption Simplification Act, Pub. L. 111–287; 8 U.S.C. 1101, 124 Stat. 3058.

SOURCE: 52 FR 42613, Nov. 5, 1987, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 42 appear at 71 FR 34522, June 15, 2006.

Subpart A—Visa and Passport Not Required for Certain Immigrants

§42.1 Aliens not required to obtain immigrant visas.

An immigrant within any of the following categories is not required to obtain an immigrant visa:

(a) *Aliens lawfully admitted for permanent residence.* An alien who has previously been lawfully admitted for permanent residence and who is not required under the regulations of the Department of Homeland Security to present a valid immigrant visa upon returning to the United States.

(b) *Alien members of U.S. Armed Forces.* An alien member of the U.S. Armed Forces bearing military identification, who has previously been lawfully admitted for permanent residence and is coming to the United States under official orders or permit of those Armed Forces.

(c) *Aliens entering from Guam, Puerto Rico, or the Virgin Islands.* An alien who has previously been lawfully admitted for permanent residence who seeks to enter the continental United States or any other place under the jurisdiction of the United States directly from Guam, Puerto Rico, or the Virgin Islands of the United States.

(d) *Child born after issuance of visa to accompanying parent.* An alien child born after the issuance of an immigrant visa to an accompanying parent, who will arrive in the United States with the parent, and apply for admission during the period of validity of the visa issued to the parent.

(e) *Child born of a national or lawful permanent resident mother during her temporary visit abroad.* An alien child born during the temporary visit abroad of a mother who is a national or lawful permanent resident of the United States if applying for admission within 2 years of birth and accompanied by either parent applying and eligible for readmission as a permanent resident upon that parent's first return to the United States after the child's birth.

(f) *American Indians born in Canada.* An American Indian born in Canada and having at least 50 per centum of blood of the American Indian race.

§42.2 Aliens not required to present passports.

An immigrant within any of the following categories is not required to present a passport in applying for an immigrant visa:

(a) *Certain relatives of U.S. citizens.* An alien who is the spouse, unmarried son

or daughter, or parent, of a U.S. citizen, unless the alien is applying for a visa in the country of which the applicant is a national and the possession of a passport is required for departure.

(b) *Returning aliens previously lawfully admitted for permanent residence.* An alien previously lawfully admitted for permanent residence who is returning from a temporary visit abroad, unless the alien is applying for a visa in the country of which the applicant is a national and the possession of a passport is required for departure.

(c) *Certain relatives of aliens lawfully admitted for permanent residence.* An alien who is the spouse, unmarried son or daughter, or parent of an alien lawfully admitted for permanent residence, unless the alien is applying for a visa in the country of which the applicant is a national and the possession of a passport is required for departure.

(d) *Stateless persons.* An alien who is a stateless person, and accompanying spouse and unmarried son or daughter.

(e) *Nationals of Communist-controlled countries.* An alien who is a national of a Communist-controlled country and who is unable to obtain a passport from the government of that country, and accompanying spouse and unmarried son or daughter.

(f) *Alien members of U.S. Armed Forces.* An alien who is a member of the U.S. Armed Forces.

(g) *Beneficiaries of individual waivers.* (1) An alien who would be within one of the categories described in paragraphs (a) through (d) of this section except that the alien is applying for a visa in a country of which the applicant is a national and possession of a passport is required for departure, in whose case the passport requirement has been waived by the Secretary of State, as evidence by a specific instruction from the Department.

(2) An alien unable to obtain a passport and not within any of the foregoing categories, in whose case the passport requirement imposed by § 42.64(b) or by DHS regulations has been waived by the Secretary of Homeland Security and the Secretary of State as evidenced by a specific instruction from the Department.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49680, Oct. 1, 1991]

Subpart B—Classification and Foreign State Chargeability

§ 42.11 Classification symbols.

A visa issued to an immigrant alien within one of the classes described below shall bear an appropriate visa symbol to show the classification of the alien.

IMMIGRANTS

Symbol	Class	Section of law
	Immediate Relatives	
IR1	Spouse of U.S. Citizen	201(b).
IR2	Child of U.S. Citizen	201(b).
IR3	Orphan Adopted Abroad by U.S. Citizen	201(b) & 101(b)(1)(F).
IH3	Child from Hague Convention Country Adopted Abroad by U.S. Citizen	201(b) & 101(b)(1)(G).
IR4	Orphan to be Adopted in U.S. by U.S. Citizen	201(b) & 101(b)(1)(F).
IH4	Child from Hague Convention Country to be Adopted in U.S. by U.S. Citizen.	201(b) & 101(b)(1)(G).
IR5	Parent of U.S. Citizen at Least 21 Years of Age	201(b).
CR1	Spouse of U.S. Citizen (Conditional Status)	201(b) & 216.
CR2	Child of U.S. Citizen (Conditional Status)	201(b) & 216.
IW1	Certain Spouses of Deceased U.S. Citizens	201(b).
IW2	Child of IW1	201(b).
IB1	Self-petition Spouse of U.S. Citizen	204(a)(1)(A)(iii).
IB2	Self-petition child of U.S. Citizen	204(a)(1)(A)(iv).
IB3	Child of IB1	204(a)(1)(A)(iii).
VI5	Parent of U.S. Citizen Who Acquired Permanent Resident Status Under the Virgin Islands Nonimmigrant Alien Adjustment Act.	201(b) & sec. 2 of the Virgin Islands Nonimmigrant Alien Adjustment Act, (Pub. L. 97–271).

IMMIGRANTS—Continued

Symbol	Class	Section of law
	Vietnam Amerasian Immigrants	
AM1	Vietnam Amerasian Principal	584(b)(1)(A) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of Pub. L. 100–102) as amended.
AM2	Spouse or Child of AM1	584(b)(1)(A) and 584(b)(1)(B) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of Public Law 100–102) as amended.
AM3	Natural Mother of AM1 (and Spouse or Child of Such Mother) or Person Who has Acted in Effect as the Mother, Father, or Next-of-Kin of AM1 (and Spouse or Child of Such Person).	584(b)(1)(A) and 584(b)(1)(C) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of Public Law 100–102) as amended.
	Special Immigrants	
SB1	Returning Resident	101(a)(27)(A).
SC1	Person Who Lost U.S. Citizenship by Marriage	101(a)(27)(B) & 324(a).
SC2	Person Who Lost U.S. Citizenship by Serving in Foreign Armed Forces	101(a)(27)(B) & 327.
SI1	Certain Aliens Employed by the U.S. Government in Iraq or Afghanistan as Translators or Interpreters.	Section 1059 of Pub. L. 109–163 as amended by Pub. L. 110–36.
SI2	Spouse of SI1	Section 1059 of Pub. L. 109–163 as amended by Pub. L. 110–36.
SI3	Child of SI1	Section 1059 of Pub. L. 109–163 as amended by Pub. L. 110–36.
SM1	Alien Recruited Outside the United States Who Has Served or is Enlisted to Serve in the U.S. Armed Forces for 12 Years.	101(a)(27)(K).
SM2	Spouse of SM1	101(a)(27)(K).
SM3	Child of SM1	101(a)(27)(K).
SQ1	Certain Iraqis or Afghans Employed by or on Behalf of the U.S. Government.	Section 602(b), Division F, Title VI, Omnibus Appropriations Act of 2009, Pub. L. 111–8 and Section 1244 of Pub. L. 110–181.
SQ2	Spouse of SQ1	Section 602(b), Division F, Title VI, Omnibus Appropriations Act of 2009, Pub. L. 111–8 and Section 1244 of Pub. L. 110–181.
SQ3	Child of SQ1	Section 602(b), Division F, Title VI, Omnibus Appropriations Act of 2009, Pub. L. 111–8 and Section 1244 of Pub. L. 110–181.
SU2	Spouse of U1	INA 245(m)(3) & INA 101(a)(15)(U)(ii).
SU3	Child of U1	INA 245(m)(3) & INA 101(a)(15)(U)(ii).
SU5	Parent of U1	INA 245(m)(3) & INA 101(a)(15)(U)(ii).
	Family-Sponsored Preferences	
	Family 1st Preference	
F11	Unmarried Son or Daughter of U.S. Citizen	203(a)(1).
F12	Child of F11	203(d) & 203(a)(1).
B11	Self-petition Unmarried Son or Daughter of U.S. Citizen	204(a)(1)(A)(iv) & 203(a)(1).
B12	Child of B11	203(d), 204(a)(1)(A)(iv) & 203(a)(1).
	Family 2nd Preference (Subject to Country Limitations)	
F21	Spouse of Lawful Permanent Resident	203(a)(2)(A).
F22	Child of Lawful Permanent Resident	203(a)(2)(A).
F23	Child of F21 or F22	203(d) & 203(a)(2)(A).
F24	Unmarried Son or Daughter of Lawful Permanent Resident	203(a)(2)(B).
F25	Child of F24	203(d) & 203(a)(2)(B).
C21	Spouse of Lawful Permanent Resident (Conditional)	203(a)(2)(A) & 216.
C22	Child of Alien Resident (Conditional)	203(a)(2)(A) & 216.

IMMIGRANTS—Continued

Symbol	Class	Section of law
C23	Child of C21 or C22 (Conditional)	203(d) & 203(a)(2)(A) & 216.
C24	Unmarried Son or Daughter of Lawful Permanent Resident (Conditional)	203(a)(2)(B) & 216.
C25	Child of F24 (Conditional)	203(d) & 203(a)(2)(B) & 216.
B21	Self-petition Spouse of Lawful Permanent Resident	204(a)(1)(B)(ii).
B22	Self-petition Child of Lawful Permanent Resident	204(a)(1)(B)(iii).
B23	Child of B21 or B22	203(d) & 204(a)(1)(B)(ii).
B24	Self-petition Unmarried Son or Daughter of Lawful Permanent Resident	204(a)(1)(B)(iii).
B25	Child of B24	203(d) & 204(a)(1)(B)(iii).
Family 2nd Preference (Exempt from Country Limitations)		
FX1	Spouse of Lawful Permanent Resident	202(a)(4)(A) & 203(a)(2)(A).
FX2	Child of Lawful Permanent Resident	202(a)(4)(A) & 203(a)(2)(A).
FX3	Child of FX1 or FX2	202(a)(4)(A) & 203(a)(2)(A) & 203(d).
CX1	Spouse of Lawful Permanent Resident (Conditional)	202(a)(4)(A) & 203(a)(2)(A) & 216.
CX2	Child of Lawful Permanent Resident (Conditional)	202(a)(4)(A) & 203(a)(2)(A) & 216.
CX3	Child of CX1 or CX2 (Conditional)	202(a)(4)(A) & 203(a)(2)(A) & 203(d) & 216.
BX1	Self-petition Spouse of Lawful Permanent Resident	204(a)(1)(B)(ii).
BX2	Self-petition Child of Lawful Permanent Resident	204(a)(1)(B)(iii).
BX3	Child of BX1 or BX2	204(a)(1)(B)(ii) & 203(d).
Family 3rd Preference		
F31	Married Son or Daughter of U.S. Citizen	203(a)(3).
F32	Spouse of F31	203(d) & 203(a)(3).
F33	Child of F31	203(d) & 203(a)(3).
C31	Married Son or Daughter of U.S. Citizen (Conditional)	203(a)(3) & 216.
C32	Spouse of C31 (Conditional)	203(d) & 203(a)(3) & 216.
C33	Child of C31 (Conditional)	203(d) & 203(a)(3) & 216.
B31	Self-petition Married Son or Daughter of U.S. Citizen	204(a)(1)(A)(iv) & 203(a)(3).
B32	Spouse of B31	203(d), 204(a)(1)(A)(iv) & 203(a)(3).
B33	Child of B31	203(d), 204(a)(1)(A)(iv) & 203(a)(3).
Family 4th Preference		
F41	Brother or Sister of U.S. Citizen at Least 21 Years of Age	203(a)(4).
F42	Spouse of F41	203(d) & 203(a)(4).
F43	Child of F41	203(d) & 203(a)(4).
Employment-Based Preferences Employment 1st Preference (Priority Workers)		
E11	Alien with Extraordinary Ability	203(b)(1)(A).
E12	Outstanding Professor or Researcher	203(b)(1)(B).
E13	Multinational Executive or Manager	203(b)(1)(C).
E14	Spouse of E11, E12, or E13	203(d) & 203(b)(1)(A) & 203(b)(1)(B) & 203(b)(1)(C).
E15	Child of E11, E12, or E13	203(d) & 203(b)(1)(A) & 203(b)(1)(B) & 203(b)(1)(C).
Employment 2nd Preference (Professionals Holding Advanced Degrees or Persons of Exceptional Ability)		
E21	Professional Holding Advanced Degree or Alien of Exceptional Ability	203(b)(2).
E22	Spouse of E21	203(d) & 203(b)(2).
E23	Child of E21	203(d) & 203(b)(2).
Employment 3rd Preference (Skilled Workers, Professionals, and Other Workers)		
E31	Skilled Worker	203(b)(3)(A)(i).
E32	Professional Holding Baccalaureate Degree	203(b)(3)(A)(ii).
E34	Spouse of E31 or E32	203(d) & 203(b)(3)(A)(i) & 203(b)(3)(A)(ii).
E35	Child of E31 or E32	203(d) & 203(b)(3)(A)(i) & 203(b)(3)(A)(ii).
EW3	Other Worker (Subgroup Numerical Limit)	203(b)(3)(A)(iii).
EW4	Spouse of EW3	203(d) & 203(b)(3)(A)(iii).
EW5	Child of EW3	203(d) & 203(b)(3)(A)(iii).

IMMIGRANTS—Continued

Symbol	Class	Section of law
	Employment 4th Preference (Certain Special Immigrants)	
BC1	Broadcaster in the U.S. employed by the International Broadcasting Bureau of the Broadcasting Board of Governors or a grantee of such organization.	101(a)(27)(M) & 203(b)(4).
BC2	Accompanying spouse of BC1	101(a)(27)(M) & 203(b)(4).
BC3	Accompanying child of BC1	101(a)(27)(M) & 203(b)(4).
SD1	Minister of Religion	101(a)(27)(C)(ii)(I) & 203(b)(4).
SD2	Spouse of SD1	101(a)(27)(C)(ii)(I) & 203(b)(4).
SD3	Child of SD1	101(a)(27)(C)(ii)(I) & 203(b)(4).
SE1	Certain Employees or Former Employees of the U.S. Government Abroad.	101(a)(27)(D) & 203(b)(4).
SE2	Spouse of SE1	101(a)(27)(D) & 203(b)(4).
SE3	Child of SE1	101(a)(27)(D) & 203(b)(4).
SF1	Certain Former Employees of the Panama Canal Company or Canal Zone Government.	101(a)(27)(E) & 203 (b)(4).
SF2	Spouse or Child of SF1	101(a)(27)(E) & 203 (b)(4).
SG1	Certain Former Employees of the U.S. Government in the Panama Canal Zone.	101(a)(27)(F) & 203 (b)(4).
SG2	Spouse or Child of SG1	101(a)(27)(F) & 203 (b)(4).
SH1	Certain Former Employees of the Panama Canal Company or Canal Zone Government on April 1, 1979.	101(a)(27)(G) & 203 (b)(4).
SH2	Spouse or Child of SH1	101(a)(27)(G) & 203(b)(4).
SJ1	Certain Foreign Medical Graduates (Adjustments Only)	101(a)(27)(H).
SJ2	Accompanying Spouse or Child of SJ1	101(a)(27)(H) & 203(b)(4).
SK1	Certain Retired International Organization employees	101(a)(27)(I)(iii) & 203(b)(4).
SK2	Spouse of SK1	101(a)(27)(I)(iv) & 203(b)(4).
SK3	Certain Unmarried Sons or Daughters of an International Organization Employee.	101(a)(27)(I)(i) & 203(b)(4).
SK4	Certain Surviving Spouses of a deceased International Organization Employee.	101(a)(27)(I)(ii) & 203(b)(4).
SL1	Juvenile Court Dependent (Adjustment Only)	101(a)(27)(J) & 203(b)(4).
SN1	Certain retired NATO6 civilians	101(a)(27)(L) & 203(b)(4).
SN2	Spouse of SN1	101(a)(27)(L) & 203(b)(4).
SN3	Certain unmarried sons or daughters of NATO6 civilian employees	101(a)(27)(L) & 203(b)(4).
SN4	Certain surviving spouses of deceased NATO6 civilian employees	101(a)(27)(L) & 203(b)(4).
SP	Alien Beneficiary of a petition or labor certification application filed prior to September 11, 2001, if the petition or application was rendered void due to a terrorist act of September 11, 2001. Spouse, child of such alien, or the grandparent of a child orphaned by a terrorist act of September 11, 2001.	Section 421 of Public Law 107–56.
SR1	Certain Religious Workers	101(a)(27)(C)(ii)(II) & (III) as amended, & 203(b)(4).
SR2	Spouse of SR1	101(a)(27)(C)(ii)(II) & (III) as amended, & 203(b)(4).
SR3	Child of SR1	101(a)(27)(C)(ii)(II) & (III) as amended, & 203(b)(4).
	Employment 5th Preference (Employment Creation Conditional Status)	
C51	Employment Creation OUTSIDE Targeted Areas	203(b)(5)(A).
C52	Spouse of C51	203(d) & 203(b)(5)(A).
C53	Child of C51	203(d) & 203(b)(5)(A).
T51	Employment Creation IN Targeted Rural/High Unemployment Area	203(b)(5)(B).
T52	Spouse of T51	203(d) & 203 (b)(5)(B).
T53	Child of T51	203(d) & 203(b)(5)(B).
R51	Investor Pilot Program, Not in Targeted Area	203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.
R52	Spouse of R51	203(d) & 203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.

IMMIGRANTS—Continued

Symbol	Class	Section of law
R53	Child of R51	203(d) & 203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.
I51	Investor Pilot Program, in Targeted Area	203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.
I52	Spouse of I51	203(d) & 203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.
I53	Child of I51	203(d) & 203(b)(5) & Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (Pub. L. 102–395), as amended.
Other Numerically Limited Categories Diversity Immigrants		
DV1	Diversity Immigrant	203(c).
DV2	Spouse of DV1	203(d) & 203(c).
DV3	Child of DV1	203(d) & 203(c).

[74 FR 61521, Nov. 25, 2009]

§ 42.12 Rules of chargeability.

(a) *Applicability*. An immigrant shall be charged to the numerical limitation for the foreign state or dependent area of birth, unless the case falls within one of the exceptions to the general rule of chargeability provided by INA 202(b) and paragraphs (b) through (e) of this section to prevent the separation of families or the alien is classifiable under:

(1) INA 201(b);

(2) INA 101(a)(27) (A) or (B);

(3) Section 112 of Public Law 101–649;

(4) Section 124 of Public Law 101–649;

(5) Section 132 of Public Law 101–649;

(6) Section 134 of Public Law 101–649; or

(7) Section 584(b)(1) as contained in section 101(e) of Public Law 100–202.

(b) *Exception for child*. If necessary to prevent the separation of a child from the alien parent or parents, an immigrant child, including a child born in a dependent area, may be charged to the same foreign state to which a parent is chargeable if the child is accompanying or following to join the parent, in accordance with INA 202(b)(1).

(c) *Exception for spouse*. If necessary to prevent the separation of husband and wife, an immigrant spouse, including a spouse born in a dependent area, may be charged to a foreign state to which a spouse is chargeable if accompanying or following to join the spouse, in accordance with INA 202(b)(2).

(d) *Exception for alien born in the United States*. An immigrant who was born in the United States shall be charged to the foreign state of which the immigrant is a citizen or subject. If not a citizen or subject of any country, the alien shall be charged to the foreign state of last residence as determined by the consular officer, in accordance with INA 202(b)(3).

(e) *Exception for alien born in foreign state in which neither parent was born or had residence at time of alien's birth*. An alien who was born in a foreign state, as defined in § 40.1, in which neither parent was born, and in which neither parent had a residence at the time of

the applicant's birth, may be charged to the foreign state of either parent as provided in INA 202(b)(4). The parents of such an alien are not considered as having acquired a residence within the meaning of INA 202(b)(4), if, at the time of the alien's birth within the foreign state, the parents were visiting temporarily or were stationed there in connection with the business or profession and under orders or instructions of an employer, principal, or superior authority foreign to such foreign state.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49681, Oct. 1, 1991]

Subpart C—Immigrants Not Subject to Numerical Limitations of INA 201 and 202

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

§ 42.21 Immediate relatives.

(a) *Entitlement to status.* An alien who is a spouse or child of a United States citizen, or a parent of a U.S. citizen at least 21 years of age, shall be classified as an immediate relative under INA 201(b) if the consular officer has received from DHS an approved Petition to Classify Status of Alien Relative for Issuance of an Immigrant Visa, filed on the alien's behalf by the U.S. citizen and approved in accordance with INA 204, and the officer is satisfied that the alien has the relationship claimed in the petition. An immediate relative shall be documented as such unless the U.S. citizen refuses to file the required petition, or unless the immediate relative is also a special immigrant under INA 101(a)(27) (A) or (B) and not subject to any numerical limitation.

(b) *Spouse of a deceased U.S. citizen.* The spouse of a deceased U.S. citizen, and each child of the spouse, will be entitled to immediate relative status after the date of the citizen's death provided the spouse or child meets the criteria of INA 201(b)(2)(A)(i) or of section 423(a)(1) of Public Law 107–56 (USA Patriot Act) and the Consular Officer has received an approved petition from the DHS which accords such status, or official notification of such approval, and the Consular Officer is satisfied that the alien meets those criteria.

(c) *Child of a U.S. citizen victim of terrorism.* The child of a U.S. citizen slain in the terrorist actions of September 11, 2001, shall retain the status of an immediate relative child (regardless of changes in age or marital status) if the child files a petition for such status within two years of the citizen's death pursuant to section 423(a)(2) of Public Law 107–56, and the consular officer has received an approved petition according such status or official notification of such approval.

[56 FR 49676, Oct. 1, 1991, as amended at 64 FR 55419, Oct. 13, 1999; 67 FR 1415, Jan. 11, 2002]

§ 42.22 Returning resident aliens.

(a) *Requirements for returning resident status.* An alien shall be classifiable as a special immigrant under INA 101(a)(27)(A) if the consular officer is satisfied from the evidence presented that:

(1) The alien had the status of an alien lawfully admitted for permanent residence at the time of departure from the United States;

(2) The alien departed from the United States with the intention of returning and has not abandoned this intention; and

(3) The alien is returning to the United States from a temporary visit abroad and, if the stay abroad was protracted, this was caused by reasons beyond the alien's control and for which the alien was not responsible.

(b) *Documentation needed.* Unless the consular officer has reason to question the legality of the alien's previous admission for permanent residence or the alien's eligibility to receive an immigrant visa, only those records and documents required under INA 222(b) which relate to the period of residence in the United States and the period of the temporary visit abroad shall be required. If any required record or document is unobtainable, the provisions of § 42.65(d) shall apply.

(c) *Returning resident alien originally admitted under the Act of December 28, 1945.* An alien admitted into the United States under Section 1 of the Act of December 28, 1945 (''GI Brides Act'') shall not be refused an immigrant visa

after a temporary absence abroad solely because of a mental or physical defect or defects that existed at the time of the original admission.

[56 FR 49676, Oct. 1, 1991, as amended at 63 FR 48578, Sept. 11, 1998]

§ 42.23 Certain former U.S. citizens.

(a) *Women expatriates.* An alien woman, regardless of marital status, shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that she was formerly a U.S. citizen and that she meets the requirements of INA 324(a).

(b) *Military expatriates.* An alien shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that the alien was formerly a U.S. citizen and that the alien lost citizenship under the circumstances set forth in INA 327.

§ 42.24 Adoption under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Intercountry Adoption Act of 2000.

(a) Except as described in paragraph (n), for purposes of this section, the definitions in 22 CFR 96.2 apply.

(b) On or after the Convention effective date, as defined in 22 CFR 96.17, a child habitually resident in a Convention country who is adopted by a United States citizen deemed to be habitually resident in the United States in accordance with applicable DHS regulations must qualify for visa status under the provisions of INA section 101(b)(1)(G) as provided in this section. Such a child shall not be accorded status under INA section 101(b)(1)(F), *provided that* a child may be accorded status under INA section 101(b)(1)(F) if Form I–600A or I–600 was filed before the Convention effective date. Although this part 42 generally applies to the issuance of immigrant visas, this section 42.24 may also provide the basis for issuance of a nonimmigrant visa to permit a Convention adoptee to travel to the United States for purposes of naturalization under INA section 322.

(c) The provisions of this section govern the operations of consular officers in processing cases involving children for whom classification is sought under INA section 101(b)(1)(G), unless the Secretary of State has personally waived any requirement of the IAA or these regulations in a particular case in the interests of justice or to prevent grave physical harm to the child, to the extent consistent with the Convention.

(d) An alien child shall be classifiable under INA section 101(b)(1)(G) only if, before the child is adopted or legal custody for the purpose of adoption is granted, a petition for the child has been received and provisionally approved by a DHS officer or, where authorized by DHS, by a consular officer, and a visa application for the child has been received and annotated in accordance with paragraph (h) of this section by a consular officer. No alien child shall be issued a visa pursuant to INA section 101(b)(1)(G) unless the petition and visa application are finally approved.

(e) If a petition for a child under INA section 101(b)(1)(G) is properly filed with a consular officer, the consular officer will review the petition for the purpose of determining whether it can be provisionally approved in accordance with applicable DHS requirements. If a properly completed application for waiver of inadmissibility is received by a consular officer at the same time that a petition for a child under INA section 101(b)(1)(G) is received, provisional approval cannot take place unless the waiver is approved, and therefore the consular officer, pursuant to 8 CFR 204.313(i)(3) and 8 CFR 212.7, will forward the petition and the waiver application to DHS for decisions as to approval of the waiver and provisional approval of the petition. If a petition for a child under INA section 101(b)(1)(G) is received by a DHS officer, the consular officer will conduct any reviews, determinations or investigations requested by DHS with regard to the petition and classification determination in accordance with applicable DHS procedures.

(f) A petition shall be provisionally approved by the consular officer if, in accordance with applicable DHS requirements, it appears that the child will be classifiable under INA section 101(b)(1)(G) and that the proposed adoption or grant of legal custody will be in

compliance with the Convention. If the consular officer knows or has reason to believe the petition is not provisionally approvable, the consular officer shall forward it to DHS pursuant to 8 CFR 204.313(i)(3).

(g) After a petition has been provisionally approved, a completed visa application form, any supporting documents required pursuant to §42.63 and §42.65, and any required fees must be submitted to the consular officer in accordance with §42.61 for a provisional review of visa eligibility. The requirements in §§42.62, 42.64, 42.66 and 42.67 shall also be satisfied to the extent practicable.

(h) A consular officer shall provisionally determine visa eligibility based on a review of the visa application, submitted supporting documents, and the provisionally approved petition. In so doing, the consular officer shall follow all procedures required to adjudicate the visa to the extent possible in light of the degree of compliance with §§42.62 through 42.67. If it appears, based on the available information, that the child would not be ineligible under INA section 212 or other applicable law to receive a visa, the consular officer shall so annotate the visa application. If evidence of an ineligibility is discovered during the review of the visa application, and the ineligibility was not waived in conjunction with provisional approval of the petition, the prospective adoptive parents shall be informed of the ineligibility and given an opportunity to establish that it will be overcome. If the visa application cannot be annotated as described above, the consular officer shall deny the visa in accordance with §42.81, regardless of whether the application has yet been executed in accordance with §42.67(a); provided however that, in cases in which a waiver may be available under the INA and the consular officer determines that the visa application appears otherwise approvable, the consular officer shall inform the prospective adoptive parents of the procedure for applying to DHS for a waiver. If in addition the consular officer comes to know or have reason to believe that the petition is not clearly approvable as provided in 8 CFR 204.313(i)(3), the consular officer shall forward the petition to DHS pursuant to that section.

(i) If the petition has been provisionally approved and the visa application has been annotated in accordance with subparagraph (h), the consular officer shall notify the country of origin that the steps required by Article 5 of the Convention have been taken.

(j) After the consular officer has received appropriate notification from the country of origin that the adoption or grant of legal custody has occurred and any remaining requirements established by DHS or §§42.61 through 42.67 have been fulfilled, the consular officer, if satisfied that the requirements of the IAA and the Convention have been met with respect to the adoption or grant of legal custody, shall affix to the adoption decree or grant of legal custody a certificate so indicating. This certificate shall constitute the certification required by IAA section 301(a) and INA section 204(d)(2). For purposes of determining whether to issue a certificate, the fact that a consular officer notified the country of origin pursuant to paragraph (i) of this section that the steps required by Article 5 of the Convention had been taken and the fact that the country of origin has provided appropriate notification that the adoption or grant of legal custody has occurred shall together constitute prima facie evidence of compliance with the Convention and the IAA.

(k) If the consular officer is unable to issue the certificate described in paragraph (j) of this section, the consular officer shall notify the country of origin of the consular officer's decision.

(l) After the consular officer determines whether to issue the certificate described in paragraph (j) of this section, the consular officer shall finally adjudicate the petition and visa application in accordance with standard procedures.

(m) If the consular officer is unable to give final approval to the visa application or the petition, then the consular officer shall forward the petition to DHS, pursuant to §42.43 or 8 CFR 204.313(i)(3), as applicable, for appropriate action in accordance with applicable DHS procedures, and/or refuse the visa application in accordance with §42.81. The consular officer shall notify

the country of origin that the visa has been refused.

(n) Notwithstanding paragraphs (d) through (m) of this section, an alien described in paragraph (n)(1) of this section may qualify for visa status under INA section 101(b)(1)(G)(iii) without meeting the requirements set forth in paragraphs (d) through (m) of this section.

(1) Per Section 4(b) of the Intercountry Adoption Simplification Act, Public Law 111–287 (IASA), an alien otherwise described in INA section 101(b)(1)(G)(iii) who attained the age of 18 on or after April 1, 2008 shall be deemed to meet the age requirement imposed by INA section 101(b)(1)(G)(iii)(III), provided that a petition is filed for such child in accordance with DHS requirements not later than November 30, 2012.

(2) For any alien described in paragraph (n)(1) of this section, the ''competent authority'' referred to in INA section 101(b)(1)(G)(i)(V)(aa) is a court or governmental agency of a foreign country of origin having jurisdiction and authority to make decisions in matters of child welfare, including adoption. If the competent authority over matters of child welfare no longer has jurisdiction or authority over the alien due to his or her age, then the passport issuing authority of the country of origin may be considered the competent authority for the purposes of INA section 101(b)(1)(G)(i)(V)(aa).

[72 FR 61305, Oct. 30, 2007, as amended at 76 FR 67363, Nov. 1, 2011; 78 FR 32990, June 3, 2013]

Subpart D—Immigrants Subject to Numerical Limitations

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

§ 42.31 Family-sponsored immigrants.

(a) *Entitlement to status.* An alien shall be classifiable as a family-sponsored immigrant under INA 203(a) (1), (2), (3) or (4) if the consular officer has received from DHS a Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien has the relationship to the petitioner indicated in the petition. In the case of a petition according an alien status under INA 203(a) (1) or (3) or status as an unmarried son or daughter under INA 203(a)(2), the petitioner must be a ''parent'' as defined in INA 101(b)(2) and 22 CFR 40.1. In the case of a petition to accord an alien status under INA 203(a)(4) filed on or after January 1, 1977, the petitioner must be at least twenty-one years of age.

(b) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child of a family-sponsored first, second, third or fourth preference immigrant or the spouse of a family-sponsored third or fourth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 61 FR 1836, Jan. 24, 1996]

§ 42.32 Employment-based preference immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as indicated below.

(a) *First preference—Priority workers—* (1) *Entitlement to status.* An alien shall be classifiable as an employment-based first preference immigrant under INA 203(b)(1) if the consular office has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such Preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(1).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based first preference immigrant, if not otherwise entitled to an immigrant status and

the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(b) *Second preference—Professionals with advanced degrees or persons of exceptional ability*—(1) *Entitlement to status.* An alien shall be classifiable as an employment-based second preference immigrant under INA 203(b)(2) if the consular officer has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(2).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based second preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(c) *Third preference—Skilled workers, professionals, other workers*—(1) *Entitlement to status.* An alien shall be classifiable as an employment-based third preference immigrant under INA 203(b)(3) if the consular officer has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(3).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based third preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(d) *Fourth preference—Special immigrants*—(1) *Religious workers*—(i) *Classification based on qualifications under INA 101(A)(27)(C).* An alien shall be classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(C) if:

(A) The consular officer has received a petition approved by DHS to accord such classification, or an official notification of such approval; and

(B) The consular officer is satisfied from the evidence presented that the alien qualifies under that section; or

(C) The consular officer is satisfied the alien is the spouse or child of a religious worker so classified and is accompanying or following to join the principal alien.

(ii) *Timeliness of application.* An immigrant visa issued under INA 203(b)(4) to an alien described in INA 101(a)(27)(C), other than a minister of religion, who qualifies as a ''religious worker'' as defined in 8 CFR 204.5, shall bear the usual validity except that in no case shall it be valid later than September 30, 2003.

(2) *Certain U.S. Government employees*—(i) *General.* (A) An alien is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) if a petition to accord such status has been approved by the Secretary of State. An alien may file such a petition only after, but within one year of, notification from the Department that the Secretary of State has approved a recommendation from the Principal Officer that special immigrant status be accorded the alien in exceptional circumstances and has found it in the national interest so to do.

(B) An alien may qualify as a special immigrant under INA 101(a)(27)(D) on the basis of employment abroad with more than one agency of the U.S. Government provided the total amount of full-time service with the U.S. Government is 15 years or more.

(C) Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of an alien classified under INA 203(b)(4), if not entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(ii) *Special immigrant status for certain aliens employed at the United States mission in Hong Kong.* (A) An alien employed at the United States Consulate

General in Hong Kong under the authority of the Chief of Mission or an alien employed pursuant to section 5913 of title 5 of the United States Code is eligible for classification under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) provided:

(*1*) The alien has performed faithfully for a total of three years or more;

(*2*) The alien is a member of the immediate family of an employee entitled to such special immigrant status; and

(*3*) The welfare of the alien or the family member is subject to clear threat due directly to the employee's employment with the United States Government or under a United States Government official; and

(*4*) Subsequent to the Secretary's approval of the Principal Officer's recommendation and finding it in the national interest to do so, but within one year thereof, the alien has filed a petition for status under INA 203(b)(4) which the Secretary has approved.

(B) An alien desiring to benefit from this provision must seek such status not later than January 1, 2002.

(C) For purposes of § 42.32(d)(2)(ii)(A), the term *member of the immediate family* means the definition (as of November 29, 1990) in Volume 6 of the Foreign Affairs Manual, section 117k, of a relative who has been living with the employee in the same household.

(iii) *Priority date*. The priority date of an alien seeking status under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) shall be the date on which the petition to accord such classification is filed. The filing date of the petition is that on which a properly completed form and the required fee are accepted by a Foreign Service post.

(iv) *Petition validity*. Except as noted in this paragraph, the validity of a petition approved for classification under INA 203(b)(4) shall be six months beyond the date of the Secretary of State's approval thereof or the availability of a visa number, whichever is later. In cases described in § 42.32(d)(2)(ii), the validity of the petition shall not in any case extend beyond January 1, 2002.

(v) *Extension of petition validity*. If the principal officer of a post concludes that circumstances in a particular case are such that an extension of the validity of the Secretary's approval of special immigrant status or of the petition would be in the national interest, the principal officer shall recommend to the Secretary of State that such validity be extended for not more than one additional year.

(vi) *Fees*. The Secretary of State shall establish a fee for the filing of a petition to accord status under INA 203(b)(4) which shall be collected following notification that the Secretary has approved status as a special immigrant under INA 101(a)(27)(D) for the alien.

(vii) *Delegation of authority to approve petitions*. The authority to approve petitions to accord status under INA 203(b)(4) to an alien described in INA 101(a)(27)(D) is hereby delegated to the chief consular officer at the post of recommendation or, in the absence of the consular officer, to any alternate approving officer designated by the principal officer. Such authority may not be exercised until the Foreign Service post has received formal notification of the Secretary's approval of special immigrant status for the petitioning alien.

(3) *Panama Canal employees*—(i) *Entitlement to status*. An alien who is subject to the numerical limitations specified in section 3201(c) of the Panama Canal Act of 1979, Public Law 96–70, is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27) (E), (F) or (G) if the consular officer has received a petition approved by DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 101(a)(27) (E), (F), or (G).

(ii) *Entitlement to derivative status*. Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(4) *Spouse and children of certain foreign medical graduates.* The accompanying spouse and children of a graduate of a foreign medical school or of a person qualified to practice medicine in a foreign state who has adjusted status as a special immigrant under the provisions of INA 101(a)(27)(H) are classifiable under INA 203(b)(4) as special immigrants defined in INA 101(a)(27)(H) if the consular officer has received an approved petition from DHS which accords such status and the consular officer is satisfied that the alien is within the class described in INA 101(a)(27)(H).

(5) *Certain international organization and NATO civilian employees*—(i) *Entitlement to status.* An alien is classifiable under INA 203(b)(4) as a special immigrant defined in INA 101(a)(27)(I) or (L) if the consular officer has received a petition approved by the DHS to accord such classification, or official notification of such approval, and the consular officer is satisfied from the evidence presented that the alien is within one of the classes described therein.

(ii) *Timeliness of application.* An alien accorded status under INA 203(b)(4) because of qualification under INA 101(a)(27)(I) or (L) must appear for the final visa interview and issuance of the immigrant visa within six months of establishing entitlement to status.

(6) *Certain juvenile court dependents.* An alien shall be classifiable under INA 203(b)(4) as a special immigrant defined in INA 101(a)(27)(J) if the consular officer has received from DHS an approved petition to accord such status, or an official notification of such an approval, and the consular officer is satisfied the alien is within the class described in that section.

(7) *Certain members of the United States Armed Forces recruited abroad*—(i) *Entitlement to status.* An alien is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(K) if the consular office has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is within the class described in INA 101(a)(27)(K).

(ii) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(8) *Certain United States international broadcasting employees*—(i) *Entitlement to status.* An alien is classifiable as a special immigrant under INA 203(b)(4) as described in INA 101(a)(27)(M), if the consular office has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is within the class described in INA 101(a)(27)(M).

(ii) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(9) *Certain victims of the September 11, 2001 terrorist attacks*—(i) *Entitlement to status.* An alien shall be classifiable as a special immigrant under INA 203(b)(4) as specified in section 421 of Public Law 107–56, if:

(A) The consular officer has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is entitled to that classification; or

(B) The alien is the spouse or child of an alien so classified in paragraph (d)(9)(i) of this section and is accompanying or following to join the principal alien.

(ii) *Ineligibility exemption.* An alien classified under paragraph (d)(9)(i) of this section shall not be subject to the provisions of INA 212(a)(4).

(iii) *Priority date.* Aliens entitled to status under paragraph (d)(9)(i) of this section shall be assigned a priority

date as of the date the petition was filed under INA 204 for classification under section INA 203(b)(4) and visas shall be issued in the chronological order of application submission. However, in the event that the annual limit for immigrants under INA 203 is reached, the alien may retain the earlier priority date of the petition that was revoked.

(e) *Fifth preference—Employment-creation immigrants*—(1) *Entitlement to status.* An alien shall be classifiable as a fifth preference employment-creation immigrant if the consular officer has received from DHS an approved petition to accord such status, or official notification of such an approval, and the consular officer is satisfied that the alien is within the class described in INA 203(b)(5).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of an employment-based fifth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 56 FR 51172, Oct. 10, 1991; 56 FR 55077, Oct. 24, 1991; 60 FR 35839, July 12, 1995; 63 FR 4394, Jan. 29, 1998; 63 FR 68393, Dec. 11, 1998; 65 FR 80745, Dec. 22, 2000; 66 FR 15350, Mar. 19, 2001; 68 FR 24639, May 8, 2003]

§ 42.33 Diversity immigrants.

(a) *General*—(1) *Eligibility to compete for consideration under section 203(c).* An alien will be eligible to compete for consideration for visa issuance under INA 203(c) during a fiscal year only if he or she is a native of a low-admission foreign state, as determined by the Secretary of Homeland Security pursuant to INA 203(c)(1)(E), with respect to the fiscal year in question; and if he or she has at least a high school education or its equivalent or, within the five years preceding the date of application for a visa, has two years of work experience in an occupation requiring at least two years training or experience. The eligibility for a visa under INA 203(c) ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility.

(2) *Definition of high school education or its equivalent.* For the purposes of this section, the phrase high school education or its equivalent means the successful completion of a twelve-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to completion of twelve years' elementary and secondary education in the United States.

(3) *Determinations of work experience.* For all cases registered for the 2003 Diversity Visa Program and Diversity Visa Programs occurring in subsequent fiscal years, consular officers must use the Department of Labor's O*Net On Line to determine qualifying work experience.

(4) *Limitation on number of petitions per year.* No more than one petition may be submitted by or on behalf of, any alien for consideration during any single fiscal year. If two or more petitions for any single fiscal year are submitted by, or on behalf of, any alien, all such petitions will be void pursuant to INA 204(a)(1)(I)(i) and the alien by or for whom the petition has been submitted will not be eligible for consideration for diversity visa issuance during the fiscal year in question.

(5) *Northern Ireland.* For purposes of determining eligibility to file a petition for consideration under INA 203(c) for a fiscal year, the districts comprising that portion of the United Kingdom of Great Britain and Northern Ireland, known as ''Northern Ireland'', will be treated as a separate foreign state. The districts comprising ''Northern Ireland'' are Antrim, Ards, Armagh, Ballymena, Ballymoney, Banbridge, Belfast, Carrickfergus, Castlereagh, Coleraine, Cookstown, Craigavon, Down, Dungannon, Fermanagh, Larne, Limavady, Lisburn, Londonderry, Magherafelt, Moyle, Newry and Mourne, Newtownabbey, North Down, Omagh, and Strabane.

(b) *Petition requirement.* An alien claiming to be entitled to compete for

consideration under INA 203(c) must file a petition with the Department of State for such consideration. At the alien petitioner's request, another person may file a petition on behalf of the alien. The petition will consist of an electronic entry form that the alien petitioner or a person acting on the behalf of the alien petitioner must complete on-line and submit to the Department of State via a Web site established by the Department of State for the purpose of receiving such petitions. The Department will specify the address of the Web site prior to the commencement of the 30-day or greater period described in paragraph (b)(3) of this section using the notice procedure prescribed in that paragraph.

(1) *Information to be provided in the petition*. The website will include the electronic entry form mentioned in paragraph (b) of this section. The entry form will require the person completing the form to provide the following information, typed in the Roman alphabet, regarding the alien petitioner:

(i) The petitioner's full name;

(ii) The petitioner's date and place of birth (including city and country, province or other political subdivision of the country);

(iii) The petitioner's gender;

(iv) The country of which the petitioner claims to be a native, if other than the country of birth;

(v) The name[s], date[s] and place[s] of birth and gender of the petitioner's spouse and child[ren], if any, (including legally adopted and step-children), regardless of whether or not they are living with the petitioner or intend to accompany or follow to join the petitioner should the petitioner immigrate to the United States pursuant to INA 203(c), but excluding a spouse or a child[ren] who is already a U.S. citizen or U.S. lawful permanent resident;

(vi) A current mailing address for the petitioner;

(vii) The location of the consular office nearest to the petitioner's current residence or, if in the United States, nearest to the petitioner's last foreign residence prior to entry into the United States;

(2) *Requirements for photographs*. The electronic entry form will also require inclusion of a recent photograph of the petitioner and of his or her spouse and all unmarried children under the age of 21 years. The photographs must meet the following specifications:

(i) A digital image of the applicant from either a digital camera source or a scanned photograph via scanner. If scanned, the original photographic print must have been 2″ by 2″ (50mm × 50mm). Scanner hardware and digital image resolution requirements will be further specified in the public notice described in paragraph (b)(3) of this section.

(ii) The image must be in the Joint Photographic Experts Group (JPEG) File Interchange Format (JFIF) format.

(iii) The image must be in color.

(iv) The person being photographed must be directly facing the camera with the head neither tilted up, down, or to the side. The head must cover about 50% of the area of the photograph.

(v) The photograph must be taken with the person in front of a neutral, light-colored background. Photos taken with very dark or patterned, busy backgrounds will not be accepted.

(vi) The person's face must be in focus.

(vii) The person in the photograph must not wear sunglasses or other paraphernalia that detracts from the face.

(viii) A photograph with the person wearing a head covering or a hat is only acceptable if the covering or hat is worn specifically due to that person's religious beliefs, and even then, the hat or covering may not obscure any portion of the face. A photograph of a person wearing tribal, military, airline or other headgear not specifically religious in nature will not be accepted.

(3) *Submission of petition*. A petition for consideration for visa issuance under INA 203(c) must be submitted to the Department of State by electronic entry to an Internet website designated by the Department for that purpose. No fee will be collected at the time of submission of a petition, but a processing fee may be collected at a later date, as provided in paragraph (i) of this section. The Department will establish a

period of not less than thirty days during each fiscal year within which aliens may submit petitions for approval of eligibility to apply for visa issuance during the following fiscal year. Each fiscal year the Department will give timely notice of both the website address and the exact dates of the petition submission period, as well as other pertinent information, through publication in the FEDERAL REGISTER and such other methods as will ensure the widest possible dissemination of the information, both abroad and within the United States.

(c) *Processing of petitions.* Entries received during the petition submission period established for the fiscal year in question and meeting all of the requirements of paragraph (b) of this section will be assigned a number in a separate numerical sequence established for each regional area specified in INA 203(c)(1)(F). Upon completion of the numbering of all petitions, all numbers assigned for each region will be separately rank-ordered at random by a computer using standard computer software for that purpose. The Department will then select in the rank orders determined by the computer program a quantity of petitions for each region estimated to be sufficient to ensure, to the extent possible, usage of all immigrant visas authorized under INA 203(c) for the fiscal year in question. The Department will consider petitions selected in this manner to have been approved for the purposes of this section.

(d) *Validity of approved petitions.* A petition approved pursuant to paragraph (c) of this section will be valid for a period not to exceed Midnight of the last day of the fiscal year for which the petition was approved. At that time, the Department of State will consider approval of the petition to cease to be valid pursuant to INA 204(a)(1)(I)(ii)(II), which prohibits issuance of visas based upon petitions submitted and approved for a fiscal year after the last day of that fiscal year.

(e) *Order of consideration.* Consideration for visa issuance to aliens whose petitions have been approved pursuant to paragraph (c) of this section will be in the regional rank orders established pursuant that paragraph.

(f) *Allocation of visa numbers.* To the extent possible, diversity immigrant visa numbers will be allocated in accordance with INA 203(c)(1)(E) and will be allotted only during the fiscal year for which a petition to accord diversity immigrant status was submitted and approved. Under no circumstances will immigrant visa numbers be allotted after midnight of the last day of the fiscal year for which the petition was submitted and approved.

(g) *Further processing.* The Department will inform applicants whose petitions have been approved pursuant to paragraph (c) of this section of the steps necessary to meet the requirements of INA 222(b) in order to apply formally for an immigrant visa.

(h) *Maintenance of certain information.* (1) The Department will compile and maintain the following information concerning petitioners to whom immigrant visas are issued under INA 203(c):

(i) Age;

(ii) Country of birth;

(iii) Marital status;

(iv) Sex;

(v) Level of education; and

(vi) Occupation and level of occupational qualification.

(2) The Department will not maintain the names of visa recipients in connection with this information and the information will be compiled and maintained in such form that the identity of visa recipients cannot be determined therefrom.

(i) *Diversity Visa Lottery fee.* Consular officers shall collect, or ensure the collection of, the Diversity Visa Lottery fee from those persons who apply for a diversity immigrant visa, described in INA 203(c), after being selected by the diversity visa lottery program. The Diversity Visa Lottery fee, as prescribed by the Secretary of State, is set forth in the Schedule of Fees, 22 CFR 22.1.

[68 FR 49355, Aug. 18, 2003, as amended at 73 FR 7670, Feb. 11, 2008; 77 FR 18914, Mar. 29, 2012]

Subpart E—Petitions

§ 42.41 Effect of approved petition.

Consular officers are authorized to grant to an alien the immediate relative or preference status accorded in a petition approved in the alien's behalf

upon receipt of the approved petition or official notification of its approval. The status shall be granted for the period authorized by law or regulation. The approval of a petition does not relieve the alien of the burden of establishing to the satisfaction of the consular officer that the alien is eligible in all respects to receive a visa.

[56 FR 49682, Oct. 1, 1991]

§42.42 Petitions for immediate relative or preference status.

Petition for immediate relative or preference status. The consular officer may not issue a visa to an alien as an immediate relative entitled to status under 201(b), a family-sponsored immigrant entitled to preference status under 203(a)(1)–(4), or an employment-based preference immigrant entitled to status under INA 203(b)(1)–(5), unless the officer has received a petition filed and approved in accordance with INA 204 or official notification of such filing and approval.

[56 FR 49682, Oct. 1, 1991]

§42.43 Suspension or termination of action in petition cases.

(a) *Suspension of action.* The consular officer shall suspend action in a petition case and return the petition, with a report of the facts, for reconsideration by DHS if the petitioner requests suspension of action, or if the officer knows or has reason to believe that approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for some other reason, to the status approved.

(b) *Termination of action.* (1) The consular officer shall terminate action in a petition case upon receipt from DHS of notice of revocation of the petition in accordance with DHS regulations.

(2) The consular officer shall terminate action in a petition case subject to the provisions of INA 203(g) in accordance with the provisions of §42.83.

[56 FR 49682, Oct. 1, 1991]

Subpart F—Numerical Controls and Priority Dates

SOURCE: 56 FR 51174, Oct. 10, 1991, unless otherwise noted.

§42.51 Department control of numerical limitations.

(a) *Centralized control.* Centralized control of the numerical limitations on immigration specified in INA 201, 202, and 203 is established in the Department. The Department shall limit the number of immigrant visas that may be issued and the number of adjustments of status that may be granted to aliens subject to these numerical limitations to a number:

(1) Not to exceed 27 percent of the world-wide total made available under INA 203 (a), (b) and (c) in any of the first three quarters of any fiscal year; and

(2) Not to exceed, in any month of a fiscal year, 10% of the world-wide total made available under INA 203 (a), (b) and (c) plus any balance remaining from authorizations for preceding months in the same fiscal year.

(b) *Allocation of numbers.* Within the foregoing limitations, the Department shall allocate immigrant visa numbers for use in connection with the issuance of immigrant visas and adjustments based on the chronological order of the priority dates of visa applicants classified under INA 203 (a) and (b) reported by consular officers pursuant to §42.55(b) and of applicants for adjustment of status as reported by officers of the DHS, taking into account the requirements of INA 202(e) in such allocations. In the case of applicants under INA 203(c), visa numbers shall be allocated within the limitation for each specified geographical region in the random order determined in accordance with sec. 42.33(c) of this part.

(c) *Recaptured visa numbers.* An immigrant visa number shall be returned to the Department for reallocation within the fiscal year in which the visa was issued when:

(1) An immigrant having an immigrant visa is excluded from the United States and deported;

(2) An immigrant does not apply for admission to the United States before

the expiration of the validity of the visa;

(3) An alien having a preference immigrant visa is found not to be a preference immigrant; or

(4) An immigrant visa is revoked pursuant to § 42.82.

[56 FR 51174, Oct. 10, 1991, as amended at 59 FR 15302, Mar. 31, 1994; 63 FR 48578, Sept. 11, 1998]

§ 42.52 Post records of visa applications.

(a) *Waiting list.* Records of individual visa applicants entitled to an immigrant classification and their priority dates shall be maintained at posts at which immigrant visas are issued. These records shall indicate the chronological and preferential order in which consideration may be given to immigrant visa applications within the several immigrant classifications subject to the numerical limitations specified in INA 201, 202, and 203. Similar records shall be kept for the classes specified in INA 201(b)(2) and 101(a)(27)(A) and (B) which are not subject to numerical limitations. The records which pertain to applicants subject to numerical limitations constitute ''waiting lists'' within the meaning of INA 203(e)(3) as redesignated by the Immigration Act of 1990.

(b) *Entitlement to immigrant classification.* An alien shall be entitled to immigrant classification if the alien:

(1) Is the beneficiary of an approved petition according immediate relative or preference status;

(2) Has satisfied the consular officer that the alien is entitled to special immigrant status under INA(101)(a)(27)(A) or (B);

(3) Is entitled to status as a Vietnam Amerasian under section 584(b)(1) of section 101(e) of Public Law 100–202 as amended by Public Law 101–167 and reamended by Public Law 101–513; or

(4) Beginning in FY–95, is entitled to status as a diversity immigrant under INA 203(c).

(c) *Record made when entitlement to immigrant classification is established.* (1) A record that an alien is entitled to an immigrant visa classification shall be made whenever the consular officer is satisfied—or receives evidence—that the alien is within the criteria set forth in paragraph (b) of this section.

(2) A separate record shall be made of family members entitled to derivative immigrant status whenever the consular officer determines that a spouse or child is chargeable to a different foreign state or other numerical limitation than the principal alien. The provisions of INA 202(b) are to be applied as appropriate when either the spouse or parent is reached on the waiting list.

(3) A separate record shall be made of a spouse or child entitled to derivative immigrant status whenever the consular officer determines that the principal alien intends to precede the family.

[56 FR 51174, Oct. 9, 1991, as amended at 61 FR 1836, Jan. 24, 1996; 78 FR 31399, May 24, 2013]

§ 42.53 Priority date of individual applicants.

(a) *Preference applicant.* The priority date of a preference visa applicant under INA 203 (a) or (b) shall be the fiing date of the approved petition that accorded preference status.

(b) *Former Western Hemisphere applicant with priority date prior to January 1, 1977.* Notwithstanding the provisions of paragraph (a) of this section, an alien who, prior to January 1, 1977, was subject to the numerical limitation specified in section 21(e) of the Act of October 3, 1965, and who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977, shall retain that priority date as a preference immigrant upon approval of a petition according status under INA 203 (a) or (b).

(c) *Derivative priority date for spouse or child of principal alien.* A spouse or child of a principal alien acquired prior to the principal alien's admission shall be entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of a principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission.

§42.54 Order of consideration.

(a) *General*. Consular officers shall request applicants to take the steps necessary to meet the requirements of INA 222(b) in order to apply formally for a visa as follows:

(1) In the chronological order of the priority dates of all applicants within each of the immigrant classifications specified in INA 203 (a) and (b); and

(2) In the random order established by the Secretary of State for each region for the fiscal year for applicants entitled to status under INA 203(c).

(b) [Reserved]

[56 FR 51174, Oct. 10, 1991, as amended at 59 FR 15302, Mar. 31, 1994; 61 FR 1836, Jan. 24, 1996; 63 FR 48578, Sept. 11, 1998]

§42.55 Reports on numbers and priority dates of applications on record.

(a) Consular officers shall report periodically, as the Department may direct, the number and priority dates of all applicants subject to the numerical limitations prescribed in INA 201, 202, and 203 whose immigrant visa applications have been recorded in accordance with §42.52(c).

(b) *Documentarily qualified applicants*. Consular officers shall also report periodically, as the Department may direct, the number and priority dates of all applicants described in paragraph (a) of this section who have informed the consular office that they have obtained the documents required under INA 222(b), for whom the necessary clearance procedures have been completed.

[56 FR 51174, Oct. 10, 1991, as amended at 61 FR 1836, Jan. 24, 1996]

Subpart G—Application for Immigrant Visas

§42.61 Place of application.

(a) *Alien to apply in consular district of residence*. Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. Finally, a consular office may, as a matter of discretion, or shall, at the direction of the Department, accept an immigrant visa application from an alien who is neither a resident of, nor physically present in, the area designated for that office for such purpose. For the purposes of this section, an alien physically present in the United States shall be considered to be a resident of the area of his or her last residence prior to entry into the United States.

(b) *Transfer of immigrant visa cases*. (1) All documents, papers, and other evidence relating to an applicant whose case is pending or has been refused at one post may be transferred to another post at the applicant's request and risk when there is reasonable justification for the transfer and the transferring post has no reason to believe that the alien will be unable to appear at the receiving post.

(2) Any approved petition granting immediate relative or preference status should be included among the documents when a case is transferred from one post to another.

(3) In no case may a visa number be transferred from one post to another. A visa number which cannot be used as a result of the transfer must be returned to the Department immediately.

[52 FR 42613, Nov. 5, 1987, as amended at 59 FR 39955, Aug. 4, 1994]

§42.62 Personal appearance and interview of applicant.

(a) *Personal appearance of applicant before consular officer*. Every alien applying for an immigrant visa, including an alien whose application is executed by another person pursuant to §42.63(a)(2), shall be required to appear personally before a consular officer for the execution of the application or, if in Taiwan, before a designated officer of the American Institute in Taiwan, except that the personal appearance of any child under the age of 14 may be waived at the officer's discretion.

(b) *Interview by consular officer*. Every alien executing an immigrant visa application must be interviewed by a consular officer who shall determine on the basis of the applicant's representations and the visa application and other relevant ducumentation—

(1) The proper immigrant classification, if any, of the visa applicant, and

(2) The applicant's eligibility to receive a visa.

The officer has the authority to require that the alien answer any question deemed material to these determinations.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49682, Oct. 1, 1991]

§ 42.63 Definitions.

(a) *Application forms*—(1) *Application on Form DS–230 or Form DS–260 required*. Every alien applying for an immigrant visa must make application, as directed by the consular officer, on Form DS–230, Application for Immigrant Visa and Alien Registration, or on Form DS–260, Electronic Application for Immigrant Visa and Alien Registration. This requirement may not be waived. Form DS–230 consists of parts I and II which, together, are meant in any reference to this Form.

(2) *Application of alien under 14 or physically incapable*. The application on Form DS–230 or on Form DS–260 for an alien under 14 years of age or one physically incapable of completing an application may be executed by the alien's parent or guardian, or, if the alien has no parent or guardian, by any person having legal custody of, or a legitimate interest in, the alien.

(b) *Preparation of forms*. The consular officer shall ensure that Form DS–230 or Form DS–260 and all other forms an alien is required to submit are fully and properly completed in accordance with the applicable regulations and instructions.

(c) *Additional information as part of application*. The officer may require the submission of additional information or question the alien on any relevant matter whenever the officer believes that the information provided in Form DS–230 or Form DS–260 is inadequate to determine the alien's eligibility to receive an immigrant visa. Additional statements made by the alien become a part of the visa application. All documents required under the authority of § 42.62 are considered papers submitted with the alien's application within the meaning of INA 221(g)(1).

[75 FR 45476, Aug. 3, 2010]

§ 42.64 Passport requirements.

(a) *Passport defined*. *Passport*, as defined in INA 101(a)(30), is not limited to a national passport or to a single document. A passport may consist of two or more documents which, when considered together, fulfill the requirements of a passport, provided that documentary evidence of permission to enter a foreign country has been issued by a competent authority and clearly meets the requirements of INA 101(a)(30).

(b) *Passport validity requirements*. Except as provided in § 42.2, every applicant for an immigrant visa shall present a passport, as defined in INA 101(a)(30), that is valid for at least 60 days beyond the period of validity of the visa. The 60-day additional validity requirement does not apply to an applicant who would be excepted as provided in § 42.2 were it not for the fact that the applicant is applying in the country of which the applicant is a national and the possession of a passport is required for departure. Such an applicant may be issued a visa valid for 6 months or for such shorter period as will assure its expiration in unison with the passport.

(c) *A single passport including more than one person*. The passport requirement of this section may be met by the presentation of a passport including more than one person, if such inclusion is authorized under the laws or regulations of the issuing authority and if a photograph of each person 16 years of age or over is attached to the passport by the issuing authority.

[52 FR 42613, Nov. 5, 1987; 53 FR 9112, Mar. 21, 1988, as amended at 63 FR 48578, Sept. 11, 1998]

§ 42.65 Supporting documents.

(a) *Authority to require documents*. The consular officer is authorized to require documents considered necessary to establish the alien's eligibility to receive an immigrant visa. All such documents submitted and other evidence

presented by the alien, including briefs submitted by attorneys or other representatives, shall be considered by the officer.

(b) *Basic documents required*. An alien applying for an immigrant visa shall be required to furnish, if obtainable: A copy of a police certificate or certificates; a certified copy of any existing prison record, military record, and record of birth; and a certified copy of all other records or documents which the consular officer considers necessary.

(c) *Definitions*. (1) *Police certificate* means a certification by the police or other appropriate authorities reporting information entered in their records relating to the alien. In the case of the country of an alien's nationality and the country of an alien's current residence (as of the time of visa application) the term ''appropriate police authorities'' means those of a country, area or locality in which the alien has resided for at least six months. In the case of all other countries, areas, or localities, the term ''appropriate police authorities'' means the authorities of any country, area, or locality in which the alien has resided for at least one year. A consular officer may require a police certificate regardless of length of residence in any country if he or she has reason to believe that a police record exists in the country, area, or locality concerned.

(2) *Prison record* means an official document containing a report of the applicant's record of confinement and conduct in a penal or correctional institution.

(3) *Military record* means an official document containing a complete record of the applicant's service and conduct while in military service, including any convictions of crime before military tribunals as distinguished from other criminal courts. A certificate of discharge from the military forces or an enrollment book belonging to the applicant shall not be acceptable in lieu of the official military record, unless it shows the alien's complete record while in military service. The applicant may, however, be required to present for inspection such a discharge certificate or enrollment book if deemed necessary by the consular officer to establish the applicant's eligibility to receive a visa.

(4) A *certified copy of an alien's record of birth* means a certificate issued by the official custodian of birth records in the country of birth showing the date and place of birth and the parentage of the alien, based upon the original registration of birth.

(5) *Other records or documents* include any records or documents establishing the applicant's relationship to a spouse or children, if any, and any records or documents pertinent to a determination of the applicant's identity, classification, or any other matter relating to the applicant's visa eligibility.

(d) *Unobtainable documents*. (1) If the consular officer is satisfied, or the catalogue of available documents prepared by the Department indicates, that any document or record required under this section is unobtainable, the officer may permit the immigrant to submit other satisfactory evidence in lieu of such document or record. A document or other record shall be considered unobtainable if it cannot be procured without causing to the applicant or a family member actual hardship as opposed to normal delay and inconvenience.

(2) If the consular officer determines that a supporting document, as described in paragraph (b) of this section, is in fact unobtainable, although the catalogue of available documents shows it is available, the officer shall affix to the visa application a signed statement describing in detail the reasons for considering the record or document unobtainable and for accepting the particular secondary evidence attached to the visa.

(e) *Authenticity of records and documents*. If the consular officer has reason to believe that a required record or document submitted by an applicant is not authentic or has been altered or tampered with in any material manner, the officer shall take such action as may be necessary to determine its authenticity or to ascertain the facts to which the record or document purports to relate.

(f) *Photographs*. Every alien shall furnish color photographs of the number and specifications prescribed by the Department, except that, in countries

where facilities for producing color photographs are unavailable as determined by the consular officer, black and white photographs may be substituted.

[52 FR 42613, Nov. 5, 1987, as amended at 55 FR 29015, July 17, 1990; 56 FR 49682, Oct. 1, 1991]

§ 42.66 Medical examination.

(a) *Medical examination required of all applicants.* Before the issuance of an immigrant visa, the consular officer shall require every alien, regardless of age, to undergo a medical examination in order to determine eligibility to receive a visa.

(b) *Examination by physician from approved panel.* The required examination shall be conducted in accordance with requirements and procedures established by the United States Public Health Service and by a physician selected by the alien from a panel of physicians approved by the consular officer.

(c) *Facilities required for panel physician.* A consular officer shall not include the name of a physician on the panel of physicians referred to in paragraph (b) of this section unless the physician has facilities to perform required serological and X-ray tests or is in a position to refer applicants to a qualified laboratory for such tests.

§ 42.67 Execution of application, registration, and fingerprinting.

(a) *Execution of visa application*—(1) *Application fee.* A fee is prescribed for each application for an immigrant visa. It shall be collected prior to the execution of the application and a receipt shall be issued.

(2) *Oath and signature on Form DS–230.* The applicant shall be required to read the Form DS–230, Application for Immigrant Visa and Alien Registration, when it is completed, or it shall be read to the applicant in the applicant's language, or the applicant shall otherwise be informed of its full contents. Applicants shall be asked whether they are willing to subscribe thereto. If the applicant is not willing to subscribe to the application unless changes are made in the information stated therein, the required changes shall be made. The application shall then be sworn to or affirmed and signed by or on behalf of the applicant before a consular officer, or a designated officer of the American Institute of Taiwan, who shall then sign the application over the officer's title.

(3) *Oath and signature on Form DS–260.* The applicant shall be required to read the Form DS–260, Electronic Application for Immigrant Visa and Alien Registration, when it has been completed, or it shall be read to the applicant in the applicant's language, or the applicant shall otherwise be informed of its full contents, before the applicant electronically signs and submits the application to the Department. At the time of the applicant's interview the applicant shall be asked whether they are willing to subscribe thereto to the information provided on Form DS–260. If the alien is not willing to subscribe to the application unless changes are made in the information stated therein, the required changes shall be made. The application shall then be sworn to or affirmed and signed, biometrically, by or on behalf of the applicant before a consular officer, or a designated officer of the American Institute of Taiwan, who shall then electronically sign the application.

(b) *Registration.* The alien shall be considered to be registered for the purposes of INA 221(b) and 203(g) upon the filing of Form DS–230 or Form DS–260, when duly executed, or the transmission by the Department to the alien of a notification of the availability of an immigrant visa, whichever occurs first.

(c) *Fingerprinting.* Every applicant for an immigrant visa must furnish fingerprints prior to the execution of Form DS–230 or Form DS–260.

[75 FR 45476, Aug. 3, 2010]

§ 42.68 Informal evaluation of family members if principal applicant precedes them.

(a) *Preliminary determination of visa eligibility.* If a principal applicant proposes to precede the family to the United States, the consular officer may arrange for an informal examination of the other members of the principal applicant's family in order to determine whether there exists at that time any

mental, physical, or other ground of ineligibility on their part to receive a visa.

(b) *When family member ineligible.* In the event the consular officer finds that any member of such family would be ineligible to receive an immigrant visa, the principal applicant shall be informed and required to acknowledge receipt of this information in writing.

(c) *No guarantee of future eligibility.* A determination in connection with an informal examination that an alien appears to be eligible for a visa carries no assurance that the alien will be issued an immigrant visa in the future. The principal applicant shall be so informed and required to acknowledge receipt of this information in writing. The question of visa eligibility can be determined definitively only at the time the family member applies for a visa.

Subpart H—Issuance of Immigrant Visas

§42.71 Authority to issue visas; visa fees.

(a) *Authority to issue visas.* Consular officers may issue immigrant visas at designated consular offices abroad pursuant to the authority contained in INA 101(a)(16), 221(a), and 224. (Consular offices designated to issue immigrant visas are listed periodically in Visa Office Bulletins published at *www.travel.state.gov* by the Department of State.) A consular officer assigned to duty in the territory of a country against which the sanctions provided in INA 243(d) have been invoked must not issue an immigrant visa to an alien who is a national, citizen, subject, or resident of that country, unless the officer has been informed that the sanction has been waived by DHS in the case of an individual alien or a specified class of aliens.

(b) *Immigrant visa fees.* The Secretary of State prescribes a fee for the processing of immigrant visa applications. An individual registered for immigrant visa processing at a post designated for this purpose by the Deputy Assistant Secretary for Visa Services must pay the processing fee upon being notified that a visa is expected to become available in the near future and being requested to obtain the supporting documentation needed to apply formally for a visa. A fee collected for the processing of an immigrant visa application is refundable only if the principal officer of a post or the officer in charge of a consular section determines that the application was not adjudicated as a result of action by the U. S. Government over which the alien had no control and for which the alien was not responsible, that precluded the applicant from benefiting from the processing.

[67 FR 38893, June 6, 2002]

§42.72 Validity of visas.

(a) *Period of validity.* With the exception indicated herein, the period of validity of an immigrant visa shall not exceed six months, beginning with the date of issuance. Any visa issued to a child lawfully adopted by a U.S. citizen and spouse while such citizen is serving abroad in the U.S. Armed Forces, is employed abroad by the U.S. Government, or is temporarily abroad on business, however, shall be valid until such time, for a period not to exceed 3 years, as the adoptive citizen parent returns to the United States in the course of that parent's military service, U.S. Government employment, or business.

(b) *Extension of period of validity.* If the visa was originally issued for a period of validity less than the maximum authorized by paragraph (a) of this section, the consular officer may extend the validity of the visa up to but not exceeding the maximum period permitted. If an immigrant applies for an extension at a consular office other than the issuing office, the consular officer shall, unless the officer is satisfied beyond doubt that the alien is eligible for the extension, communicate with the issuing office to determine if there is any objection to an extension. In extending the period of validity, the officer shall make an appropriate notation on the visa of the new expiration date, sign the document with title indicated, and impress the seal of the office thereon.

(c) [Reserved]

(d) *Age and marital status in relation to validity of certain immigrant visas.* In accordance with §42.64(b), the validity of a visa may not extend beyond a date sixty days prior to the expiration of

the passport. The period of validity of a visa issued to an immigrant as a child shall not extend beyond the day immediately proceding the date on which the alien becomes 21 years of age. The consular officer shall warn an alien, when appropriate, that the alien will be admissible as such an immigrant only if unmarried and under 21 years of age at the time of application for admission at a U.S. port of entry. The consular officer shall also warn an alien issued a visa as a first or second preference immigrant as an unmarried son or daughter of a citizen or lawful permanent resident of the United States that the alien will be admissible as such an immigrant only if unmarried at the time of application for admission at a U.S. port of entry.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 32323, July 16, 1991; 61 FR 1836, Jan. 24, 1996; 62 FR 27694, May 21, 1997; 64 FR 28916, May 28, 1999; 67 FR 38894, June 6, 2002; 68 FR 13628, Mar. 20, 2003]

§ 42.73 Procedure in issuing visas.

(a) *Insertion of data.* In issuing an immigrant visa, the issuing office shall insert the pertinent information in the designated blank spaces provided on Form OF–55B, Immigrant Visa and Alien Registration, in accordance with the instructions contained in this section.

(1) A symbol as specified in § 42.11 shall be used to indicate the classification of the immigrant.

(2) An immigrant visa issued to an alien subject to numerical limitations shall bear a number allocated by the Department. The foreign state or dependent area limitation to which the alien is chargeable shall be entered in the space provided.

(3) No entry need be made in the space provided for foreign state or other applicable area limitation on visas issued to aliens in the classifications set forth in § 42.12(a)(1)–(7), but such visas may be numbered if a post voluntarily uses a consecutive post numbering system.

(4) The date of issuance and the date of expiration of the visa shall be inserted in the proper places on the visa and show the day, month, and year in that order, with the name of the month spelled out, as in ''24 December 1986.''

(5) In the event the passport requirement has been waived under § 42.2, a notation shall be inserted in the space provided for the passport number, setting forth the authority (section and paragraph) under which the passport was waived.

(6) A signed photograph shall be attached in the space provided on Form OF–55B by the use of a legend machine, unless specific authorization has been granted by the Department to use the impression seal.

(b) *Documents comprising an immigrant visa.* An immigrant visa consists of Form OF–155B and Form DS–230, Application for Immigrant Visa and Alien Registration, properly executed, and a copy of each document required pursuant to § 42.63.

(c) *Arrangement of visa documentation.* Form OF–155B shall be placed immediately above Form DS–230 and the supporting documents attached thereto. Any document required to be attached to the visa, if furnished to the consular officer by the alien's sponsor or other person with a request that the contents not be divulged to the visa applicant, shall be placed in an envelope and sealed with the impression seal of the consular office before being attached to the visa. If an immigrant visa is issued to an alien in possession of a United States reentry permit, valid or expired, the consular officer shall attach the permit to the immigrant visa for disposition by DHS at the port of entry. (Documents having no bearing on the alien's qualifications or eligiblity to receive a visa may be returned to the alien or to the person who furnished them.)

(d) *Signature, seal, and issuance of visa.* The consular officer shall sign the visa (Form OF–155B) and impress the seal of the office on it so as to partially cover the photograph and the signature. The immigrant visa shall then be issued by delivery to the immigrant or the immigrant's authorized agent or representative.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49682, Oct. 1, 1991; 71 FR 34522, June 15, 2006]

§42.74 Issuance of new or replacement visas.

(a) *New immigrant visa for a special immigrant under INA 101(a)(27)(A) and (B).* (1) The consular officer may issue a new immigrant visa to a qualified alien entitled to status under INA 101(a)(27)(A) or (B), who establishes:

(i) That the original visa has been lost, mutilated or has expired, or

(ii) The alien will be unable to use it during the period of its validity;

(2) Provided:

(i) The alien pays anew the application processing fees prescribed in the Schedule of Fees; and

(ii) The consular officer ascertains whether the original issuing office knows of any reason why a new visa should not be issued.

(b) *Replacement immigrant visa for an immediate relative or for an alien subject to numerical limitation.* (1) A consular officer may issue a replacement visa under the original number of a qualified alien entitled to status as an immediate relative (INA 201(b)(2)), a family or employment preference immigrant (INA 203(a) or (b)), or a diversity immigrant (INA 203(c)), if—

(i) The alien is unable to use the visa during the period of its validity due to reasons beyond the alien's control;

(ii) The visa is issued during the same fiscal year in which the original visa was issued, or in the following year, in the case of an immediate relative only, if the original number had been reported as recaptured;

(iii) The number has not been returned to the Department as a ''recaptured visa number'' in the case of a preference or diversity immigrant;

(iv) The alien pays anew the application and processing fees prescribed in the Schedule of Fees; and

(v) The consular officer ascertains whether the original issuing office knows of any reason why a new visa should not be issued.

(2) In issuing a visa under this paragraph (b), the consular officer shall insert the word ''REPLACE'' on Form OF–155B, Immigrant Visa and Alien Registration, before the word ''IMMIGRANT'' in the title of the visa.

(c) *Duplicate visas issued within the validity period of the original visa.* If the validity of a visa previously issued has not yet terminated and the original visa has been lost or mutilated, a duplicate visa may be issued containing all of the information appearing on the original visa, including the original issuance and expiration dates. The applicant shall execute a new application and provide copies of the supporting documents submitted in support of the original application. The alien must pay anew the application processing fees prescribed in the Schedule of Fees. In issuing a visa under this paragraph, the consular officer shall insert the word ''DUPLICATE'' on Form OF–155B before the word ''IMMIGRANT'' in the title of the visa.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49682, Oct. 1, 1991; 61 FR 1836, Jan. 24, 1996; 63 FR 4393, Jan. 29, 1998; 67 FR 1416, Jan. 11, 2002; 67 FR 38894, June 6, 2002; 71 FR 34522, June 15, 2006]

Subpart I—Refusal, Revocation, and Termination of Registration

§42.81 Procedure in refusing individual visas.

(a) *Issuance or refusal mandatory.* When a visa application has been properly completed and executed before a consular officer in accordance with the provisions of INA and the implementing regulations, the consular officer must either issue or refuse the visa under INA 212(a) or INA 221(g) or other applicable law. Every refusal must be in conformance with the provisions of 22 CFR 40.6.

(b) *Refusal procedure.* A consular officer may not refuse an immigrant visa until either Form DS–230, Application for Immigrant Visa and Alien Registration, or Form DS–260, Electronic Application for Immigrant Visa and Alien Registration, has been executed by the applicant. When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department. The form shall be signed and dated by the consular officer. The consular officer shall inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory

provision of law or implementing regulation under which administrative relief is available. Each document related to the refusal shall then be attached to Form DS–230 for retention in the refusal files. Alternatively, each document related to the refusal shall be electronically scanned and electronically attached to Form DS–260 for retention in the electronic refusal files. Any documents not related to the refusal shall be returned to the applicant. The original copy of a document that was scanned and attached to the DS–260 for the refusal file shall be returned to the applicant. If the ground of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates an intention to submit such evidence, all documents may, with the consent of the alien, be retained in the consular files for a period not to exceed one year. If the refusal as not been overcome within one year, any documents not relating to the refusal shall be removed from the file and returned to the alien.

(c) *Review of refusal at consular office.* If the grounds of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the principal consular officer at a post, or a specifically designated alternate, shall review the case without delay, record the review decision, and sign and date the prescribed form. If the grounds of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates the intention to submit such evidence, a review of the refusal may be deferred. If the principal consular officer or alternate does not concur in the refusal, that officer shall either (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for final action on the case.

(d) *Review of refusal by Department.* The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review each report and may furnish an advisory opinion to the consular officer for assistance in considering the case further. If the officer believes that action contrary to an advisory opinion should be taken, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, are binding upon consular officers.

(e) *Reconsideration of refusal.* If a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered. In such circumstance, an additional application fee shall not be required.

[52 FR 42613, Nov. 5, 1987; 53 FR 9112, Mar. 21, 1988, as amended at 66 FR 10364, Feb. 15, 2001; 71 FR 34522, June 15, 2006; 75 FR 45477, Aug. 3, 2010]

§ 42.82 Revocation of visas.

(a) *Grounds for revocation by consular officers.* A consular officer, the Secretary, or any Department official to whom the Secretary has delegated this authority is authorized to revoke an immigrant visa at any time, in his or her discretion.

(b) *Provisional revocation.* A consular officer, the Secretary, or any Department official to whom the Secretary has delegated this authority may provisionally revoke an immigrant visa while considering information related to whether a visa holder is eligible for the visa. Provisional revocation shall have the same force and effect as any other visa revocation under INA 221(i).

(c) *Notice of revocation.* Unless otherwise instructed by the Department, a consular officer shall, if practicable, notify the alien to whom the visa was issued that the visa was revoked or provisionally revoked. Regardless of delivery of such notice, once the revocation has been entered into the Department's Consular Lookout and Support System (CLASS), the visa is no longer to be considered valid for travel to the United States. The date of the revocation shall be indicated in CLASS and on any notice sent to the alien to whom the visa was issued.

(d) *Procedure for physically canceling visas.* An immigrant visa that is revoked shall be canceled by writing or stamping the word ''REVOKED'' plainly across the face of the visa, if the

visa is available to the consular officer. The failure or inability to physically cancel the visa does not affect the validity of the revocation.

[76 FR 23479, Apr. 27, 2011]

§42.83 Termination of registration.

(a) *Termination following failure of applicant to apply for visa.* In accordance with INA 203(g), an alien's registration for an immigrant visa shall be terminated if, within one year after transmission of a notification of the availability of an immigrant visa, the applicant fails to apply for an immigrant visa.

(b) *Termination following visa refusal.* An alien's registration for an immigrant visa shall be terminated if, within one year following the refusal of the immigrant visa application under INA 221(g), the alien has failed to present to a consular officer evidence purporting to overcome the basis for refusal.

(c) *Notice of termination.* Upon the termination of registration under paragraph (a) of this section, the National Visa Center (NVC) shall notify the alien of the termination. The NVC shall also inform the alien of the right to have the registration reinstated if the alien, before the end of the second year after the missed appointment date if paragraph (a) applies, establishes to the satisfaction of the consular officer at the post where the alien is registered that the failure to apply for an immigrant visa was due to circumstances beyond the alien's control. If paragraph (b) applies, the consular officer at the post where the alien is registered shall, upon the termination of registration, notify the alien of the termination and the right to have the registration reinstated if the alien, before the end of the second year after the INA 221(g) refusal, establishes to the satisfaction of the consular officer at such post that the failure to present evidence purporting to overcome the ineligibility under INA 221(g) was due to circumstances beyond the alien's control.

(d) *Reinstatement of registration.* If the consular officer is satisfied that an alien, as provided for in paragraph (c) of this section, has established that failure to apply as scheduled for an immigrant visa or to present evidence purporting to overcome ineligibility under INA 221(g) was due to circumstances beyond the alien's control, the consular officer shall reinstate the alien's registration for an immigrant visa. Any petition approved under INA 204(b) which had been automatically revoked as a result of the termination of registration shall be considered to be automatically reinstated if the registration is reinstated.

(e) *Interpretation of ''circumstances beyond alien's control''.* For the purpose of this section, the term ''circumstances beyond the alien's control'' includes, but is not limited to, an illness or other physical disability preventing the alien from traveling, a refusal by the authorities of the country of an alien's residence to grant the alien permission to depart as an immigrant, and foreign military service.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49682, Oct. 1, 1991; 73 FR 11028, Feb. 29, 2008]

PARTS 43–45 [RESERVED]

PART 46—CONTROL OF ALIENS DEPARTING FROM THE UNITED STATES

Sec.

46.1 Definitions.
46.2 Authority of departure-control officer to prevent alien's departure from the United States.
46.3 Aliens whose departure is deemed prejudicial to the interests of the United States.
46.4 Procedure in case of alien prevented from departing from the United States.
46.5 Hearing procedure before special inquiry officer.
46.6 Departure from the Canal Zone, the Trust Territory of the Pacific Islands, or outlying possessions of the United States.
46.7 Instructions from the Administrator required in certain cases.

AUTHORITY: Secs. 104, 215, 66 Stat. 174, 190; 8 U.S.C. 1104, 1185.

§46.1 Definitions.

For the purposes of this part:

(a) The term *alien* means any person who is not a citizen or national of the United States.

(b) The term *Commissioner* means the Commissioner of Immigration and Naturalization.

(c) The term *regional commissioner* means an officer of the Immigration and Naturalization Service duly appointed or designated as a regional commissioner, or an officer who has been designated to act as a regional commissioner.

(d) The term *district director* means an officer of the Immigration and Naturalization Service duly appointed or designated as a district director, or an officer who has been designated to act as a district director.

(e) The term *United States* means the several States, the District of Columbia, the Canal Zone, Puerto Rico, the Virgin Islands, Guam, American Samoa, Swains Island, the Trust Territory of the Pacific Islands, and all other territory and waters, continental and insular, subject to the jurisdiction of the United States.

(f) The term *continental United States* means the District of Columbia and the several States, except Alaska and Hawaii.

(g) The term *geographical part of the United States* means (1) the continental United States, (2) Alaska, (3) Hawaii, (4) Puerto Rico, (5) the Virgin Islands, (6) Guam, (7) the Canal Zone, (8) American Samoa, (9) Swains Island, or (10) the Trust Territory of the Pacific Islands.

(h) The term *depart from the United States* means depart by land, water, or air (1) from the United States for any foreign place, or (2) from one geographical part of the United States for a separate geographical part of the United States: *Provided,* That a trip or journey upon a public ferry, passenger vessel sailing coastwise on a fixed schedule, excursion vessel, or aircraft, having both termini in the continental United States or in any one of the other geographical parts of the United States and not touching any territory or waters under the jurisdiction or control of a foreign power, shall not be deemed a departure from the United States.

(i) The term *departure-control officer* means any immigration officer as defined in the regulations of the Immigration and Naturalization Service who is designated to supervise the departure of aliens, or any officer or employee of the United States designated by the Governor of the Canal Zone, the High Commissioner of the Trust Territory of the Pacific Islands, or the governor of an outlying possession of the United States, to supervise the departure of aliens.

(j) The term *port of departure* means a port in the continental United States, Alaska, Guam, Hawaii, Puerto Rico or the Virgin Islands, designated as a port of entry by the Attorney General or by the Commissioner, or in exceptional circumstances such other place as the departure-control officer may, in his discretion, designate in an individual case, or a port in American Samoa, Swains Island, the Canal Zone, or the Trust Territory of the Pacific Islands, designated as a port of entry by the chief executive officer thereof.

(k) The term *special inquiry officer* shall have the meaning ascribed thereto in section 101(b)(4) of the Immigration and Nationality Act.

[22 FR 10827, Dec. 27, 1957, as amended at 25 FR 7022, July 23, 1960]

§ 46.2 Authority of departure-control officer to prevent alien's departure from the United States.

(a) No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of § 46.3. Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 46.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.

(b) The written order temporarily preventing an alien, other than an enemy alien, from departing from the United States shall become final 15 days after the date of service thereof upon the alien, unless prior thereto the alien requests a hearing as hereinafter provided. At such time as the alien is served with an order temporarily preventing his departure from the United States, he shall be notified in writing

concerning the provisions of this paragraph, and shall be advised of his right to request a hearing if entitled thereto under §46.4. In the case of an enemy alien, the written order preventing departure shall become final on the date of its service upon the alien.

(c) Any alien who seeks to depart from the United States may be required, in the discretion of the departure-control officer, to be examined under oath and to submit for official inspection all documents, articles, and other property in his possession which are being removed from the United States upon, or in connection with, the alien's departure. The departure-control officer may permit such other persons, including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to cause the alien to submit to such examination or inspection, take possession of the alien's passport or other travel document or issue a subpoena requiring the alien to submit to such examination or inspection.

[22 FR 10827, Dec. 27, 1957, as amended at 45 FR 64174, Sept. 29, 1980]

§46.3 Aliens whose departure is deemed prejudicial to the interests of the United States.

The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interest of the United States:

(a) Any alien who is in possession of, and who is believed likely to disclose to unauthorized persons, information concerning the plans, preparations, equipment, or establishments for the national defense and security of the United States.

(b) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities of any kind designed to obstruct, impede, retard, delay or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States or the United Nations for the defense of any other country.

(c) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safety of the United States or such other country.

(d) Any alien who seeks to depart from the United States for the purpose of organizing, directing, or participating in any rebellion, insurrection, or violent uprising in or against the United States or a country allied with the United States, or of waging war against the United States or its allies, or of destroying, or depriving the United States of sources of supplies or materials vital to the national defense of the United States, or to the effectiveness of the measures adopted by the United States for its defense, or for the defense of any other country allied with the United States.

(e) Any alien who is subject to registration for training and service in the Armed Forces of the United States and who fails to present a Registration Certificate (SSS Form No. 2) showing that he has complied with his obligation to register under the Universal Military Training and Service Act, as amended.

(f) Any alien who is a fugitive from justice on account of an offense punishable in the United States.

(g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States: *Provided*, That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.

(h) Any alien who is needed in the United States in connection with any investigation or proceeding being, or

soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local.

(i) Any alien whose technical or scientific training and knowledge might be utilized by an enemy or a potential enemy of the United States to undermine and defeat the military and defensive operations of the United States or of any nation cooperating with the United States in the interests of collective security.

(j) Any alien, where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily except an alien who is departing or seeking to depart subject to an order issued in extradition, exclusion, or deportation proceedings.

(k) Any alien whose case does not fall within any of the categories described in paragraphs (a) to (j), inclusive, of this section, but which involves circumstances of a similar character rendering the alien's departure prejudicial to the interests of the United States.

(Sec. 215, Immigration and Nationality Act, 66 Stat. 190, 8 U.S.C. 1185; Proc. No. 3004 of January 17, 1953)

[22 FR 10828, Dec. 27, 1957, as amended at 42 FR 19479, Apr. 14, 1977; 45 FR 64174, Sept. 29, 1980]

§ 46.4 Procedure in case of alien prevented from departing from the United States.

(a) Any alien, other than an enemy alien, whose departure has been temporarily prevented under the provisions of § 46.2 may, within 15 days of the service upon him of the written order temporarily preventing his departure, request a hearing before a special inquiry officer. The alien's request for a hearing shall be made in writing and shall be addressed to the district director having administrative jurisdiction over the alien's place of residence. If the alien's request for a hearing is timely made, the district director shall schedule a hearing before a special inquiry officer, and notice of such hearing shall be given to the alien. The notice of hearing shall, as specifically as security considerations permit, inform the alien of the nature of the case against him, shall fix the time and place of the hearing, and shall inform the alien of his right to be represented, at no expense to the Government, by counsel of his own choosing.

(b) Every alien for whom a hearing has been scheduled under paragraph (a) of this section shall be entitled (1) to appear in person before the special inquiry officer, (2) to be represented by counsel of his own *choice*, (3) to have the opportunity to be heard and to present evidence, (4) to cross-examine the witnesses who appear at the hearing, except that if, in the course of the examination, it appears that further examination may divulge information of a confidential or security nature, the special inquiry officer may, in his discretion, preclude further examination of the witness with respect to such matters, (5) to examine any evidence in possession of the Government which is to be considered in the disposition of the case, provided that such evidence is not of a confidential or security nature the disclosure of which would be prejudicial to the interests of the United States, (6) to have the time and opportunity to produce evidence and witnesses on his own behalf, and (7) to reasonable continuances upon request, for good cause shown.

(c) Any special inquiry officer who is assigned to conduct the hearing provided for in this section shall have the authority to: (1) Administer oaths and affirmations, (2) present and receive evidence, (3) interrogate, examine, and cross-examine under oath or affirmation both the alien and witnesses, (4) rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (5) take or cause depositions to be taken, (6) issue subpoenas, and (7) take any further action consistent with applicable provisions of law, executive orders, proclamations, and regulations.

[22 FR 10828, Dec. 27, 1957, as amended at 27 FR 1358, Feb. 14, 1962]

§ 46.5 Hearing procedure before special inquiry officer.

(a) The hearing before the special inquiry officer shall be conducted in accordance with the following procedure:

(1) The special inquiry officer shall advise the alien of the rights and privileges accorded him under the provisions of §46.4.

(2) The special inquiry officer shall enter of record (i) a copy of the order served upon the alien temporarily preventing his departure from the United States, and (ii) a copy of the notice of hearing furnished the alien.

(3) The alien shall be interrogated by the special inquiry officer as to the matters considered pertinent to the proceeding, with opportunity reserved to the alien to testify thereafter in his own behalf, if he so chooses.

(4) The special inquiry officer shall present on behalf of the Government such evidence, including the testimony of witnesses and the certificates or written statements of Government officials or other persons, as may be necessary and available. In the event such certificates or statements are received in evidence, the alien may request and, in the discretion of the special inquiry officer, be given an opportunity to interrogate such officials or persons, by deposition or otherwise, at a time and place and in a manner fixed by the special inquiry officer: *Provided,* That when in the judgment of the special inquiry officer any evidence relative to the disposition of the case is of a confidential or security nature the disclosure of which would be prejudicial to the interests of the United States, such evidence shall not be presented at the hearing but shall be taken into consideration in arriving at a decision in the case.

(5) The alien may present such additional evidence, including the testimony of witnesses, as is pertinent and available.

(b) A complete verbatim transcript of the hearing, except statements made off the record, shall be recorded. The alien shall be entitled, upon request, to the loan of a copy of the transcript, without cost, subject to reasonable conditions governing its use.

(c) Following the completion of the hearing, the special inquiry officer shall make and render a recommended decision in the case, which shall be governed by and based upon the evidence presented at the hearing and any evidence of a confidential or security nature which the Government may have in its possession. The decision of the special inquiry officer shall recommend (1) that the temporary order preventing the departure of the alien from the United States be made final, or (2) that the temporary order preventing the departure of the alien from the United States be revoked. This recommended decision of the special inquiry officer shall be made in writing and shall set forth the officer's reasons for such decision. The alien concerned shall at his request be furnished a copy of the recommended decision of the special inquiry officer, and shall be allowed a reasonable time, not to exceed 10 days, in which to submit representations with respect thereto in writing.

(d) As soon as practicable after the completion of the hearing and the rendering of a decision by the special inquiry officer, the district director shall forward the entire record of the case, including the recommended decision of the special inquiry officer and any written representations submitted by the alien, to the regional commissioner having jurisdiction over his district. After reviewing the record, the regional commissioner shall render a decision in the case, which shall be based upon the evidence in the record and on any evidence or information of a confidential or security nature which he deems pertinent. Whenever any decision is based in whole or in part on confidential or security information not included in the record, the decision shall state that such information was considered. A copy of the regional commissioner's decision shall be furnished the alien, or his attorney or representative. No administrative appeal shall lie from the regional commissioner's decision.

(e) Notwithstanding any other provision of this part, the Administrator of the Bureau of Security and Consular Affairs referred to in section 104(b) of the Immigration and Nationality Act, or such other officers of the Department of State as he may designate, after consultation with the Commissioner, or such other officers of the Immigration and Naturalization Service as he may designate, may at any time permit the departure of an individual alien or of a group of aliens from the

United States if he determines that such action would be in the national interest. If the Administrator specifically requests the Commissioner to prevent the departure of a particular alien or of a group of aliens, the Commissioner shall not permit the departure of such alien or aliens until he has consulted with the Administrator.

(f) In any case arising under §§ 46.1 to 46.7, the Administrator shall, at his request, be kept advised, in as much detail as he may indicate is necessary, of the facts and of any action taken or proposed.

[22 FR 10828, Dec. 27, 1957, as amended at 26 FR 3069, Apr. 11, 1961; 27 FR 1358, Feb. 14, 1962]

§ 46.6 Departure from the Canal Zone, the Trust Territory of the Pacific Islands, or outlying possessions of the United States.

(a) In addition to the restrictions and prohibitions imposed by the provisions of this part upon the departure of aliens from the United States, any alien who seeks to depart from the Canal Zone, the Trust Territory of the Pacific Islands, or an outlying possession of the United States shall comply with such other restrictions and prohibitions as may be imposed by regulations prescribed, with the concurrence of the Administrator of the Bureau of Security and Consular Affairs and the Commissioner, by the Governor of the Canal Zone, the High Commissioner of the Trust Territory of the Pacific Islands, or by the governor of an outlying possession of the United States, respectively. No alien shall be prevented from departing from such zone, territory, or possession without first being accorded a hearing as provided in §§ 46.4 and 46.5.

(b) The Governor of the Canal Zone, the High Commissioner of the Trust Territory of the Pacific Islands, or the governor of any outlying possession of the United States shall have the authority to designate any employee or class of employees of the United States as hearing officers for the purpose of conducting the hearing referred to in paragraph (a) of this section. The hearing officer so designated shall exercise the same powers, duties, and functions as are conferred upon special inquiry officers under the provisions of this part. The chief executive officer of such zone, territory, or possession shall, in lieu of the regional commissioner, review the recommended decision of the hearing officer, and shall render a decision in any case referred to him, basing it on evidence in the record and on any evidence or information of a confidential or a security nature which he deems pertinent.

[22 FR 10829, Dec. 27, 1957, as amended at 26 FR 3069, Apr. 11, 1961]

§ 46.7 Instructions from the Administrator required in certain cases.

In the absence of appropriate instructions from the Administrator of the Bureau of Security and Consular Affairs, departure-control officers shall not exercise the authority conferred by § 46.2 in the case of any alien who seeks to depart from the United States in the status of a nonimmigrant under section 101(a)(15) (A) or (G) of the Immigration and Nationality Act, or in the status of a nonimmigrant under section 11(3), 11 (4), or 11(5) of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (61 Stat. 756): *Provided*, That in cases of extreme urgency, where the national security so requires, a departure-control officer may preliminarily exercise the authority conferred by § 46.2 pending the outcome of consultation with the Administrator, which shall be undertaken immediately. In all cases arising under this section, the decision of the Administrator shall be controlling: *Provided*, That any decision to prevent the departure of an alien shall be based upon a hearing and record as prescribed in this part.

[26 FR 3069, Apr. 11, 1961; 26 FR 3188, Apr. 14, 1961]

PART 47 [RESERVED]

SUBCHAPTER F—NATIONALITY AND PASSPORTS

PART 50—NATIONALITY PROCEDURES

Sec.
50.1 Definitions.

Subpart A—Procedures for Determination of United States Nationality of a Person Abroad

50.2 Determination of U.S. nationality of persons abroad.
50.3 Application for registration.
50.4 Application for passport.
50.5 Application for registration of birth abroad.
50.6 Registration at the Department of birth abroad.
50.7 Consular Report of Birth Abroad of a Citizen of the United States of America.
50.8 Certification of Report of Birth Abroad of a United States Citizen.
50.9 Card of identity.
50.10 Certificate of nationality.
50.11 Certificate of identity for travel to the United States to apply for admission.

Subpart B—Retention and Resumption of Nationality

50.20 Retention of nationality.
50.30 Resumption of nationality.

Subpart C—Loss of Nationality

50.40 Certification of loss of U.S. nationality.
50.50 Renunciation of nationality.
50.51 Review of finding of loss of nationality.

AUTHORITY: 22 U.S.C. 2651a; 8 U.S.C. 1104 and 1401 through 1504.

SOURCE: 31 FR 13537, Oct. 20, 1966, unless otherwise noted.

§ 50.1 Definitions.

The following definitions shall be applicable to this part:

(a) *United States* means the continental United States, the State of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, the Canal Zone, American Samoa, Guam and any other islands or territory over which the United States exercises jurisdiction.

(b) *Department* means the Department of State of the United States of America.

(c) *Secretary* means the Secretary of State.

(d) *National* means a citizen of the United States or a noncitizen owing permanent allegiance to the United States.

(e) *Passport* means a travel document issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer.

(f) *Passport Agent* means a person designated by the Department to accept passport applications.

(g) *Designated nationality examiner* means a United States citizen employee of the Department of State assigned or employed abroad (permanently or temporarily) and designated by the Deputy Assistant Secretary of State for Overseas Citizen Services, to grant, issue and verify U.S. passports. A designated nationality examiner may adjudicate claims of acquisition and loss of United States nationality and citizenship as required for the purpose of providing passport and related services. The authority of designated nationality examiners shall include the authority to examine, adjudicate, approve and deny passport applications and applications for related services. The authority of designated nationality examiners shall expire upon termination of the employee's assignment for such duty and may also be terminated at any time by the Deputy Assistant Secretary for Overseas Citizen Services.

[31 FR 13537, Oct. 20, 1966, as amended at 31 FR 14521, Nov. 11, 1966; 61 FR 43311, Aug. 22, 1996]

Subpart A—Procedures for Determination of United States Nationality of a Person Abroad

§ 50.2 Determination of U.S. nationality of persons abroad.

The Department shall determine claims to United States nationality when made by persons abroad on the basis of an application for registration, for a passport, or for a Consular Report of Birth Abroad of a Citizen of the

United States of America. Such determinations of nationality may be made abroad by a consular officer or a designated nationality examiner. A designated nationality examiner may accept and approve/disapprove applications for registration and accept and approve/disapprove applications for passports and issue passports. Under the supervision of a consular officer, designated nationality examiners shall accept, adjudicate, disapprove and provisionally approve applications for the Consular Report of Birth Abroad. A Consular Report of Birth Abroad may only be issued by a consular officer, who will review a designated nationality examiner's provisional approval of an application for such report and issue the report if satisfied that the claim to nationality has been established.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 43311, Aug. 22, 1996]

§ 50.3 Application for registration.

(a) A person abroad who claims U.S. nationality, or a representative on his behalf, may apply at a consular post for registration to establish his claim to U.S. nationality or to make his residence in the particular consular area a matter of record.

(b) The applicant shall execute the registration form prescribed by the Department and shall submit the supporting evidence required by subpart C of part 51 of this chapter. A diplomatic or consular officer or a designated nationality examiner shall determine the period of time for which the registration will be valid.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 43312, Aug. 22, 1996]

§ 50.4 Application for passport.

A claim to U.S. nationality in connection with an application for passport shall be determined by posts abroad in accordance with the regulations contained in part 51 of this chapter.

§ 50.5 Application for registration of birth abroad.

Upon application by the parent(s) or the child's legal guardian, a consular officer or designated nationality examiner may accept and adjudicate the application for a Consular Report of Birth Abroad of a Citizen of the United States of America for a child born in their consular district. In specific instances, the Department may authorize consular officers and other designated employees to adjudicate the application for a Consular Report of Birth Abroad of a child born outside his/her consular district. Under the supervision of a consular officer, designated nationality examiners shall accept, adjudicate, disapprove and provisionally approve applications for the Consular Report of Birth Abroad. The applicant shall be required to submit proof of the child's birth, identity and citizenship meeting the evidence requirements of subpart C of part 51 of this subchapter and shall include:

(a) *Proof of child's birth.* Proof of child's birth usually consists of, but is not limited to, an authentic copy of the record of the birth filed with local authorities, a baptismal certificate, a military hospital certificate of birth, or an affidavit of the doctor or the person attending the birth. If no proof of birth is available, the person seeking to register the birth shall submit his affidavit explaining why such proof is not available and setting forth the facts relating to the birth.

(b) *Proof of child's citizenship.* Evidence of parent's citizenship and, if pertinent, evidence of parent's physical presence in the United States as required for transmittal of claim of citizenship by the Immigration and Nationality Act of 1952 shall be submitted.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 43312, Aug. 22, 1996]

§ 50.6 Registration at the Department of birth abroad.

In the time of war or national emergency, passport agents may be designated to complete consular reports of birth for children born at military facilities which are not under the jurisdiction of a consular office. An officer of the Armed Forces having authority to administer oaths may take applications for registration under this section.

§ 50.7 Consular Report of Birth Abroad of a Citizen of the United States of America.

(a) Upon application and the submission of satisfactory proof of birth, identity and nationality, and at the time of the reporting of the birth, the consular officer may issue to the parent or legal guardian, when approved and upon payment of a prescribed fee, a Consular Report of Birth Abroad of a Citizen of the United States of America.

(b) Amended and replacement Consular Reports of Birth Abroad of a Citizen of the United States of America may be issued by the Department of State's Passport Office upon written request and payment of the required fee.

(c) When it reports a birth under § 50.6, the Department shall furnish the Consular Report of Birth Abroad of a Citizen of the United States of America to the parent or legal guardian upon application and payment of required fees.

(d) A consular report of birth, or a certification thereof, may be canceled if it appears that such document was illegally, fraudulently, or erroneously obtained, or was created through illegality or fraud. The cancellation under this paragraph of such a document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued. A person for or to whom such document has been issued or made shall be given at such person's last known address, written notice of the cancellation of such document, together with the specific reasons for the cancellation and the procedures for review available under the provisions in 22 CFR 51.81 through 51.89.

[61 FR 43312, Aug. 22, 1996, as amended at 64 FR 19714, Apr. 22, 1999]

§ 50.8 Certification of Report of Birth Abroad of a United States Citizen.

At any time subsequent to the issuance of a Consular Report of Birth Abroad of a Citizen of the United States of America, when requested and upon payment of the required fee, the Department of State's Passport Office may issue to the citizen, the citizen's parent or legal guardian a certificate entitled ''Certification of Report of Birth Abroad of a United States Citizen.''

[61 FR 43312, Aug. 22, 1996]

§ 50.9 Card of identity.

When authorized by the Department, consular offices or designated nationality examiners may issue a card of identity for travel to the United States to nationals of the United States being deported from a foreign country, to nationals/citizens of the United States involved in a common disaster abroad, or to a returning national of the United States to whom passport services have been denied or withdrawn under the provisions of this part or parts 51 or 53 of this subchapter.

[61 FR 43312, Aug. 22, 1996]

§ 50.10 Certificate of nationality.

(a) Any person who acquired the nationality of the United States at birth and who is involved in any judicial or administrative proceedings in a foreign state and needs to establish his U.S. nationality may apply for a certificate of nationality in the form prescribed by the Department.

(b) An applicant for a certificate of nationality must submit evidence of his nationality and documentary evidence establishing that he is involved in judicial or administrative proceedings in which proof of his U.S. nationality is required.

§ 50.11 Certificate of identity for travel to the United States to apply for admission.

(a) A person applying abroad for a certificate of identity under section 360(b) of the Immigration and Nationality Act shall complete the application form prescribed by the Department and submit evidence to support his claim to U.S. nationality.

(b) When a diplomatic or consular officer denies an application for a certificate of identity under this section, the applicant may submit a written appeal to the Secretary, stating the pertinent facts, the grounds upon which U.S. nationality is claimed and his reasons for

considering that the denial was not justified.

[31 FR 14521, Nov. 11, 1966]

Subpart B—Retention and Resumption of Nationality

§ 50.20 Retention of nationality.

(a) *Section 351(b) of the Immigration and Nationality Act*. (1) A person who desires to claim U.S. nationality under the provisions of section 351(b) of the Immigration and Nationality Act must, within the time period specified in the statute, assert a claim to U.S. nationality and subscribe to an oath of allegiance before a diplomatic or consular officer.

(2) In addition, the person shall submit to the Department a statement reciting the person's identity and acquisition or derivation of U.S. nationality, the facts pertaining to the performance of any act which would otherwise have been expatriative, and his desire to retain his U.S. nationality.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 29652, 29653, June 12, 1996]

§ 50.30 Resumption of nationality.

(a) *Section 324(c) of the Immigration and Nationality Act*. (1) A woman formerly a citizen of the United States at birth who wishes to regain her citizenship under section 324(c) of the Immigration and Nationality Act may apply abroad to a diplomatic or consular officer on the form prescribed by the Department to take the oath of allegiance prescribed by section 337 of that Act.

(2) The applicant shall submit documentary evidence to establish her eligibility to take the oath of allegiance. If the diplomatic or consular officer or the Department determines, when the application is submitted to the Department for decision, that the applicant is ineligible for resumption of citizenship because of section 313 of the Immigration and Nationality Act, the oath shall not be administered.

(b) *The Act of June 25, 1936*. (1) A woman who has been restored to citizenship by the Act of June 25, 1936, as amended by the Act of July 2, 1940, but who failed to take the oath of allegiance prior to December 24, 1952, as prescribed by the nationality laws, may apply abroad to any diplomatic or consular officer to take the oath of allegiance as prescribed by section 337 of the Immigration and Nationality Act.

(2) The applicant shall submit documentary evidence to establish her eligibility to take the oath of allegiance. If the diplomatic or consular officer or the Department determines, when the application is submitted to the Department, that the applicant is ineligible for resumption of citizenship under section 313 of the Immigration and Nationality Act, the oath shall not be administered.

(c) *Certification of repatriation*. Upon request and payment of the prescribed fee, a diplomatic or consular officer or the Department shall issue a certified copy of the application and oath administered to a woman repatriated under this section.

(d) *Section 324(d)(1) of the Immigration and Nationality Act*. (1) A former citizen of the United States who did not retain U.S. citizenship by failure to fulfill residency requirements as set out in Section 201(g) of the 1940 Nationality Act or former 301(b) of the 1952 Immigration and Nationality Act, may regain his/her U.S. citizenship pursuant to Section 324(d) INA, by applying abroad at a diplomatic or consular post, or in the U.S. at any Immigration and Naturalization Service office in the form and manner prescribed by the Department of State and the Immigration and Naturalization Service (INS).

(2) The applicant shall submit documentary evidence to establish eligibility to take the oath of allegiance, which includes proof of birth abroad to a U.S. citizen parent between May 24, 1934 and December 24, 1952. If the diplomatic, consular, INS, or passport officer determines that the applicant is ineligible to regain citizenship under section 313 INA, the oath shall not be administered.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 29653, June 12, 1996]

Subpart C—Loss of Nationality

§ 50.40 Certification of loss of U.S. nationality.

(a) *Administrative presumption*. In adjudicating potentially expatriating

acts pursuant to INA 349(a), the Department has adopted an administrative presumption regarding certain acts and the intent to commit them. U.S. citizens who naturalize in a foreign country; take a routine oath of allegiance; or accept non-policy level employment with a foreign government need not submit evidence of intent to retain U.S. nationality. In these three classes of cases, intent to retain U.S. citizenship will be presumed. A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship. In other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.

(b) Whenever a person admits that he or she had the intent to relinquish citizenship by the voluntary and intentional performance of one of the acts specified in Section 349(a) of the Immigration and Nationality Act, and the person consents to the execution of an affidavit to that effect, the diplomatic or consular officer shall attach such affidavit to the certificate of loss of nationality.

(c) Whenever a diplomatic or consular officer has reason to believe that a person, while in a foreign country, has lost his U.S. nationality under any provision of chapter 3 of title III of the Immigration and Nationality Act of 1952, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall prepare a certificate of loss of nationality containing the facts upon which such belief is based and shall forward the certificate to the Department.

(d) If the diplomatic or consular officer determines that any document containing information relevant to the statements in the certificate of loss of nationality should not be attached to the certificate, the person may summarize the pertinent information in the appropriate section of the certificate and send the documents together with the certificate to the Department.

(e) If the certificate of loss of nationality is approved by the Department, a copy shall be forwarded to the Immigration and Naturalization Service, Department of Justice. The diplomatic or consular office in which the certificate was prepared shall then forward a copy of the certificate to the person to whom it relates or his representative.

[31 FR 13537, Oct. 20, 1996. Redesignated and amended at 61 FR 29652, June 12, 1996; 63 FR 20315, Apr. 24, 1998]

§50.50 Renunciation of nationality.

(a) A person desiring to renounce U.S. nationality under section 349(a)(5) of the Immigration and Nationality Act shall appear before a diplomatic or consular officer of the United States in the manner and form prescribed by the Department. The renunciant must include on the form he signs a statement that he absolutely and entirely renounces his U.S. nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

(b) The diplomatic or consular officer shall forward to the Department for approval the oath of renunciation together with a certificate of loss of nationality as provided by section 358 of the Immigration and Nationality Act. If the officer's report is approved by the Department, copies of the certificate shall be forwarded to the Immigration and Naturalization Service, Department of Justice, and to the person to whom it relates or his representative.

[31 FR 13537, Oct. 20, 1966, as amended at 61 FR 29653, June 12, 1996]

§50.51 Review of finding of loss of nationality.

(a) There are no prescribed ''procedures for administrative appeal'' of issuance of a Certificate of Loss of Nationality for purposes of §358 of the Immigration and Nationality Act (8 U.S.C. 1501) and no mandatory administrative review procedure prior to resort to judicial processes under §360 of the Immigration and Nationality Act (8 U.S.C. 1503). Nevertheless, the Department may in its discretion review determinations of loss of nationality at any time after approval of issuance of the Certificate of Loss of Nationality to ensure consistency with governing law (see INA §§349 and 356, 8 U.S.C. 1481 and 1488). Such reconsideration may be initiated at the request of the person

concerned or another person determined in accordance with guidance issued by the Department to have a legitimate interest.

(b) The primary grounds on which the Department will consider reversing a finding of loss of nationality and vacating a Certificate of Loss of Nationality are:

(1) The law under which the finding of loss was made has been held unconstitutional; or

(2) A major change in the interpretation of the law of expatriation is made as a result of a U.S. Supreme Court decision; or

(3) A major change in the interpretation of the law of expatriation is made by the Department, or is made by a court or another agency and adopted by the Department; and/or

(4) The person presents substantial new evidence, not previously considered, of involuntariness or absence of intent at the time of the expatriating act.

(c) When the Department reverses a finding of loss of nationality, the person concerned shall be considered not to have lost U.S. nationality as of the time the expatriating act was committed, and the Certificate of Loss of Nationality shall be vacated.

(d) Requesting the Department to reverse a finding of loss of nationality and vacate a Certificate of Loss of Nationality is not a prescribed ''procedure for administrative appeal'' for purposes of § 358 of the Immigration and Nationality Act (8 U.S.C. 1501). The Department's decision in response to such a request is not a prescribed ''procedure for administrative appeal'' for purposes of § 358 of the Immigration and Nationality Act (8 U.S.C. 1501). The issuance of a Certificate of Loss of Nationality by the Department is a ''final administrative determination'' and ''final administrative denial'' for purposes of §§ 358 and 360 of the Immigration and Nationality Act (8 U.S.C. 1501 and 1503), respectively.

[73 FR 41258, July 18, 2008]

PART 51—PASSPORTS

Sec.

51.1 Definitions.

Subpart A—General

51.2 Passport issued to nationals only.
51.3 Types of passports.
51.4 Validity of passports.
51.5 Adjudication and issuance of passports.
51.6 Verification of passports and release of information from passport records.
51.7 Passport property of the U.S. Government.
51.8 Submission of currently valid passport.
51.9 Amendment of passports.
51.10 Replacement passports.

Subpart B—Application

51.20 General.
51.21 Execution of passport application.
51.22 Passport agents and passport acceptance agents.
51.23 Identity of applicant.
51.24 Affidavit of identifying witness.
51.25 Name of applicant to be used in passport.
51.26 Photographs.
51.27 Incompetents.
51.28 Minors.

Subpart C—Evidence of U.S. Citizenship or Nationality

51.40 Burden of proof.
51.41 Documentary evidence.
51.42 Persons born in the United States applying for a passport for the first time.
51.43 Persons born outside the United States applying for a passport for the first time.
51.44 Proof of resumption or retention of U.S. citizenship.
51.45 Department discretion to require evidence of U.S. citizenship or non-citizen nationality.
51.46 Return or retention of evidence of U.S. citizenship or non-citizen nationality.

Subpart D—Fees

51.50 Form of payment.
51.51 Passport fees.
51.52 Exemption from payment of passport fees.
51.53 Refunds.
51.54 Replacement passports without payment of applicable fees.
51.55 Execution fee not refundable.
51.56 Expedited passport processing.

Subpart E—Denial, Revocation, and Restriction of Passports

51.60 Denial and restriction of passports.
51.61 Denial of passports to certain convicted drug traffickers.
51.62 Revocation or limitation of passports.
51.63 Passports invalid for travel into or through restricted areas; prohibition on passports valid only for travel to Israel.

51.64 Special validation of passports for travel to restricted areas.
51.65 Notification of denial or revocation of passport.
51.66 Surrender of passport.

Subpart F—Procedures for Review of Certain Denials and Revocations

51.70 Request for hearing to review certain denials and revocations.
51.71 The hearing.
51.72 Transcript and record of the hearing.
51.73 Privacy of hearing.
51.74 Final decision.

AUTHORITY: 8 U.S.C. 1504; 18 U.S.C. 1621; 22 U.S.C. 211a, 212, 213, 213n (Pub. L. 106–113 Div. B, Sec. 1000(a)(7) [Div. A, Title II, Sec. 236], 113 Stat. 1536, 1501A–430); 214, 214a, 217a, 218, 2651a, 2671(d)(3), 2705, 2714, 2721, & 3926; 26 U.S.C. 6039E; 31 U.S.C. 9701; 42 U.S.C. 652(k) [Div. B, Title V of Pub. L. 103–317, 108 Stat. 1760]; E.O. 11295, Aug. 6, 1966, FR 10603, 3 CFR, 1966–1970 Comp., p. 570; Sec. 1 of Pub. L. 109–210, 120 Stat. 319; Sec. 2 of Pub. L. 109–167, 119 Stat. 3578; Sec. 5 of Pub. L. 109–472, 120 Stat. 3554; Pub. L. 108–447, Div. B, Title IV, Dec. 8, 2004, 118 Stat. 2809; Pub. L. 108–458, 118 Stat. 3638, 3823 (Dec. 17, 2004).

SOURCE: 72 FR 64931, Nov. 19, 2007, unless otherwise noted.

§51.1 Definitions.

The following definitions are applicable to this part:

(a) *Department* means the United States Department of State.

(b) *Electronic passport* means a passport containing an electronically readable device, an electronic chip encoded with the bearer's personal information printed on the data page, a digitized version of the bearer's photograph, a unique chip number, and a digital signature to protect the integrity of the stored information.

(c) *Minor* means an unmarried, unemancipated person under 18 years of age.

(d) *Passport* means a travel document regardless of format issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer.

(e) *Passport acceptance agent* means a U.S. national designated by the Department to accept passport applications and to administer oaths and affirmations in connection with such applications.

(f) *Passport agent* means a U.S. citizen employee of the Department of State, including consular officers, diplomatic officers and consular agents abroad, and such U.S. citizen Department of State employees or contractors as the Assistant Secretary for Consular Affairs may designate for the purpose of administering oaths and affirmations for passport applications.

(g) *Passport application* means the application form for a United States passport, as prescribed by the Department pursuant to 22 U.S.C. 213 and all documents, photographs, and statements submitted with the form or thereafter in support of the application.

(h) *Passport authorizing officer* means a U.S. citizen employee who is authorized by the Department to approve the issuance of passports.

(i) *Secretary* means the Secretary of State.

(j) *United States* when used in a geographical sense means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and all other United States territories and possessions.

(k) *U.S. citizen* means a person who acquired U.S. citizenship at birth or upon naturalization as provided by law and who has not subsequently lost such citizenship.

(l) *U.S. national* means a U.S. citizen or a U.S. non-citizen national.

(m) *U.S. non-citizen national* means a person on whom U.S. nationality, but not U.S. citizenship, has been conferred at birth under 8 U.S.C. 1408, or under other law or treaty, and who has not subsequently lost such non-citizen nationality.

[72 FR 64931, Nov. 19, 2007; 73 FR 5435, Jan. 30, 2008]

Subpart A—General

§51.2 Passport issued to nationals only.

(a) A passport may be issued only to a U.S. national.

(b) Unless authorized by the Department, no person may bear more than one valid passport of the same type.

§51.3 Types of passports.

(a) *Regular passport.* A regular passport is issued to a national of the United States.

(b) *Official passport*. An official passport is issued to an official or employee of the U.S. Government traveling abroad to carry out official duties. When authorized by the Department, spouses and family members of such persons may be issued official passports. When authorized by the Department, an official passport may be issued to a U.S. government contractor traveling abroad to carry out official duties on behalf of the U.S. government.

(c) *Diplomatic passport*. A diplomatic passport is issued to a Foreign Service officer or to a person having diplomatic status or comparable status because he or she is traveling abroad to carry out diplomatic duties on behalf of the U.S. Government. When authorized by the Department, spouses and family members of such persons may be issued diplomatic passports. When authorized by the Department, a diplomatic passport may be issued to a U.S. Government contractor if the contractor meets the eligibility requirements for a diplomatic passport and the diplomatic passport is necessary to complete his or her mission.

(d) *Passport card*. A passport card is issued to a national of the United States on the same basis as a regular passport. It is valid only for departure from and entry to the United States through land and sea ports of entry between the United States and Mexico, Canada, the Caribbean and Bermuda. It is not a globally interoperable international travel document.

[72 FR 64931, Nov. 19, 2007, as amended at 72 FR 74173, Dec. 31, 2007]

§ 51.4 Validity of passports.

(a) *Signature of bearer*. A passport book is valid only when signed by the bearer in the space designated for signature, or, if the bearer is unable to sign, signed by a person with legal authority to sign on his or her behalf. A passport card is valid without the signature of the bearer.

(b) *Period of validity of a regular passport and a passport card*. (1) A regular passport or passport card issued to an applicant 16 years of age or older is valid for ten years from date of issue unless the Department limits the validity period to a shorter period.

(2) A regular passport or passport card issued to an applicant under 16 years of age is valid for five years from date of issue unless the Department limits the validity period to a shorter period.

(3) A regular passport for which payment of the fee has been excused is valid for a period of five years from the date issued unless limited by the Department to a shorter period.

(c) *Period of validity of an official passport*. The period of validity of an official passport, unless limited by the Department to a shorter period, is five years from the date of issue, or so long as the bearer maintains his or her official status, whichever is shorter. An official passport which has not expired must be returned to the Department upon the termination of the bearer's official status or at such other time as the Department may determine.

(d) *Period of validity of a diplomatic passport*. The period of validity of a diplomatic passport, unless limited by the Department to a shorter period, is five years from the date of issue, or so long as the bearer maintains his or her diplomatic status, whichever is shorter. A diplomatic passport which has not expired must be returned to the Department upon the termination of the bearer's diplomatic status or at such other time as the Department may determine.

(e) *Limitation of validity*. The validity period of any passport may be limited by the Department to less than the normal validity period. The bearer of a limited passport may apply for a new passport, using the proper application and submitting the limited passport, applicable fees, photographs, and additional documentation, if required, to support the issuance of a new passport.

(f) *Invalidity*. A United States passport is invalid as soon as:

(1) The Department has sent or personally delivered a written notice to the bearer stating that the passport has been revoked; or

(2) The passport has been reported as lost or stolen to the Department, a U.S. passport agency or a diplomatic or consular post abroad and the Department has recorded the reported loss or theft; or

(3) The passport is cancelled by the Department (physically, electronically, or otherwise) upon issuance of a new passport of the same type to the bearer; or

(4) The Department has sent a written notice to the bearer that the passport has been invalidated because the Department has not received the applicable fees; or

(5) The passport has been materially changed in physical appearance or composition, or contains a damaged, defective or otherwise nonfunctioning chip, or includes unauthorized changes, obliterations, entries or photographs, or has observable wear or tear that renders it unfit for use as a travel document, and the Department either takes possession of the passport or sends a written notice to the bearer.

[72 FR 64931, Nov. 19, 2007, as amended at 72 FR 74173, Dec. 31, 2007]

§51.5 Adjudication and issuance of passports.

(a) A passport authorizing officer may adjudicate applications and authorize the issuance of passports.

(b) A passport authorizing officer will examine the passport application and all documents, photographs and statements submitted in support of the application in accordance with guidance issued by the Department.

§51.6 Verification of passports and release of information from passport records.

(a) *Verification*. When required by a foreign government, a consular officer abroad may verify a U.S. passport.

(b) *Release of information*. Information in passport records is subject to the provisions of the Freedom of Information Act (FOIA) and the Privacy Act. Release of this information may be requested in accordance with part 171 or part 172 of this title.

§51.7 Passport property of the U.S. Government.

(a) A passport at all times remains the property of the United States and must be returned to the U.S. Government upon demand.

(b) Law enforcement authorities who take possession of a passport for use in an investigation or prosecution must return the passport to the Department on completion of the investigation and/or prosecution.

§51.8 Submission of currently valid passport.

(a) When applying for a new passport, an applicant must submit for cancellation any currently valid passport of the same type.

(b) If an applicant is unable to produce a passport under paragraph (a) of this section, he or she must submit a signed statement in the form prescribed by the Department setting forth the circumstances regarding the disposition of the passport.

(c) The Department may deny or limit a passport if the applicant has failed to provide a sufficient and credible explanation for lost, stolen, altered or mutilated passport(s) previously issued to the applicant, after being given a reasonable opportunity to do so.

§51.9 Amendment of passports.

Except for the convenience of the U.S. Government, no passport may be amended.

§51.10 Replacement passports.

A passport issuing office may issue a replacement passport without payment of applicable fees for the reasons specified in §51.54.

Subpart B—Application

§51.20 General.

(a) An application for a passport, a replacement passport, extra visa pages, or other passport related service must be completed using the forms the Department prescribes.

(b) The passport applicant must truthfully answer all questions and must state every material matter of fact pertaining to his or her eligibility for a passport. All information and evidence submitted in connection with an application is considered part of the application. A person providing false information as part of a passport application, whether contemporaneously with the form or at any other time, is subject to prosecution under applicable Federal criminal statutes.

§ 51.21 Execution of passport application.

(a) *Application by personal appearance.* Except as provided in § 51.28, to assist in establishing identity, a minor, a person who has never been issued a passport in his or her own name, a person who has not been issued a passport for the full validity period of 10 years in his or her own name within 15 years of the date of a new application, or a person who is otherwise not eligible to apply for a passport by mail under paragraphs (b) and (c) of this section, must apply for a passport by appearing in person before a passport agent or passport acceptance agent (see § 51.22). The applicant must verify the application by oath or affirmation before the passport agent or passport acceptance agent, sign the completed application, provide photographs as prescribed by the Department, provide any other information or documents requested and pay the applicable fees prescribed in the Schedule of Fees for Consular Services (see 22 CFR 22.1).

(b) *Application by mail—persons in the United States.* (1) A person in the United States who previously has been issued a passport valid for 10 years in his or her own name may apply for a new passport by filling out, signing and mailing an application on the form prescribed by the Department if:

(i) The most recently issued previous passport was issued when the applicant was 16 years of age or older;

(ii) The application is made not more than 15 years following the issue date of the previous passport, except as provided in paragraph (e) of this section; and

(iii) The most recently issued previous passport of the same type is submitted with the new application.

(2) The applicant must also provide photographs as prescribed by the Department and pay the applicable fees prescribed in the Schedule of Fees for Consular Services (22 CFR 22.1).

(c) *Application by mail—persons abroad.* (1) A person in a foreign country where the Department has authorized a post to receive passport applications by mail who previously has been issued a passport valid for 10 years in his or her own name may apply for a new passport in that country by filling out, signing and mailing an application on the form prescribed by the Department if:

(i) The most recently issued previous passport was issued when the applicant was 16 years of age or older;

(ii) The application is made not more than 15 years following the issue date of the previous passport, except as provided in paragraph (e) of this section; and

(iii) The most recently issued previous passport of the same type is submitted with the new application.

(2) The applicant must also provide photographs as prescribed by the Department and pay the applicable fees prescribed in the Schedule of Fees for Consular Services (22 CFR 22.1).

(d) Nothing in this part shall prohibit or limit the Department from authorizing an overseas post to accept a passport application or applications from persons outside the country or outside the person's country of residence in circumstances which prevent provision of these services to the person where they are located or in other unusual circumstances as determined by the Department.

(e) A senior passport authorizing officer may authorize acceptance of an application by mail where the application is made more than 15 years following the issue date of the previous passport as appropriate and in accordance with guidance issued by the Department.

[72 FR 64931, Nov. 19, 2007; 73 FR 4078, Jan. 24, 2008]

§ 51.22 Passport agents and passport acceptance agents.

(a) *U.S. citizen employees of the Department authorized to serve as passport agents.* The following employees of the Department are authorized by virtue of their positions to serve as passport agents unless the Department in an individual case withdraws authorization:

(1) A passport authorizing officer;

(2) A consular officer, or a U.S. citizen consular agent abroad;

(3) A diplomatic officer specifically authorized by the Department to accept passport applications; and

(4) Such U.S. citizen Department of State employees and contractors as the Assistant Secretary for Consular Affairs may designate for the purpose of

administering oaths and affirmations for passport applications.

(b) *Persons designated by the Department to serve as passport acceptance agents*. When designated by the Department, the following persons are authorized to serve as passport acceptance agents unless the Department in an individual case withdraws authorization.

(1) An employee of the clerk of any Federal court;

(2) An employee of the clerk of any state court of record;

(3) A postal employee at a United States post office that has been selected to accept passport applications;

(4) An employee of the Department of Defense at a military installation that has been authorized to accept passport applications;

(5) An employee of a federal agency that has been selected to accept passport applications; and

(6) Any other person specifically designated by the Department.

(c) *Qualifications of persons designated by the Department to serve as passport acceptance agents*. Before the Department will designate a person described in §51.22(b) as a passport acceptance agent, his or her employer must certify that the person:

(1) Is a U.S. citizen or a U.S. non-citizen national;

(2) Is 18 years of age or older;

(3) Is a permanent employee, excluding ad hoc, contractual, and volunteer employees; and

(4) Does not have a record of either:

(i) A Federal or State felony conviction; or

(ii) A misdemeanor conviction for crimes involving moral turpitude or breach of trust, including but not limited to embezzlement, identity theft, misappropriation, document fraud, drug offenses, or dishonesty in carrying out a responsibility involving public trust.

(d) *Training*. A passport acceptance agent described in §51.22(b) must be trained to apply procedures and practices as detailed in guidance provided by the Department. Training must be successfully completed before accepting passport applications.

(e) *Responsibilities*. The responsibilities of a passport acceptance agent described in §51.22(b) include but are not limited to the following:

(1) Certifying the identity of each applicant. Passport acceptance agents must certify that they have personally witnessed the applicant signing his or her application, and that the applicant has:

(i) Personally appeared;

(ii) Presented proper identification, as documented on the application;

(iii) Submitted photographs that are a true likeness; and

(iv) Taken the oath administered by the acceptance agent.

(2) Safeguarding passport application information under the Privacy

Act of 1974. Passport acceptance agents described in §51.22(b) must not retain copies of executed applications, nor release passport application information to anyone other than the applicant and the Department.

(3) Avoiding conflict of interest. Passport acceptance agents described in §51.22(b) must not participate in any relationship that could be perceived as a conflict of interest, including but not limited to providing commercial services related to the passport process.

(f) *Documentation*. Passport acceptance facilities within the United

States must maintain a current listing of all passport acceptance agents designated under §51.22(b) working at its facility. This list must be updated at least annually and a copy provided to the officer specified by the Department at the appropriate passport issuing office.

(1) The current listing of all designated passport acceptance agents must include the passport acceptance agents':

(i) Names; and

(ii) Signatures.

(2) Any addition to or deletion from the current listing of designated passport acceptance agents is subject to prior approval by the Department.

§51.23 Identity of applicant.

(a) The applicant has the burden of establishing his or her identity.

(b) The applicant must establish his or her identity by the submission of a previous passport, other state, local, or federal government officially issued identification with photograph, or

other identifying evidence which may include an affidavit of an identifying witness.

(c) The Department may require such additional evidence of identity as it deems necessary.

§ 51.24 Affidavit of identifying witness.

(a) An identifying witness must execute an affidavit in the form prescribed by the Department before the person who accepts the passport application.

(b) A person who has received or expects to receive a fee for his or her services in connection with executing the application or obtaining the passport may not serve as an identifying witness.

§ 51.25 Name of applicant to be used in passport.

(a) The passport shall be issued in the full name of the applicant, generally the name recorded in the evidence of nationality and identity.

(b) The applicant must explain any material discrepancies between the name on the application and the name recorded in the evidence of nationality and identity. The name provided by the applicant on the application may be used if the applicant submits the documentary evidence prescribed by the Department.

(c) A name change will be recognized for purposes of issuing a passport if the name change occurs in one of the following ways.

(1) *Court order or decree.* An applicant whose name has been changed by court order or decree must submit with his or her application a copy of the order or decree.

Acceptable types of court orders and decrees include but are not limited to:

(i) A name change order;

(ii) A divorce decree specifically declaring the return to a former name;

(2) Certificate of naturalization issued in a new name.

(3) *Marriage.* An applicant who has adopted a new name following marriage must present a copy of the marriage certificate.

(4) *Operation of state law.* An applicant must present operative government-issued legal documentation declaring the name change or issued in the new name.

(5) *Customary usage.* An applicant who has adopted a new name other than as prescribed in paragraphs (c)(1) through (4) of this section must submit evidence of public and exclusive use of the adopted name for a long period of time, in general five years, as prescribed in guidance issued by the Department. The evidence must include three or more public documents, including one government-issued identification with photograph and other acceptable public documents prescribed by the Department.

§ 51.26 Photographs.

The applicant must submit with his or her application photographs as prescribed by the Department that are a good likeness of and satisfactorily identify the applicant.

§ 51.27 Incompetents.

A legal guardian or other person with the legal capacity to act on behalf of a person declared incompetent may execute a passport application on the incompetent person's behalf.

§ 51.28 Minors.

(a) *Minors under age 16*—(1) *Personal appearance.* Minors under 16 years of age applying for a passport must appear in person, unless the personal appearance of the minor is specifically excused by a senior passport authorizing officer, pursuant to guidance issued by the Department. In cases where personal appearance is excused, the person(s) executing the passport application on behalf of the minor shall appear in person and verify the application by oath or affirmation before a person authorized by the Secretary to administer oaths or affirmations, unless these requirements are also excused by a senior passport authorizing officer pursuant to guidance issued by the Department.

(2) *Execution of passport application by both parents or by each legal guardian.* Except as specifically provided in this section, both parents or each of the minor's legal guardians, if any, whether applying for a passport for the first time or for a renewal, must execute the application on behalf of a minor under

age 16 and provide documentary evidence of parentage or legal guardianship showing the minor's name, date and place of birth, and the names of the parent or parents or legal guardian.

(3) *Execution of passport application by one parent or legal guardian.* A passport application may be executed on behalf of a minor under age 16 by only one parent or legal guardian if such person provides:

(i) A notarized written statement or affidavit from the non-applying parent or legal guardian, if applicable, consenting to the issuance of the passport, or

(ii) Documentary evidence that such person is the sole parent or has sole custody of the minor. Such evidence includes, but is not limited to, the following:

(A) A birth certificate providing the minor's name, date and place of birth and the name of only the applying parent;

(B) A Consular Report of Birth Abroad of a Citizen of the United States of America or a Certification of Report of Birth of a United States Citizen providing the minor's name, date and place of birth and the name of only the applying parent;

(C) A copy of the death certificate for the non-applying parent or legal guardian;

(D) An adoption decree showing the name of only the applying parent;

(E) An order of a court of competent jurisdiction granting sole legal custody to the applying parent or legal guardian containing no travel restrictions inconsistent with issuance of the passport; or, specifically authorizing the applying parent or legal guardian to obtain a passport for the minor, regardless of custodial arrangements; or specifically authorizing the travel of the minor with the applying parent or legal guardian;

(F) An order of a court of competent jurisdiction terminating the parental rights of the non-applying parent or declaring the non-applying parent or legal guardian to be incompetent.

(G) An order of a court of competent jurisdiction providing for joint legal custody or requiring the permission of both parents or the court for important decisions will be interpreted as requiring the permission of both parents or the court, as appropriate. Notwithstanding the existence of any such court order, a passport may be issued when compelling humanitarian or emergency reasons relating to the welfare of the minor exist.

(4) *Execution of passport application by a person acting in loco parentis.* (i) A person may apply in loco parentis on behalf of a minor under age 16 by submitting a notarized written statement or a notarized affidavit from both parents or each legal guardian, if any, specifically authorizing the application.

(ii) If only one parent or legal guardian provides the notarized written statement or notarized affidavit, the applicant must provide documentary evidence that an application may be made by one parent or legal guardian, consistent with §51.28(a)(3)

(5) *Exigent or special family circumstances.* A passport may be issued when only one parent, legal guardian or person acting in loco parentis executes the application, in cases of exigent or special family circumstances.

(i) ''Exigent circumstances'' are defined as time-sensitive circumstances in which the inability of the minor to obtain a passport would jeopardize the health and safety or welfare of the minor or would result in the minor being separated from the rest of his or her traveling party. ''Time sensitive'' generally means that there is not enough time before the minor's emergency travel to obtain either the required consent of both parents/legal guardians or documentation reflecting a sole parent's/legal guardian's custody rights.

(ii) ''Special family circumstances'' are defined as circumstances in which the minor's family situation makes it exceptionally difficult for one or both of the parents to execute the passport application; and/or compelling humanitarian circumstances where the minor's lack of a passport would jeopardize the health, safety, or welfare of the minor; or, pursuant to guidance issued by the Department, circumstances in which return of a minor to the jurisdiction of his or her home state or habitual residence is necessary

to permit a court of competent jurisdiction to adjudicate or enforce a custody determination. A passport issued due to such special family circumstances may be limited for direct return to the United States in accordance with § 51.60(e).

(iii) A parent, legal guardian, or person acting in loco parentis who is applying for a passport for a minor under age 16 under this paragraph must submit a written statement with the application describing the exigent or special family circumstances he or she believes should be taken into consideration in applying an exception.

(iv) Determinations under § 51.28(a)(5) must be made by a senior passport authorizing officer pursuant to guidance issued by the Department.

(6) Nothing contained in this section shall prohibit any Department official adjudicating a passport application filed on behalf of a minor from requiring an applicant to submit other documentary evidence deemed necessary to establish the applying adult's entitlement to obtain a passport on behalf of a minor under the age of 16 in accordance with the provisions of this regulation.

(b) *Minors 16 years of age and above.* (1) A minor 16 years of age and above applying for a passport must appear in person and may execute the application for a passport on his or her own behalf unless the personal appearance of the minor is specifically excused by a senior passport authorizing officer pursuant to guidance issued by the Department, or unless, in the judgment of the person before whom the application is executed, it is not advisable for the minor to execute his or her own application. In such case, it must be executed by a parent or legal guardian of the minor, or by a person in loco parentis, unless the personal appearance of the parent, legal guardian or person in loco parentis is excused by the senior passport authorizing officer pursuant to guidance issued by the Department.

(2) The passport authorizing officer may at any time require a minor 16 years of age and above to submit the notarized consent of a parent, a legal guardian, or a person in loco parentis to the issuance of the passport.

(c) *Rules applicable to all minors*—(1) *Objections.* At any time prior to the issuance of a passport to a minor, the application may be disapproved and a passport may be denied upon receipt of a written objection from a parent or legal guardian of the minor, or from another party claiming authority to object, so long as the objecting party provides sufficient documentation of his or her custodial rights or other authority to object.

(2) An order from a court of competent jurisdiction providing for joint legal custody or requiring the permission of both parents or the court for important decisions will be interpreted as requiring the permission of both parents or the court as appropriate.

(3) The Department will consider a court of competent jurisdiction to be a U.S. state or federal court or a foreign court located in the minor's home state or place of habitual residence.

(4) The Department may require that conflicts regarding custody orders, whether domestic or foreign, be settled by the appropriate court before a passport may be issued.

(5) *Access by parents and legal guardians to passport records for minors.* Either parent or any legal guardian of a minor may upon written request obtain information regarding the application for and issuance of a passport to a minor, unless the requesting parent's parental rights have been terminated by an order of a court of competent jurisdiction, a copy of which has been provided to the Department. The Department may deny such information to a parent or legal guardian if it determines that the minor objects to disclosure and the minor is 16 years of age or older or if the Department determines that the minor is of sufficient age and maturity to invoke his or her own privacy rights.

Subpart C—Evidence of U.S. Citizenship or Nationality

§ 51.40 Burden of proof.

The applicant has the burden of proving that he or she is a U.S. citizen or non-citizen national.

§51.41 Documentary evidence.

The applicant must provide documentary evidence that he or she is a U.S. citizen or non-citizen national.

§51.42 Persons born in the United States applying for a passport for the first time.

(a) *Primary evidence of birth in the United States.* A person born in the United States generally must submit a birth certificate. The birth certificate must show the full name of the applicant, the applicant's place and date of birth, the full name of the parent(s), and must be signed by the official custodian of birth records, bear the seal of the issuing office, and show a filing date within one year of the date of birth.

(b) *Secondary evidence of birth in the United States.* If the applicant cannot submit a birth certificate that meets the requirement of paragraph (a) of this section, he or she must submit secondary evidence sufficient to establish to the satisfaction of the Department that he or she was born in the United States. Secondary evidence includes but is not limited to hospital birth certificates, baptismal certificates, medical and school records, certificates of circumcision, other documentary evidence created shortly after birth but generally not more than 5 years after birth, and/or affidavits of persons having personal knowledge of the facts of the birth.

§51.43 Persons born outside the United States applying for a passport for the first time.

(a) *General.* A person born outside the United States must submit documentary evidence that he or she meets all the statutory requirements for acquisition of U.S. citizenship or non-citizen nationality under the provision of law or treaty under which the person is claiming U.S. citizenship or non-citizen nationality.

(b) *Documentary evidence.* (1) Types of documentary evidence of citizenship for a person born outside the United States include:

(i) A certificate of naturalization.

(ii) A certificate of citizenship.

(iii) A Consular Report of Birth Abroad.

(2) An applicant without one of these documents must produce supporting documents as required by the Department, showing acquisition of U.S. citizenship under the relevant provisions of law.

§51.44 Proof of resumption or retention of U.S. citizenship.

An applicant who claims to have resumed or retained U.S. citizenship must submit with the application a certificate of naturalization or evidence that he or she took the steps necessary to resume or retain U.S. citizenship in accordance with the applicable provision of law.

§51.45 Department discretion to require evidence of U.S. citizenship or non-citizen nationality.

The Department may require an applicant to provide any evidence that it deems necessary to establish that he or she is a U.S. citizen or non-citizen national, including evidence in addition to the evidence specified in 22 CFR 51.42 through 51.44.

§51.46 Return or retention of evidence of U.S. citizenship or non-citizen nationality.

The Department will generally return to the applicant evidence submitted in connection with an application for a passport. The Department may, however, retain evidence when it deems it necessary for anti-fraud or law enforcement or other similar purposes.

Subpart D—Fees

§51.50 Form of payment.

Passport fees must be paid in U.S. currency or in other forms of payments permitted by the Department.

§51.51 Passport fees.

The Department collects the following passport fees in the amounts prescribed in the Schedule of Fees for Consular Services (22 CFR 22.1):

(a) An application fee, which must be paid at the time of application, except as provided in §51.52, and is not refundable, except as provided in §51.53.

(b) An execution fee, except as provided in §51.52, when the applicant is

required to execute the application in person before a person authorized to administer oaths for passport purposes. The execution fee is collected at the time of application and is not refundable (see § 51.55). When execution services are provided by an official of a State or local government or of the United States Postal Service (USPS), the State or local government or USPS may retain the fee if authorized to do so by the Department.

(c) A fee for expedited passport processing, if applicable (see § 51.56).

(d) A surcharge in the amount of twenty-two dollars ($22) on the filing of each application for a passport book, in the amount of twenty-two dollars ($22) on the filing of each application for a passport card for an applicant age 16 or over, and in the amount of fifteen dollars ($15) on the filing of each application for a passport card for an applicant under age 16, in order to cover the costs of meeting the increased demand for passports as a result of actions taken to comply with section 7209(b) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458 (8 U.S.C. 1185 note). The surcharge will be recovered by the Department of State from within the passport application fee reflected in the Schedule of Fees for Consular Services.

(e) An ''enhanced border security'' surcharge on the filing of each application for a regular passport in an amount set administratively by the Department and published in the Schedule of Fees for Consular Services.

(f) Any other fee that the Department is authorized or required by law to charge for passport services.

(g) The foregoing fees are applicable regardless of the validity period of the passport.

[72 FR 64931, Nov. 19, 2007; 73 FR 5435, Jan. 30, 2008, as amended at 75 FR 36535, June 28, 2010]

§ 51.52 Exemption from payment of passport fees.

(a) A person who is exempt from the payment of passport fees under this section may obtain a passport book only for no charge. A passport card will not be issued for no charge to the individuals exempt from the payment of passport fees under this section.

(b) The following persons are exempt from payment of passport fees except for the passport execution fee, unless their applications are executed before a federal official, in which case they are also exempt from payment of the passport execution fee:

(1) An officer or employee of the United States traveling on official business and the members of his or her immediate family. The applicant must submit evidence of the official purpose of the travel and, if applicable, authorization for the members of his or her immediate family to accompany or reside with him or her abroad.

(2) An American seaman who requires a passport in connection with his or her duties aboard a United States flag vessel.

(3) A widow, widower, child, parent, brother or sister of a deceased member of the United States Armed Forces proceeding abroad to visit the grave of such service member or to attend a funeral or memorial service for such member.

(4) Other persons whom the Department determines should be exempt from payment of passport fees for compelling circumstances, pursuant to guidance issued by the Department; or

(5) Other categories of persons exempted by law.

[72 FR 74173, Dec. 31, 2007]

§ 51.53 Refunds.

(a) The Department will refund the passport application fee and the security surcharge to any person exempt from payment of passport fees under 22 CFR 51.52 from whom the fee was erroneously collected.

(b) The Department will refund an expedited passport processing fee if the Department fails to provide expedited passport processing as provided in 22 CFR 51.56.

(c) For procedures on refunds of $5.00 or less, see 22 CFR 22.6(b).

§ 51.54 Replacement passports without payment of applicable fees.

A passport issuing office may issue a replacement passport for the following reasons without payment of applicable fees:

(a) To correct an error or rectify a mistake of the Department;

(b) When the bearer has changed his or her name or other personal identifier listed on the data page of the passport, and applies for a replacement passport within one year of the date of the passport's original issuance.

(c) When the bearer of an emergency full fee passport issued for a limited validity period applies for a full validity passport within one year of the date of the passport's original issuance.

(d) When a passport is retained by U.S. law enforcement or judiciary for evidentiary purposes and the bearer is still eligible to have a passport.

(e) When a passport is issued to replace a passport with a failed electronic chip for the balance of the original validity period.

§51.55 Execution fee not refundable.

The fee for the execution of a passport application is not refundable.

§51.56 Expedited passport processing.

(a) Within the United States, an applicant for passport service (including issuance, replacement or the addition of visa pages) may request expedited processing. The Department may decline to accept the request.

(b) Expedited passport processing shall mean completing processing within the number of business days published on the Department's Web site, *http://www.travel.state.gov*, commencing when the application reaches a Passport Agency or, if the application is already with a Passport Agency, commencing when the request for expedited processing is approved. The processing will be considered completed when the passport is ready to be picked up by the applicant or is mailed to the applicant, or a letter of passport denial is transmitted to the applicant.

(c) A fee is charged for expedited passport processing (see 22 CFR 51.51(c)). The fee does not cover any costs of mailing above the normal level of service regularly provided by the Department. The cost of expedited mailing must be paid by the applicant.

(d) The Department will not charge the fee for expedited passport processing if the Department's error, mistake or delay caused the need for expedited processing.

[72 FR 64931, Nov. 19, 2007, as amended at 74 FR 47727, Sept. 17, 2009]

Subpart E—Denial, Revocation, and Restriction of Passports

§51.60 Denial and restriction of passports.

(a) The Department may not issue a passport, except a passport for direct return to the United States, in any case in which the Department determines or is informed by competent authority that:

(1) The applicant is in default on a loan received from the United States under 22 U.S.C. 2671(b)(2)(B) for the repatriation of the applicant and, where applicable, the applicant's spouse, minor child(ren), and/or other immediate family members, from a foreign country (see 22 U.S.C. 2671(d)); or

(2) The applicant has been certified by the Secretary of Health and Human Services as notified by a state agency under 42 U.S.C. 652(k) to be in arrears of child support in an amount determined by statute.

(b) The Department may refuse to issue a passport in any case in which the Department determines or is informed by competent authority that:

(1) The applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073); or

(2) The applicant is subject to a criminal court order, condition of probation, or condition of parole, any of which forbids departure from the United States and the violation of which could result in the issuance of a Federal warrant of arrest, including a warrant issued under the Federal Fugitive Felon Act; or

(3) The applicant is subject to a U.S. court order committing him or her to a mental institution; or

(4) The applicant has been legally declared incompetent by a court of competent jurisdiction in the United States; or

(5) The applicant is the subject of a request for extradition or provisional request for extradition which has been

presented to the government of a foreign country; or

(6) The applicant is the subject of a subpoena received from the United States pursuant to 28 U.S.C. 1783, in a matter involving Federal prosecution for, or grand jury investigation of, a felony; or

(7) The applicant is a minor and the passport may be denied under 22 CFR 51.28; or

(8) The applicant is subject to an order of restraint or apprehension issued by an appropriate officer of the United States Armed Forces pursuant to chapter 47 of title 10 of the United States Code; or

(9) The applicant is the subject of an outstanding state or local warrant of arrest for a felony; or

(10) The applicant is the subject of a request for extradition or provisional arrest submitted to the United States by a foreign country.

(c) The Department may refuse to issue a passport in any case in which:

(1) The applicant has not repaid a loan received from the United States under 22 U.S.C. 2670(j) for emergency medical attention, dietary supplements, and other emergency assistance, including, if applicable, assistance provided to his or her child(ren), spouse, and/or other immediate family members in a foreign country; or

(2) The applicant has not repaid a loan received from the United States under 22 U.S.C. 2671(b)(2)(B) or 22 U.S.C. 2671(b)(2)(A) for the repatriation or evacuation of the applicant and, if applicable, the applicant's child(ren), spouse, and/or other immediate family members from a foreign country to the United States; or

(3) The applicant has previously been denied a passport under this section or 22 CFR 51.61, or the Department has revoked the applicant's passport or issued a limited passport for direct return to the United States under 22 CFR 51.62, and the applicant has not shown that there has been a change in circumstances since the denial, revocation or issuance of a limited passport that warrants issuance of a passport; or

(4) The Secretary determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.

(d) The Department may refuse to issue a passport in a case in which the Department is informed by an appropriate foreign government authority or international organization that the applicant is the subject of a warrant of arrest for a felony.

(e) The Department may refuse to issue a passport, except a passport for direct return to the United States, in any case in which the Department determines or is informed by a competent authority that the applicant is a minor who has been abducted, wrongfully removed or retained in violation of a court order or decree and return to his or her home state or habitual residence is necessary to permit a court of competent jurisdiction to determine custody matters.

§ 51.61 Denial of passports to certain convicted drug traffickers.

(a) A passport may not be issued in any case in which the Department determines or is informed by competent authority that the applicant is subject to imprisonment or supervised release as the result of a felony conviction for a Federal or state drug offense, if the individual used a U.S. passport or otherwise crossed an international border in committing the offense, including a felony conviction arising under:

(1) The Controlled Substances Act (21 U.S.C. 801 *et seq.*) or the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*); or

(2) Any Federal law involving controlled substances as defined in section 802 of the Controlled Substances Act (21 U.S.C. 801 *et seq.*); or

(3) The Bank Secrecy Act (31 U.S.C. 5311 *et seq.*) or the Money Laundering Act (18 U.S.C. 1956 *et seq.*) if the Department is in receipt of information that supports the determination that the violation involved is related to illicit production of or trafficking in a controlled substance; or

(4) Any state law involving the manufacture, distribution, or possession of a controlled substance.

(b) A passport may be refused in any case in which the Department determines or is informed by competent authority that the applicant is subject to

imprisonment or supervised release as the result of a misdemeanor conviction of a Federal or state drug offense if the individual used a U.S. passport or otherwise crossed an international border in committing the offense, other than a first conviction for possession of a controlled substance, including a misdemeanor conviction arising under:

(1) The Federal statutes described in §51.61(a); or

(2) Any State law involving the manufacture, distribution, or possession of a controlled substance.

(c) Notwithstanding paragraph (a) of this section, the Department may issue a passport when the competent authority confirms, or the Department otherwise finds, that emergency circumstances or humanitarian reasons exist.

§51.62 Revocation or limitation of passports.

(a) The Department may revoke or limit a passport when

(1) The bearer of the passport may be denied a passport under 22 CFR 51.60 or 51.61; or 51.28; or any other provision contained in this part; or,

(2) The passport has been obtained illegally, fraudulently or erroneously; was created through illegality or fraud practiced upon the Department; or has been fraudulently altered or misused;

(b) The Department may revoke a passport when the Department has determined that the bearer of the passport is not a U.S. national, or the Department is on notice that the bearer's certificate of citizenship or certificate of naturalization has been canceled.

§51.63 Passports invalid for travel into or through restricted areas; prohibition on passports valid only for travel to Israel.

(a) The Secretary may restrict the use of a passport for travel to or use in a country or area which the Secretary has determined is:

(1) A country with which the United States is at war; or

(2) A country or area where armed hostilities are in progress; or

(3) A country or area in which there is imminent danger to the public health or physical safety of United States travelers.

(b) Any determination made and restriction imposed under paragraph (a) of this section, or any extension or revocation of the restriction, shall be published in the FEDERAL REGISTER.

(c) A passport may not be designated as valid only for travel to Israel.

§51.64 Special validation of passports for travel to restricted areas.

(a) A U.S. national may apply to the Department for a special validation of his or passport to permit its use for travel to, or use in, a restricted country or area. The application must be accompanied by evidence that the applicant falls within one of the categories in paragraph (c) of this section.

(b) The Department may grant a special validation if it determines that the validation is in the national interest of the United States.

(c) A special validation may be determined to be in the national interest if:

(1) The applicant is a professional reporter or journalist, the purpose of whose trip is to obtain, and make available to the public, information about the restricted area; or

(2) The applicant is a representative of the International Committee of the Red Cross or the American Red Cross traveling pursuant to an officially-sponsored Red Cross mission; or

(3) The applicant's trip is justified by compelling humanitarian considerations; or

(4) The applicant's request is otherwise in the national interest.

§51.65 Notification of denial or revocation of passport.

(a) The Department will notify in writing any person whose application for issuance of a passport has been denied, or whose passport has been revoked. The notification will set forth the specific reasons for the denial or revocation, and, if applicable, the procedures for review available under 22 CFR 51.70 through 51.74.

(b) An application for a passport will be denied or treated as abandoned if an applicant fails to meet his or her burden of proof under 22 CFR 51.23(a) and 51.40 or otherwise does not provide documentation sufficient to establish entitlement to passport issuance within

ninety days of notification by the Department that additional information from the applicant is required. Thereafter, if an applicant wishes to pursue a claim of entitlement to passport issuance, he or she must submit a new application and supporting documents, photographs, and statements in support of the application, along with applicable application and execution fees.

§ 51.66 Surrender of passport.

The bearer of a passport that is revoked must surrender it to the Department or its authorized representative upon demand.

Subpart F—Procedures for Review of Certain Denials and Revocations

§ 51.70 Request for hearing to review certain denials and revocations.

(a) A person whose passport has been denied or revoked under 22 CFR 51.60(b)(1) through (10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1) where the basis for the adverse action would entitle the applicant to a hearing under this section, or § 51.62(a)(2) may request a hearing to the Department to review the basis for the denial or revocation within 60 days of receipt of the notice of the denial or revocation.

(b) The provisions of §§ 51.70 through 51.74 do not apply to any action of the Department taken on an individual basis in denying, restricting, revoking, or invalidating a passport or in any other way adversely affecting the ability of a person to receive or use a passport for reasons excluded from § 51.70(a) including:

(1) Non-nationality;

(2) Refusal under the provisions of 51.60(a);

(3) Refusal to grant a discretionary exception under emergency or humanitarian relief provisions of § 51.61(c);

(4) Refusal to grant a discretionary exception from geographical limitations of general applicability.

(c) If a timely request for a hearing is made, the Department will hold it within 60 days of the date the Department receives the request, unless the person requesting the hearing asks for a later date and the Department and the hearing officer agree.

(d) The Department will give the person requesting the hearing not less than 10 business days' written notice of the date and place of the hearing.

§ 51.71 The hearing.

(a) The Department will name a hearing officer, who will make findings of fact and submit recommendations based on the record of the hearing as defined in § 51.72 to the Deputy Assistant Secretary for Passport Services in the Bureau of Consular Affairs.

(b) The person requesting the hearing may appear in person, or with or by his designated attorney. The attorney must be admitted to practice in any state of the United States, the District of Columbia, any territory or possession of the United States, or be admitted to practice before the courts of the country in which the hearing is to be held.

(c) The person requesting the hearing may testify, offer evidence in his or her own behalf, present witnesses, and make arguments at the hearing. The person requesting the hearing is responsible for all costs associated with the presentation of his or her case. The Department may present witnesses, offer evidence, and make arguments in its behalf. The Department is responsible for all costs associated with the presentation of its case.

(d) Formal rules of evidence will not apply, but the hearing officer may impose reasonable restrictions on relevancy, materiality, and competency of evidence presented. Testimony will be under oath or by affirmation under penalty of perjury. The hearing officer may not consider any information that is not also made available to the person requesting the hearing and made a part of the record of the proceeding.

(e) If any witness is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit from or order a deposition of the witness, the cost for which will be the responsibility of the requesting party.

§ 51.72 Transcript and record of the hearing.

A qualified reporter will make a complete verbatim transcript of the hearing. The person requesting the hearing and/or his or her attorney may review

and purchase a copy of the transcript. The hearing transcript and the documents received by the hearing officer will constitute the record of the hearing.

§ 51.73 Privacy of hearing.

Only the person requesting the hearing, his or her attorney, the hearing officer, official reporters, and employees of the Department directly concerned with the presentation of the case for the Department may be present at the hearing. Witnesses may be present only while actually giving testimony or as otherwise directed by the hearing officer.

§ 51.74 Final decision.

After reviewing the record of the hearing and the findings of fact and recommendations of the hearing officer, the Deputy Assistant Secretary for Passport Services will decide whether to uphold the denial or revocation of the passport. The Department will promptly notify the person requesting the hearing in writing of the decision. If the decision is to uphold the denial or revocation, the notice will contain the reason(s) for the decision. The decision is final and is not subject to further administrative review.

PART 53—PASSPORT REQUIREMENT AND EXCEPTIONS

Sec.
53.1 Passport requirement; definitions.
53.2 Exceptions.
53.3 Attempt of a citizen to enter without a valid passport.
53.4 Optional use of a valid passport.

AUTHORITY: 8 U.S.C. 1185; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); E.O. 13323, 69 FR 241 (Dec. 30, 2003).

SOURCE: 71 FR 68430, Nov. 24, 2006, unless otherwise noted.

§ 53.1 Passport requirement; definitions.

(a) It is unlawful for a citizen of the United States, unless excepted under 22 CFR 53.2, to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport.

(b) For purposes of this part ''United States'' means ''United States'' as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

§ 53.2 Exceptions.

(a) U.S. citizens, as defined in § 41.0 of this chapter, are not required to bear U.S. passports when traveling directly between parts of the United States as defined in § 51.1 of this chapter.

(b) A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States:

(1) When traveling as a member of the Armed Forces of the United States on active duty and when he or she is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, when under official orders or permit of such Armed Forces, and when carrying a military identification card; or

(2) When traveling entirely within the Western Hemisphere on a cruise ship, and when the U.S. citizen boards the cruise ship at a port or place within the United States and returns on the return voyage of the same cruise ship to the same United States port or place from where he or she originally departed. That U.S. citizen may present a government-issued photo identification document in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services before entering the United States; if the U.S. citizen is under the age of 16, he or she may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services; or

(3) When traveling as a U.S. citizen seaman, carrying an unexpired Merchant Marine Document (MMD) in conjunction with maritime business. The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(4) *Trusted traveler programs*—(i) *NEXUS Program.* When traveling as a participant in the NEXUS program, he or she may present a valid NEXUS program card when using a NEXUS Air

kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A U.S. citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may also present a NEXUS program card;

(ii) *FAST program.* A U.S. citizen who is traveling as a participant in the FAST program may present a valid FAST card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry;

(iii) *SENTRI program.* A U.S. citizen who is traveling as a participant in the SENTRI program may present a valid SENTRI card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry; The NEXUS, FAST, and SENTRI cards are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(5) When arriving at land ports of entry and sea ports of entry from contiguous territory or adjacent islands, Native American holders of American Indian Cards (Form I–872) issued by U.S. Citizenship and Immigration Services (USCIS) may present those cards; or

(6) When arriving at land or sea ports of entry from contiguous territory or adjacent islands, U.S. citizen holders of a tribal document issued by a United States qualifying tribal entity or group of United States qualifying tribal entities as provided in 8 CFR 235.1(e) may present that document. Tribal documents are not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(7) When bearing documents or combinations of documents the Secretary of Homeland Security has determined under Section 7209(b) of Public Law 108–458 (8 U.S.C. 1185 note) are sufficient to denote identity and citizenship. Such documents are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(8) When the U.S. citizen is employed directly or indirectly on the construction, operation, or maintenance of works undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission (IBWC), TS 994, 9 Bevans 1166, 59 Stat. 1219, or other related agreements, provided that the U.S. citizen bears an official identification card issued by the IBWC and is traveling in connection with such employment; or

(9) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Section 2, the requirement with respect to the U.S. citizen because there is an unforeseen emergency; or

(10) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen for humanitarian or national interest reasons; or

(11) When the U.S. citizen is a child under the age of 19 arriving from contiguous territory in the following circumstances:

(i) *Children under age 16.* A United States citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when entering the United States from contiguous territory at land or sea ports-of-entry; or

(ii) *Groups of children under age 19.* A U.S. citizen who is under age 19 and who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when arriving in the United States from contiguous territory at all land or sea ports of entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older. The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border on organizational letterhead:

(*1*) The name of the group, organization or team, and the name of the supervising adult;

(*2*) A list of the children on the trip; and

(*3*) For each child, the primary address, primary phone number, date of birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (b)(11)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in 8 CFR parts 211, 212, or 235.

[73 FR 18419, Apr. 3, 2008]

§ 53.3 Attempt of a citizen to enter without a valid passport.

The appropriate officer at the port of entry shall report to the Department of State any citizen of the United States who attempts to enter the United States contrary to the provisions of this part, so that the Department of State may apply the waiver provisions of § 53.2(h) and § 53.2(i) to such citizen, if appropriate.

§ 53.4 Optional use of a valid passport.

Nothing in this part shall be construed to prevent a citizen from using a valid U.S. passport in a case in which that passport is not required by this part 53, provided such travel is not otherwise prohibited.

SUBCHAPTER G—PUBLIC DIPLOMACY AND EXCHANGES

PART 61—WORLD-WIDE FREE FLOW OF AUDIO-VISUAL MATERIALS

Sec.
61.1 Purpose.
61.2 Definitions.
61.3 Certification and authentication criteria.
61.4 Certification procedures—Exports.
61.5 Authentication procedures—Imports.
61.6 Consultation with subject matter specialists.
61.7 Review and appeals procedures.
61.8 Coordination with U.S. Customs Service.
61.9 General information.

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 2051, 2052; 22 U.S.C. 1431 *et seq.;* Public Law 101–138; E.O. 11311, 31 FR 13413, 3 CFR 1966–1900 comp., page 593.

SOURCE: 59 FR 18965, Apr. 21, 1994, unless otherwise noted. Redesignated at 64 FR 54539, Oct. 7, 1999.

EDITORIAL NOTE: Nomenclature changes to part 61 appear at 64 FR 54539, Oct. 7, 1999.

§ 61.1 Purpose.

The Department of State administers the ''Beirut Agreement of 1948'', a multinational treaty formally known as the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character. This Agreement facilitates the free flow of educational, scientific and cultural audio-visual materials between nations by providing favorable import treatment through the elimination or reduction of import duties, licenses, taxes, or restrictions. The United States and other participating governments facilitate this favorable import treatment through the issuance or authentication of a certificate that the audio-visual material for which favorable treatment is sought conforms with criteria set forth in the Agreement.

§ 61.2 Definitions.

Department—means the Department of State.

Applicant— means: (1) The United States holder of the ''basic rights'' in the material submitted for export certification; or (2) the holder of a foreign certificate seeking import authentication.

Application form—means the Application for Certificate of International Educational Character (Form IAP–17) which is required for requesting Department certification of United States produced audio-visual materials under the provisions of the Beirut Agreement.

Attestation Officer—means the Chief Attestation Officer of the United States and any member of his or her staff with authority to issue Certificates or Importation Documents.

Audio-visual materials—means: (1) Films, filmstrips and microfilm in exposed and developed negative form, or in positive form, *viz.*, masters or prints, teletranscriptions, kinescopes, videotape; (2) electronic sound recordings and sound/picture recordings of all types and forms or pressings and transfers thereform; (3) slides and transparencies; moving and static models, wallcharts, globes, maps and posters.

Authentication—means the process through which an applicant obtains a United States Importation Document for Audio-visual Materials (Form IA–862).

Basic rights—means the world-wide non-restrictive ownership rights in audio-visual materials from which the assignment of subsidiary rights (such as language versions, television, limited distribution, reproduction, etc.) are derived.

Beirut Agreement—means the ''Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, or Cultural Character.''

Certificate—means a document attesting that the named material complies with the standards set forth in Article I of the Beirut Agreement issued by: (1) The appropriate government agency of the State wherein the material to which the certificate relates originated, or (2) by the United Nations Educational, Scientific or Cultural Organization.

Certification—means the process of obtaining a certificate attesting that audio-visual materials of United States

origin being exported from the United States comply with the standards set forth in Article I of the Beirut Agreement, as interpreted pursuant to Section 207 of Public Law 101–138.

Collateral instructional material—means a teacher's manual, study guide, or similar instructional material prepared or reviewed by a bona fide subject matter specialist. Such material must delineate the informational or instructional objectives of the audio-visual material and illustrate or explain how to utilize such material to attain the stated objectives.

Committee on attestation—means the committee which advises the Attestation Officer on matters of policy and the evaluation of specific materials.

Exports—means educational, scientific, and cultural audio-visual material of United States origin, being sent from the United States.

Importation document—means the United States Importation Document for Audio-visual Materials (Form IA–862) issued by the Chief Attestation Officer of the United States which attests that materials of foreign origin entering the United States comply with the standards set forth in Article I of the Beirut Agreement (as interpreted pursuant to section 207 of Public Law 101–138) and is therefore entitled to duty-free entry into the United States pursuant to the provisions of United States Customs Bureau Harmonized Tariff System Item No. 9817.00.4000.

Imports—means educational, scientific, and cultural audio-visual material of foreign origin being brought into the United States.

Instruct or inform—means to teach, train or impart knowledge through the development of a subject or aspect of a subject to aid the viewer or listener in a learning process. The instructional or informational character of audio-visual material may be evidenced by the presence of collateral instructional material.

Knowledge—means a body of facts and principles acquired by instruction, study, research, or experience.

Review Board—means the panel appointed by the Secretary of State to review appeals filed by applicants from decisions rendered by an Attestation Officer.

Secretary of State—means the Secretary of State of the State Department.

Serial certification—means certification by the Department of materials produced in series form and which, for time-sensitive reasons, cannot be reviewed prior to production; but samples are provided on application, and the materials are subject to post-certification review.

Subject matter specialist—means an individual who has acquired special skill in or knowledge of a particular subject through professional training or practical experience.

[59 FR 18965, Apr. 21, 1994, as amended at 60 FR 29989, June 7, 1995. Redesignated at 64 FR 54539, Oct. 7, 1999]

§61.3 Certification and authentication criteria.

(a) The Department shall certify or authenticate audio-visual materials submitted for review as educational, scientific and cultural in character and in compliance with the standards set forth in Article I of the Beirut Agreement when: (1) Their primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill; and

(2) The materials are representative, authentic, and accurate; and

(3) The technical quality is such that it does not interfere with the use made of the material.

(b) The Department will not certify or authenticate any audio-visual material submitted for review which:

(1) Does not primarily instruct or inform through the development of a subject or aspect of a subject and its content is not such as to maintain, increase or diffuse knowledge.

(2) Contains widespread and gross misstatements of fact.

(3) Is not technically sound.

(4) Has as its primary purpose or effect to amuse or entertain.

(5) Has as its primary purpose or effect to inform concerning timely current events (newsreels, newscasts, or other forms of ''spot'' news).

(6) Stimulates the use of a special process or product, advertises a particular organization or individual, raises funds, or makes unsubstantiated claims of exclusivity.

(c) In its administration of this section, the Department shall not fail to qualify audio-visual material because:

(1) It advocates a particular position or viewpoint, whether or not it presents or acknowledges opposing viewpoints;

(2) It might lend itself to misinterpretation, or to misrepresentation of the United States or other countries, or their people or institutions;

(3) It is not representative, authentic, or accurate or does not represent the current state of factual knowledge of a subject or aspect of a subject unless the material contains widespread and gross misstatements of fact;

(4) It does not augment international understanding and goodwill, unless its primary purpose or effect is not to instruct or inform through the development of a subject or an aspect of a subject and its content is not such as to maintain, increase, or diffuse knowledge; or

(5) In the opinion of the Department the material is propaganda.

(d) The Department may certify or authenticate materials which have not been produced at the time of application upon an affirmative determination that:

(1) The materials will be issued serially,

(2) Representative samples of the serial material have been provided at the time of application,

(3) Future titles and release dates have been provided to the Department at the time of application,

(4) The applicant has affirmed that:

(i) Future released materials in the series will conform to the substantive criteria for certification delineated at paragraphs (a) through (c) of this section;

(ii) Such materials will be similar to the representative samples provided to the Department on application; and

(iii) The applicant will provide the Department with copies of the items themselves or descriptive materials for post-certification review.

(e) If the Department determines through a post-certification review that the materials do not comply with the substantive criteria for certification delineated at paragraphs (a) through (c) of this section, the applicant will no longer be eligible for serial certifications. Ineligibility for serial certifications will not affect an applicant's eligibility for certification of materials reviewed prior to production.

[59 FR 18965, Apr. 21, 1994, as amended at 60 FR 29989, June 7, 1995. Redesignated at 64 FR 54539, Oct. 7, 1999]

§ 61.4 Certification procedures—Exports.

(a) Applicants seeking certification of U.S. produced audio-visual materials shall submit to the Department a completed Application Form for each subject or series for which certification is sought. Collateral instructional material, if any, and a copy or example of the material must accompany the Application Form.

(b) Upon an affirmative determination by the Department that the submitted materials satisfy the Certification and Authentication Criteria set forth in § 502.3 of this part, a Certificate shall be issued. A copy of such Certificate must accompany each export shipment of the certified material.

§ 61.5 Authentication procedures—Imports.

(a) Applicants seeking Department authentication of foreign produced audio-visual materials shall submit to the Department a *bona fide* foreign certificate, a copy or example of the material for which authentication is sought, and related collateral instructional material, if any.

(b) Upon an affirmative determination by the Department that the submitted materials satisfy the Certification and Authentication Criteria set forth in § 502.3 of this part, an Importation Document shall be issued. A copy of such Importation Document must be presented to United States Customs at the port of entry.

§ 61.6 Consultation with subject matter specialists.

(a) The Department may, in its discretion, solicit the opinion of subject

matter specialists for the purpose of assisting the Department in its determination of whether materials for which export certification or import authentication is sought contain widespread and gross misstatements of fact.

(b) As necessary, the Department may determine eligibility of material for certification or authentication based in part on the opinions obtained from subject matter specialists and the Committee on Attestation.

§ 61.7 Review and appeal procedures.

(a) An applicant may request a formal review of any adverse ruling rendered by the Attestation Officer. Such request for review must be made in writing and received no more than 30 days from the date of the Attestation Officer's decision.

(b) The request for review must set forth all arguments which the applicant wishes to advance in support of his or her position and any data upon which such argument is based. A copy of the material for which certification or authentication has been denied must accompany the request for review. The request for review should be addressed as follows: Attestation Program Review Board ECA/GCV—Attestation Officer, Department of State, 301 4th Street, SW., Washington, DC 20547.

(c) The Review Board shall render the applicant a written decision, reversing or affirming the ruling of the Attestation Officer, within 30 days from receipt of the request for review. Such decision shall constitute final administrative action.

§ 61.8 Coordination with United States Customs Service.

(a) Nothing in this part shall preclude examination of imported materials pursuant to the Customs laws and regulations of the United States as codified at 19 U.S.C. 1305 and 19 CFR 10.121, or the application of the laws and regulations governing the importation or prohibition against importation of certain materials including seditious or salacious materials as set forth at 19 U.S.C. 1305.

(b) Department authentications of a foreign certificate for entry under HTS Item No. 9817.00.4000 will be reflected by the issuance of an Importation Document. A copy of each Importation Document issued by the Department will be simultaneously furnished the United States Customs Service.

(c) Customs User Fee: Articles delivered by mail, which are eligible for duty-free entry under the regulations in this part are, additionally, not subjected to the standard Customs User Fee normally imposed by the United States Customs Service, provided there has been a timely filing with the appropriate United States Customs Service office of the documentation required by the regulations in this part.

§ 61.9 General information.

General information and application forms may be obtained by writing to the Attestation Office as follows: ECA/GCV—Attestation Officer, Department of State, 301 4th Street, SW., Washington, DC 20547; or calling (202) 475–0221.

[59 FR 18965, Apr. 21, 1994. Redesignated and amended at 64 FR 54539, Oct. 7, 1999]

PART 62—EXCHANGE VISITOR PROGRAM

Subpart A—General Provisions

Sec.

62.1 Purpose.
62.2 Definitions.
62.3 Sponsor eligibility.
62.4 Categories of participant eligibility.
62.5 Application procedure.
62.6 Designation.
62.7 Redesignation.
62.8 General program requirements.
62.9 General obligations of sponsors.
62.10 Program administration.
62.11 Duties of responsible officers.
62.12 Control of Forms DS–2019.
62.13 Notification requirements.
62.14 Insurance.
62.15 Annual reports.
62.16 Employment.
62.17 Fees and charges.

Subpart B—Specific Program Provisions

62.20 Professors and research scholars.
62.21 Short-term scholars.
62.22 Trainees and interns.
62.23 College and university students.
62.24 Teachers.
62.25 Secondary school students.
62.26 Specialists.
62.27 Alien physicians.
62.28 International visitors.
62.29 Government visitors.

62.30 Camp counselors.
62.31 Au pairs.
62.32 Summer work travel.

Subpart C—Status of Exchange Visitors

62.40 Termination of program participation.
62.41 Change of category.
62.42 Transfer of program.
62.43 Extension of program.
62.45 Reinstatement to valid program status.

Subpart D—Sanctions

62.50 Sanctions.

Subpart E—Termination and Revocation of Programs

62.60 Termination of designation.
62.61 Revocation.
62.62 Termination of, or denial of redesignation for, a class of designated programs.
62.63 Responsibilities of the sponsor upon termination or revocation.

Subpart F—Student and Exchange Visitor Information System (SEVIS)

62.70 SEVIS reporting requirements.
62.71 Control and production of the electronic Form DS–2019.
62.72 Staffing and support services.
62.73 Academic training.
62.74 Student employment.
62.75 Extension of program participation.
62.76 Transfer procedures.
62.77 Reinstatement.
62.78 Termination.
62.79 Sanctions.

Subpart G [Reserved]

APPENDIX A TO PART 62—CERTIFICATION OF RESPONSIBLE OFFICERS AND SPONSORS
APPENDIX B TO PART 62—EXCHANGE VISITOR PROGRAM SERVICES, EXCHANGE VISITOR PROGRAM APPLICATION
APPENDIX C TO PART 62—UPDATE OF INFORMATION ON EXCHANGE VISITOR PROGRAM SPONSOR
APPENDIX D TO PART 62—ANNUAL REPORT—EXCHANGE VISITOR PROGRAM SERVICES (GC/V), DEPARTMENT OF STATE, WASHINGTON, DC 20547 (202–401–7964)
APPENDIX E TO PART 62—UNSKILLED OCCUPATIONS
APPENDIX F TO PART 62—INFORMATION TO BE COLLECTED ON SECONDARY SCHOOL STUDENT HOST FAMILY APPLICATIONS

AUTHORITY: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431–1442, 2451 *et seq.;* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, Div. G, 112 Stat. 2681 *et seq.;* Reorganization Plan No. 2 of 1977, 3 CFR, 1977 Comp. p. 200; E.O. 12048 of March 27, 1978; 3 CFR, 1978 Comp. p. 168; the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104–208, Div. C, 110 Stat. 3009–546, as amended; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. 107–56, section 416, 115 Stat. 354; and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107–173, 116 Stat. 543.

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Subpart A—General Provisions

§ 62.1 Purpose.

(a) The regulations set forth in this part implement the Mutual Educational and Cultural Exchange Act of 1961 (the ''Act''), as amended, Public Law 87–256, 22 U.S.C. 2451, *et seq.* (1988). The purpose of the Act is to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges. Educational and cultural exchanges assist the Department of State in furthering the foreign policy objectives of the United States. These exchanges are defined by section 102 of the Act, 22 U.S.C. 2452, and section 101(a)(15)(J) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15)(J).

(b) The Secretary of State of the Department of State facilitates activities specified in the Act, in part, by designating public and private entities to act as sponsors of the Exchange Visitor Program. Sponsors may act independently or with the assistance of third parties. The purpose of the Program is to provide foreign nationals with opportunities to participate in educational and cultural programs in the United States and return home to share their experiences, and to encourage Americans to participate in educational and cultural programs in other countries. Exchange visitors enter the United States on a J visa. The regulations set forth in this subpart are applicable to all sponsors.

§ 62.2 Definitions.

Accompanying spouse and dependents means the alien spouse and minor unmarried children of an exchange visitor who are accompanying or following to join the exchange visitor and who are seeking to enter or have entered the United States temporarily on a J–2 visa or are seeking to acquire or have acquired such status after admission. For the purpose of these regulations, a minor is a person under the age of 21 years old.

Accredited educational institution means any publicly or privately operated primary, secondary, or post-secondary institution of learning duly recognized and declared as such by the appropriate authority of the state in which such institution is located; provided, however, that in addition to any state recognition, all post-secondary institutions shall also be accredited by a nationally recognized accrediting agency or association as recognized by the United States Secretary of Education but shall not include any institution whose offered programs are primarily vocational in nature.

Act means the Mutual Educational and Cultural Exchange Act of 1961, as amended.

Citizen of the United States means:

(1) An individual who is a citizen of the United States or one of its territories or possessions, or who has been lawfully admitted for permanent residence, within the meaning of section 101(a)(20) of the Immigration and Nationality Act; or

(2) A general or limited partnership created or organized under the laws of the United States, or of any state, the District of Columbia, or a territory or possession of the United States, of which a majority of the partners are citizens of the United States; or

(3) A for-profit corporation, association, or other legal entity created or organized under the laws of the United States, or of any state, the District of Columbia, or a territory or possession of the United States, which:

(i) Has its principal place of business in the United States, and

(ii) Has its shares or voting interests publicly traded on a U.S. stock exchange; or, if its shares or voting interests are not publicly traded on a U.S. stock exchange, it shall nevertheless be deemed to be a citizen of the United States if a majority of its officers, Board of Directors, and its shareholders or holders of voting interests are citizens of the United States; or

(4) A non-profit corporation, association, or other legal entity created or organized under the laws of the United States, or any state, the District of Columbia, or territory or possession of the United States; and

(i) Which is qualified with the Internal Revenue Service as a tax-exempt organization pursuant to § 501(c) of the Internal Revenue Code; and

(ii) Which has its principal place of business in the United States; and

(iii) In which a majority of its officers and a majority of its Board of Directors or other like body vested with its management are citizens of the United States; or

(5) An accredited college, university, or other post-secondary educational institution created or organized under the laws of the United States, or of any state, including a county, municipality, or other political subdivision thereof, the District of Columbia, or of a territory or possession of the United States; or

(6) An agency of the United States, or of any state or local government, the District of Columbia, or a territory or possession of the United States.

Clerical means routine administrative work generally performed in an office or office-like setting, such as data entry, filing, typing, mail sorting and distribution, and other general office tasks.

Consortium means a not-for-profit corporation or association formed by two or more accredited educational institutions for the purpose of sharing educational resources, conducting research, and/or developing new programs to enrich or expand the opportunities offered by its members. Entities that participate in a consortium are not barred from having a separate exchange visitor program designation of their own.

Country of nationality or last legal residence means either the country of which the exchange visitor was a national at the time status as an exchange visitor was acquired or the last

foreign country in which the visitor had a legal permanent residence before acquiring status as an exchange visitor.

Cross-cultural activity is an activity designed to promote exposure and interchange between exchange visitors and Americans so as to increase their understanding of each other's society, culture, and institutions.

Department means the Department of State.

Designation means the written authorization given by the Department of State to an exchange visitor program applicant to conduct an exchange visitor program as a sponsor.

Employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors, as defined in 8 CFR 274a.1(j).

Exchange visitor means a foreign national who has been selected by a sponsor to participate in an exchange visitor program and who is seeking to enter or has entered the United States temporarily on a J–1 visa. The term does not include the visitor's immediate family.

Exchange Visitor Program means the international exchange program administered by the Department of State to implement the Act by means of educational and cultural programs. When ''exchange visitor program'' is set forth in lower case, it refers to the individual program of a sponsor which has been designated by the Department of State.

Exchange Visitor Program Services means the Department of State staff delegated authority by the Secretary of State to administer the Exchange Visitor Program in compliance with the regulations set forth in this part.

Exchange visitor's government means the government of the country of the exchange visitor's nationality or the country where the exchange visitor has a legal permanent residence.

Financed directly means financed in whole or in part by the United States Government or the exchange visitor's government with funds contributed directly to the exchange visitor in connection with his or her participation in an exchange visitor program.

Financed indirectly means:

(1) Financed by an international organization with funds contributed by either the United States or the exchange visitor's government for use in financing international educational and cultural exchanges, or

(2) Financed by an organization or institution with funds made available by either the United States or the exchange visitor's government for the purpose of furthering international educational and cultural exchange.

Form DS–2019 means a Certificate of Eligibility, a controlled document of the Department of State.

Full course of study means enrollment in an academic program of classroom participation and study, and/or doctoral thesis research at an accredited educational institution as follows:

(1) Secondary school students shall satisfy the attendance and course requirements of the state in which the school is located;

(2) College and university students shall register for and complete a full course of study, as defined by the accredited educational institution in which the student is registered, unless exempted in accordance with § 62.23(e).

Graduate medical education or training means participation in a program in which the alien physician will receive graduate medical education or training, which generally consists of a residency or fellowship program involving health care services to patients, but does not include programs involving observation, consultation, teaching or research in which there is no or only incidental patient care. This program may consist of a medical specialty, a directly related medical subspecialty, or both.

Home-country physical presence requirement means the requirement that an exchange visitor who is within the purview of section 212(e) of the Immigration and Nationality Act (substantially quoted in § 62.44) must reside and be physically present in the country of nationality or last legal permanent residence for an aggregate of at least two years following departure from the United States before the exchange visitor is eligible to apply for an immigrant visa or permanent residence, a nonimmigrant H visa as a temporary worker or trainee, or a nonimmigrant

L visa as an intracompany transferee, or a nonimmigrant H or L visa as the spouse or minor child of a person who is a temporary worker or trainee or an intracompany transferee.

Host organization means a in the United States that conducts training or internship programs on behalf of designated program sponsors pursuant to an executed written agreement between the two parties.

Intern means a foreign national who either

(1) Is currently enrolled in and pursuing studies at a degree- or certificate-granting post-secondary academic institution outside the United States or

(2) Graduated from such an institution no more than 12 months prior to his/her exchange visitor program begin date, and who enters the United States to participate in a structured and guided work-based internship program in his/her specific academic field.

Internship program means a structured and guided work-based learning program as set forth in an individualized Training/Internship Placement Plan (T/IPP) that reinforces a student's or recent graduate's academic study, recognizes the need for work-based experience, provides on-the-job exposure to American techniques, methodologies, and expertise, and enhances the Intern's knowledge of American culture and society.

J visa means a non-immigrant visa issued pursuant to 8 U.S.C. 1101(a)(15)(J). A J–1 visa is issued to the exchange visitor. J–2 visas are issued to the exchange visitor's immediate family.

On-the-job training means an individual's observation of and participation in given tasks demonstrated by experienced workers for the purpose of acquiring competency in such tasks.

Prescribed course of study means a non-degree academic program with a specific educational objective. Such course of study may include intensive English language training, classroom instruction, research projects, and/or academic training to the extent permitted in § 62.23.

Reciprocity means the participation of a United States citizen in an educational and cultural program in a foreign country in exchange for the participation of a foreign national in the Exchange Visitor Program. Where used herein, ''reciprocity'' shall be interpreted broadly; unless otherwise specified, reciprocity does not require a one-for-one exchange or that exchange visitors be engaged in the same activity. For example, exchange visitors coming to the United States for training in American banking practices and Americans going abroad to teach foreign nationals public administration would be considered a reciprocal exchange, when arranged or facilitated by the same sponsor.

Responsible officer means the employee or officer of a designated sponsor who has been listed with the Department of State as assuming the responsibilities outlined in § 62.11. The designation of alternate responsible officers is permitted and encouraged. The responsible officer and alternate responsible officers must be citizens of the United States or persons who have been lawfully admitted for permanent residence.

Secretary of State means the Secretary of State of the Department of State or an employee of the Department of State acting under a delegation of authority from the Secretary of State.

Sponsor means a legal entity designated by the Secretary of State of the State Department to conduct an exchange visitor program.

Staffing/Employment agency means a U.S. business that hires individuals for the express purpose of supplying workers to other businesses. Typically, the other businesses with which workers are placed pay an hourly fee per employee to the Staffing/Employment Agency, of which the worker receives a percentage.

Third party means an entity cooperating with or assisting the sponsor in the conduct of the sponsor's program. Sponsors are required to take all reasonable steps to ensure that third parties know and comply with all applicable provisions of these regulations. Third party actions in the course of providing such assistance or cooperation shall be imputed to the sponsor in evaluating the sponsor's compliance with these regulations.

Trainee means a foreign national who has either:

(1) A degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience in his/her occupational field acquired outside the United States, or

(2) Five years of work experience outside the United States in his/her occupational field, and who enters the United States to participate in a structured and guided work-based training program in his/her specific occupational field.

Training program means a structured and guided work-based learning program set forth in an individualized Trainee/Internship Placement Plan (T/IPP) that enhances both a trainee's understanding of American culture and society and his/her skills in his/her occupational field through exposure to American techniques, methodologies, and expertise.

[58 FR 15196, Mar. 19, 1993. Redesignated at 64 FR 54539, Oct. 7, 1999, as amended at 72 FR 33673, June 19, 2007]

§ 62.3 Sponsor eligibility.

(a) Entities eligible to apply for designation as a sponsor of an exchange visitor program are:

(1) United States local, state and federal government agencies;

(2) International agencies or organizations of which the United States is a member and which have an office in the United States; or

(3) Reputable organizations which are ''citizens of the United States,'' as that term is defined in § 62.2.

(b) To be eligible for designation as a sponsor, an entity is required to:

(1) Demonstrate, to the Department of State's satisfaction, its ability to comply and remain in continual compliance with all provisions of part 62; and

(2) Meet at all times its financial obligations and responsibilities attendant to successful sponsorship of its exchange program.

§ 62.4 Categories of participant eligibility.

Sponsors may select foreign nationals to participate in their exchange visitor programs. Participation by foreign nationals in an exchange visitor program is limited to individuals who shall be engaged in the following activities in the United States:

(a) *Student*. An individual who is:

(1) Studying in the United States:

(i) Pursuing a full course of study at a secondary accredited educational institution;

(ii) Pursuing a full course of study leading to or culminating in the award of a U.S. degree from a post-secondary accredited educational institution; or

(iii) Engaged full-time in a prescribed course of study of up to 24 months duration conducted by:

(A) A post-secondary accredited educational institution; or

(B) An institute approved by or acceptable to the post-secondary accredited educational institution where the student is to be enrolled upon completion of the non-degree program;

(2) Engaged in academic training as permitted in § 62.23(f); or

(3) Engaged in English language training at:

(i) A post-secondary accredited educational institution, or

(ii) An institute approved by or acceptable to the post-secondary accredited educational institution where the college or university student is to be enrolled upon completion of the language training.

(b) *Short-term scholar*. A professor, research scholar, or person with similar education or accomplishments coming to the United States on a short-term visit for the purpose of lecturing, observing, consulting, training, or demonstrating special skills at research institutions, museums, libraries, post-secondary accredited educational institutions, or similar type of institutions.

(c) *Trainee*. An individual participating in a structured training program conducted by the selecting sponsor.

(d) *Teacher*. An individual teaching full-time in a primary or secondary accredited educational institution.

(e) *Professor*. An individual primarily teaching, lecturing, observing, or consulting a post-secondary accredited educational institutions, museums,

libraries, or similar types of institutions. A professor may also conduct research, unless disallowed by the sponsor.

(f) *Research scholar*. An individual primarily conducting research, observing, or consulting in connection with a research project at research institutions, corporate research facilities, museums, libraries, post-secondary accredited educational institutions, or similar types of institutions. The research scholar may also teach or lecture, unless disallowed by the sponsor.

(g) *Specialist*. An individual who is an expert in a field of specialized knowledge or skill coming to the United States for obeserving, consulting, or demonstrating special skills.

(h) *Other person of similar description*. An individual of description similar to those set forth in paragraphs (a) through (g) coming to the United States, in a program designated by the Department of State under this category, for the purpose of teaching, instructing or lecturing, study, observing, conducting research, consulting, demonstrating special skills, or receiving training. The programs designated by the Department of State in this category consist of:

(1) *International visitor*. An individual who is a recognized or potential leader, selected by the Department of State for consultation, observation, research, training, or demonstration of special skills in the United States.

(2) *Government visitor*. An individual who is an influential or distinguished person, selected by a U.S. federal, state, or local government agency for consultation, observation, training, or demonstration of special skills in the United States.

(3) *Camp counselor*. An individual selected to be a counselor in a summer camp in the United States who imparts skills to American campers and information about his or her country or culture.

§62.5 Application procedure.

(a) Any entity meeting the eligibility requirements set forth in §62.3 may apply to the Department of State for designation as a sponsor. Such application shall be made on Form DS–3036 (''Exchange Visitor Program Application'') and filed with the Department of State's Exchange Visitor Program Services.

(b) The application shall set forth, in detail, the applicant's proposed exchange program activity and shall demonstrate its prospective ability to comply with Exchange Visitor Program regulations.

(c) The application shall be signed by the chief executive officer of the applicant and must also provide:

(1) Evidence of legal status as a corporation, partnership, or other legal entity (e.g., charter, proof of incorporation, partnership agreement, as applicable) and current certificate of good standing;

(2) Evidence of financial responsibility as set forth at §62.9(e);

(3) Evidence of accreditation if the applicant is a post-secondary educational institution;

(4) Evidence of licensure, if required by local, state, or federal law, to carry out the activity for which it is be designated;

(5) Certification by the applicant (using the language set forth in appendix A) that it and its responsible officer and alternate responsible officers are citizens of the United States as defined at §62.2; and

(6) Certification signed by the chief executive officer of the applicant that the responsible officer will be provided sufficient staff and resources to fulfill his/her duties and obligations on behalf of the sponsor.

(d) The Department of State may request any additional information and documentation which it deems necessary to evaluate the application.

§62.6 Designation.

(a) Upon a favorable determination that the proposed exchange program meets all statutory and regulatory requirements, the Department of State may, in its sole discretion, designate an entity meeting the eligibility requirements set forth in §62.3 as an exchange visitor program sponsor.

(b) Designation shall confer upon the sponsor authority to engage in one or more activities specified in §62.4. A sponsor shall not engage in activities not specifically authorized in its written designation.

(c) Designations are effective for a period of five years. In its discretion, the Department of State may designate programs, including experimental programs, for less than five years.

(d) Designations are not transferable or assignable.

§ 62.7 Redesignation.

(a) Upon expiration of a given designation term, a sponsor may seek redesignation for another five-year term.

(b) To apply for redesignation, a sponsor shall advise the Exchange Visitor Program Services by letter or by so indicating on the annual report.

(c) Request for redesignation shall be evaluated according to the criteria set forth at § 62.6(a) taking into account the sponsor's annual reports and other documents reflecting its record as an exchange visitor program sponsor.

(d) A sponsor seeking redesignation should notify the Department of State, as set forth in (b) of this section, no less than four months prior to the expiration date of its designation. A sponsor seeking redesignation may continue to operate its program(s) until such time as the Department of State notifies it of a decision to amend or terminate its designation.

§ 62.8 General program requirements.

(a) *Size of program*. Sponsors, other than Federal government agencies, shall have no less than five exchange visitors per calendar year. The Department of State may in its discretion and for good cause shown reduce this requirement.

(b) *Minimum duration of program*. Sponsors, other than federal government agencies, shall provide each exchange visitor, except short-term scholars, with a minimum period of participation in the United States of three weeks.

(c) *Reciprocity*. In the conduct of their exchange programs, sponsors shall make a good faith effort to achieve the fullest possible reciprocity in the exchange of persons.

(d) *Cross-cultural activities*. Sponsors shall:

(1) Offer or make available to exchange visitors a variety or appropriate cross-cultural activities. The extent and types of the cross-cultural activities shall be determined by the needs and interests of the particular category of exchange visitor. Sponsors will be responsible to determine the appropriate type and number of cross-cultural programs for their exchange visitors. The Department of State encourages sponsors to give their exchange visitors the broadest exposure to American society, culture and institutions; and

(2) Encourage exchange visitors to voluntarily participate in activities which are for the purpose of sharing the language, culture, or history of their home country with Americans, provided such activities do not delay the completion of the exchange visitors' programs.

§ 62.9 General obligations of sponsors.

(a) *Adherence to Department of State regulations*. Sponsors are required to adhere to all regulations set forth in this part.

(b) *Legal status*. Sponsors shall maintain legal status. A change in a sponsor's legal status (e.g. partnership to corporation) shall require application for designation of the new legal entity.

(c) *Accreditation and licensure*. Sponsors shall remain in compliance with all local, state, federal, and professional requirements necessary to carry out the activity for which they are designated, including accreditation and licensure, if applicable.

(d) *Representations and disclosures*. Sponsors shall:

(1) Provide accurate and complete information, to the extent lawfully permitted, to the Department of State regarding their exchange visitor programs and exchange visitors;

(2) Provide only accurate information to the public when advertising their exchange visitor programs or responding to public inquiries;

(3) Provide informational materials to prospective exchange visitors which clearly explain the activities, costs, conditions, and restrictions of the program;

(4) Not use program numbers on any advertising materials or publications intended for general circulation; and

(5) Not represent that any program is endorsed, sponsored, or supported by the Department of State or the United

States Government, except for United States Government sponsors or exchange visitor programs financed directly by the United States Government to promote international educational exchanges. However, sponsors may represent that they are designated by the Department of State as a sponsor of an exchange visitor program.

(e) *Financial responsibility*. (1) Sponsors shall maintain the financial capability to meet at all times their financial obligations and responsibilities attendant to successful sponsorship of their exchange visitor programs.

(2) The Department of State may require non-government sponsors to provide evidence satisfactory to the Department of State that funds necessary to fulfill all obligations and responsibilities attendant to sponsorship of exchange visitors are readily available and in the sponsor's control, including such supplementary or explanatory financial information as the Department of State may deem appropriate such as, for example, audited financial statements.

(3) The Department of State may require any non-government sponsor to secure a payment bond in favor of the Department of State guaranteeing all financial obligations arising from the sponsorship of exchange visitors.

(f) *Staffing and support services*. Sponsors shall ensure:

(1) Adequate staffing and sufficient support services to administer their exchange visitor programs; and

(2) That their employees, officers, agents, and third parties involved in the administration of their exchange visitor programs are adequately qualified, appropriately trained, and comply with the Exchange Visitor Program regulations.

(g) *Appointment of responsible officer*. (1) The sponsor shall appoint a responsible officer and such alternate responsible officers as may be necessary to perform the duties set forth at §62.11.

(2) The responsible officer and alternate responsible officers shall be employees or officers of the sponsor. The Department of State may, however, in its discretion, authorize the appointment of an individual who is not an employee or officer to serve as an alternate responsible officer, when approved by the sponsor.

(3) The Department of State may limit the number of alternate responsible officers appointed by the sponsor.

§62.10 Program administration.

Sponsors are responsible for the effective administration of their exchange visitor programs. These responsibilities include:

(a) *Selection of exchange visitors*. Sponsors shall provide a system to screen and select prospective exchange visitors to ensure that they are eligible for program participation, and that:

(1) The program is suitable to the exchange visitor's background, needs, and experience; and

(2) The exchange visitor possesses sufficient proficiency in the English language to participate in his or her program.

(b) *Pre-arrival information*. Sponsors shall provide exchange visitors with pre-arrival materials including, but not limited to, information on:

(1) The purpose of the Exchange Visitor Program;

(2) Home-country physical presence requirement;

(3) Travel and entry into the United States;

(4) Housing;

(5) Fees payable to the sponsor;

(6) Other costs that the exchange visitor will likely incur (e.g., living expenses) while in the United States;

(7) Health care and insurance; and

(8) Other information which will assist exchange visitors to prepare for their stay in the United States.

(c) *Orientation*. Sponsors shall offer appropriate orientation for all exchange visitors. Sponsors are encouraged to provide orientation for the exchange visitor's immediate family, especially those who are expected to be in the United States for more than one year. Orientation shall include, but not be limited to, information concerning:

(1) Life and customs in the United States;

(2) Local community resources (e.g., public transportation, medical centers, schools, libraries, recreation centers, and banks), to the extent possible;

(3) Available health care, emergency assistance, and insurance coverage;

(4) A description of the program in which the exchange visitor is participating;

(5) Rules that the exchange visitors are required to follow under the sponsor's program;

(6) Address of the sponsor and the name and telephone number of the responsible officer; and

(7) Address and telephone number of the Exchange Visitor Program Services of the Department of State and a copy of the Exchange Visitor Program brochure outlining the regulations relevant to the exchange visitors.

(d) *Form DS–2019.* Sponsors shall ensure that only the responsible officer or alternate responsible officers issue Forms DS–2019;

(e) *Monitoring of exchange visitors.* Sponsors shall monitor, through employees, officers, agents, or third parties, the exchange visitors participating in their programs. Sponsors shall:

(1) Ensure that the activity in which the exchange visitor is engaged is consistent with the category and activity listed on the exchange visitor's Form DS–2019;

(2) Monitor the progress and welfare of the exchange visitor to the extent appropriate for the category; and

(3) Require the exchange visitor to keep the sponsor apprised of his or her address and telephone number, and maintain such information.

(f) *Requests by the Department of State.* Sponsors shall, to the extent lawfully permitted, furnish to the Department of State within a reasonable time all information, reports, documents, books, files, and other records requested by the Department of State on all matters related to their exchange visitor programs.

(g) *Inquiries and investigations.* Sponsors shall cooperate with any inquiry or investigation that may be undertaken by the Department of State.

(h) *Retention of records.* Sponsors shall retain all records related to their exchange visitor program and exchange visitors for a minimum of three years.

§ 62.11 Duties of responsible officers.

Responsible officers shall train and supervise alternate responsible officers. Responsible officers and alternate responsible officers shall:

(a) *Knowledge of regulations and codebook.* Be thoroughly familiar with the Exchange Visitor Program regulations and the Department of State's current Codebook and Instructions for Responsible Officers.

(b) *Advisement and assistance.* Ensure that the exchange visitor obtains sufficient advice and assistance to facilitate the successful completion of the exchange visitor's program.

(c) *Communications.* Conduct the official communications relating to the exchange visitor program with the Department of State, the United States Immigration and Naturalization Service, or the United States Department of State. Reference to the sponsor's program number shall be made on any correspondence with the Department of State.

(d) *Custody of the Form DS–2019.* Act as custodian for the control, issuance, and distribution of Forms DS–2019 as set forth in § 62.12.

§ 62.12 Control of Forms DS–2019.

Forms DS–2019 shall be used only for authorized purposes. To maintain adequate control of Forms DS–2019, responsible officers or alternate responsible officers shall:

(a) *Requests.* Submit written requests to the Department of State for a one-year supply of Forms DS–2019, and allow four to six weeks for the distribution of these forms. The Department of State has the discretion to determine the number of Forms DS–2019 to be sent to a sponsor. The Department of State will take into consideration the current size of the program and the projected expansion of the program in the coming 12 months. If requested, the Department of State will consult with the responsible officer prior to determining the number of Forms DS–2019 to be sent to the sponsor. Additional forms may be requested later in the year if needed by the sponsor.

(b) *Verification.* Prior to issuing Form DS–2019, verify that the exchange visitor:

(1) Is eligible, qualified, and accepted for the program in which he or she will be participating;

(2) Possesses adequate financial resources to complete his or her program; and

(3) Possesses adequate financial resources to support any accompanying dependents.

(c) *Issuance of Form DS–2019.* Issue the Form DS–2019 only so as to:

(1) Facilitate the entry of a new participant of the exchange visitor program;

(2) Extend the stay of an exchange visitor;

(3) Facilitate program transfer;

(4) Replace a lost or stolen Form DS–2019;

(5) Facilitate entry of an exchange visitor's alien spouse or minor unmarried children into the United States separately;

(6) Facilitate re-entry of an exchange visitor who is traveling outside the United States during the program;

(7) Facilitate a change of category when permitted by the Department of State; and

(8) Update information when significant changes take place in regard to the exchange visitor's program, such as a substantial change in funding or in the location where the program will take place.

(d) *Safeguards.* (1) Store Forms DS–2019 securely to prevent unauthorized use;

(2) Prohibit transfer of any blank Form DS–2019 to another sponsor or other person unless authorized in writing (by letter or facsimile) by the Department of State to do so;

(3) Notify the Department of State promptly by telephone (confirmed promptly in writing) or facsimile of the document number of any completed Form DS–2019 that is presumed lost or stolen or any blank Form DS–2019 lost or stolen; and

(4) Forward the completed Form DS–2019 only to an exchange visitor, either directly or via an employee, officer, or agent of the sponsor, or to an individual designated by the exchange visitor.

(e) *Accounting.* (1) Maintain a record of all Forms DS–2019 received and/or issued by the sponsor;

(2) Destroy damaged and unusable Form DS–2019 on the sponsor's premises after making a record of such forms (e.g. forms with errors or forms damaged by a printer); and

(3) Request exchange visitors and prospective exchange visitors to return any unused Form DS–2019 sent to them and make a record of Forms DS–2019 which are returned to the sponsor and destroy them on the sponsor's premises.

§62.13 Notification requirements.

(a) *Change of circumstances.* Sponsors shall notify the Department of State promptly in writing of any of the following circumstances:

(1) Change of its address, telephone, or facsimile number;

(2) Change in the composition of the sponsoring organization which affects its citizenship as defined by §62.2;

(3) Change of the responsible officer or alternate responsible officers;

(4) A major change of ownership or control of the sponsor's organization;

(5) Change in financial circumstances which may render the sponsor unable to comply with its obligations as set forth in §512.9(e);

(6) Loss of licensure or accreditation;

(7) Loss or theft of Forms DS–2019 as specified at §62.12(d)(3);

(8) Litigation related to the sponsor's exchange visitor program, when the sponsor is a party; and

(9) Termination of its exchange visitor program.

(b) *Serious problem or controversy.* Sponsors shall inform the Department of State promptly by telephone (confirmed promptly in writing) or facsimile of any serious problem or controversy which could be expected to bring the Department of State or the sponsor's exchange visitor program into notoriety or disrepute.

(c) *Program status of exchange visitor.* Sponsors shall notify the Department of State in writing when:

(1) The exchange visitor has withdrawn from or completed a program thirty (30) or more days prior to the ending date on his or her Form DS–2019; or

(2) The exchange visitor has been terminated from his or her program.

§ 62.14 Insurance.

(a) Sponsors shall require each exchange visitor to have insurance in effect which covers the exchange visitor for sickness or accident during the period of time that an exchange visitor participates in the sponsor's exchange visitor program. Minimum coverage shall provide:

(1) Medical benefits of at least $50,000 per accident or illness;

(2) Repatriation of remains in the amount of $7,500;

(3) Expenses associated with the medical evacuation of the exchange visitor to his or her home country in the amount of $10,000; and

(4) A deductible not to exceed $500 per accident or illness.

(b) An insurance policy secured to fulfill the requirements of this section:

(1) May require a waiting period for pre-existing conditions which is reasonable as determined by current industry standards;

(2) May include provision for co-insurance under the terms of which the exchange visitor may be required to pay up to 25% of the covered benefits per accident or illness; and

(3) Shall not unreasonably exclude coverage for perils inherent to the activities of the exchange program in which the exchange visitor participates.

(c) Any policy, plan, or contract secured to fill the above requirements must, at a minimum, be:

(1) Underwritten by an insurance corporation having an A.M. Best rating of ''A–'' or above, an Insurance Solvency International, Ltd. (ISI) rating of ''A-i'' or above, a Standard & Poor's Claims-paying Ability rating of ''A–'' or above, a Weiss Research, Inc. rating of B+ or above, or such other rating as the Department of State may from time to time specify; or

(2) Backed by the full faith and credit of the government of the exchange visitor's home country; or

(3) Part of a health benefits program offered on a group basis to employees or enrolled students by a designated sponsor; or

(4) Offered through or underwritten by a federally qualified Health Maintenance Organization (HMO) or eligible Competitive Medical Plan (CMP) as determined by the Health Care Financing Administration of the U.S. Department of Health and Human Services.

(d) Federal, state or local government agencies, state colleges and universities, and public community colleges may, if permitted by law, self-insure any or all of the above-required insurance coverage.

(e) At the request of a non-governmental sponsor of an exchange visitor program, and upon a showing that such sponsor has funds readily available and under its control sufficient to meet the requirements of this section, the Department of State may permit the sponsor to self-insure or to accept full financial responsibility for such requirements.

(f) The Department of State, in its sole discretion, may condition its approval of self-insurance or the acceptance of full financial responsibility by the non-governmental sponsor by requiring such sponsor to secure a payment bond in favor of the Department of State guaranteeing the sponsor's obligations hereunder.

(g) An accompanying spouse or dependent of an exchange visitor is required to be covered by insurance in the amounts set forth in paragraph (a) of this section. Sponsors shall inform exchange visitors of this requirement, in writing, in advance of the exchange visitor's arrival in the United States.

(h) An exchange visitor who willfully fails to maintain the insurance coverage set forth above while a participant in an exchange visitor program or who makes a material misrepresentation to the sponsor concerning such coverage shall be deemed to be in violation of these regulations and shall be subject to termination as a participant.

(i) A sponsor shall terminate an exchange visitor's participation in its program if the sponsor determines that the exchange visitor or any accompanying spouse or dependent willfully fails to remain in compliance with this section.

[58 FR 15196, Mar. 19, 1993, as amended at 59 FR 34761, July 7, 1994. Redesignated at 64 FR 54539, Oct. 7, 1999]

§ 62.15 Annual reports.

Sponsors shall submit an annual report to the Department of State. An illustrative form of such report may be found at Appendix D to this part. Such report shall be filed on an academic or calendar year basis, as directed by the Department of State, and shall contain the following:

(a) *Program report and evaluation.* A brief summary of the activities in which exchange visitors were engaged, including an evaluation of program effectiveness;

(b) *Reciprocity.* A description of the nature and extent of reciprocity occurring in the sponsor's exchange visitor program during the reporting year;

(c) *Cross-cultural activities.* A summary of the cross-cultural activities provided for its exchange visitors during the reporting year;

(d) *Proof of insurance.* Certification of compliance with insurance coverage requirements set forth in § 62.14.

(e) *Form DS–2019 usage.* A report of Form DS–2019 usage during the reporting year setting forth the following information:

(1) The total number of blank Forms DS–2019 received from the Department of State during the reporting year;

(2) The total number of Forms DS–2019 voided or destroyed by the sponsor during the reporting year and the document numbers of such forms;

(3) The total number of Forms DS–2019 issued to potential exchange visitors that were returned to the sponsor or not used for entry into the United States; and

(4) The total number and document identification number sequence of all blank Forms DS–2019 in the possession of the sponsor on the date of the report.

(f) *Program participation.* A numerical count, by category, of all exchange visitors participating in the sponsor's program for the reporting year.

(g) *Redesignation.* Sponsors may indicate their desire for redesignation, pursuant to § 62.7, by marking the appropriate box on their annual report.

§ 62.16 Employment.

(a) An exchange visitor may receive compensation from the sponsor or the sponsor's appropriate designee for employment when such activities are part of the exchange visitor's program.

(b) An exchange visitor who engages in unauthorized employment shall be deemed to be in violation of his or her program status and is subject to termination as a participant in an exchange visitor program.

(c) The acceptance of employment by an accompanying spouse or minor child of an exchange visitor is governed by Immigration and Naturalization Service regulations.

§ 62.17 Fees and charges.

(a) *Remittances.* Fees prescribed within the framework of 31 U.S.C. 9701 must be submitted as directed by the Department and must be in the amount prescribed by law or regulation.

(b) *Amounts of fees.* The following fees are prescribed.

(1) For filing an application for program designation and/or redesignation (Form DS–3036)—$3,982.00.

(2) For filing an application for exchange visitor status changes (*i.e.*, extension beyond the maximum duration, change of category, reinstatement, reinstatement-update SEVIS status, ECFMG sponsorship authorization, and permission to issue)—$367.00.

[78 FR 28139, May 14, 2013]

Subpart B—Specific Program Provisions

§ 62.20 Professors and research scholars.

(a) *Introduction.* These regulations govern Exchange Visitor Program participants in the categories of professor and research scholar, except:

(1) Alien physicians in graduate medical education or training, who are governed by regulations set forth at § 62.27; and

(2) Short-term scholars, who are governed by regulations set forth at § 62.21.

(b) *Purpose.* The purpose of the Exchange Visitor Program, in part, is to foster the exchange of ideas between Americans and foreign nationals and to stimulate international collaborative teaching, lecturing and research efforts. The exchange of professors and

research scholars promotes the exchange of ideas, research, mutual enrichment, and linkages between research and educational institutions in the United States and foreign countries. It does so by providing foreign professors and research scholars the opportunity to engage in research, teaching and lecturing with their American colleagues, to participate actively in cross-cultural activities with Americans, and ultimately to share with their countrymen their experiences and increased knowledge of the United States and their substantive fields.

(c) *Designation*. The Department of State may, in its sole discretion, designate *bona fide* exchange visitor programs, which offer foreign nationals the opportunity to engage in research, teaching, lecturing, observing, or consulting at research institutions, corporate research facilities, museums, libraries, post-secondary accredited educational institutions, or similar types of institutions in the United States.

(d) *Visitor eligibility*. An individual may be selected for participation in the Exchange Visitor Program as a professor or research scholar subject to the following conditions:

(1) The participant must not be a candidate for a tenure track position;

(2) The participant has not been physically present in the United States as a nonimmigrant pursuant to the provisions of 8 U.S.C. 1101(a)(15)(J) for all or part of the twelve-month period immediately proceeding the date of program commencement set forth on his or her Form DS–2019, unless:

(i) The participant is transferring to the sponsor's program pursuant to provisions set forth in § 62.42;

(ii) The participant's presence in the United States was of less than six months duration; or

(iii) The participant's presence in the United States was pursuant to a short-term scholar exchange activity as authorized by § 62.21; and

(3) The participant is not subject to the prohibition against repeat participation set forth at § 62.20(i)(2).

(e) *Issuance of Form DS–2019*. The Form DS–2019 must be issued only after the professor or research scholar has been accepted by the institution where he or she will participate in an exchange visitor program.

(f) *Location of the exchange*. Professors or research scholars must conduct their exchange activity at the site(s) of activity identified in SEVIS, which may be either the location of the exchange visitor program sponsor or the site of a third party facilitating the exchange with permission of the Responsible Officer. An exchange visitor may also engage in activities at other locations if such activities constitute occasional lectures or consultations permitted by paragraph (g) of this section. All such sites of activity must be entered into SEVIS while the exchange visitor's SEVIS record is in Initial or Active status.

(g) *Occasional lectures or consultations*. Professors and research scholars may participate in occasional lectures and short-term consultations, if authorized to do so by his or her sponsor. Such lectures and consultations must be incidental to the exchange visitor's primary program activities. If wages or other remuneration are received by the exchange visitor for such activities, the exchange visitor must act as an independent contractor, as such term is defined in 8 CFR 274a.1(j), and the following criteria and procedures must be satisfied:

(1) *Criteria*. The occasional lectures or short-term consultations must:

(i) Be directly related to the objectives of the exchange visitor's program;

(ii) Be incidental to the exchange visitor's primary program activities;

(iii) Not delay the completion date of the exchange visitor's program; and

(iv) Be documented in SEVIS.

(2) *Procedures*. (i) To obtain authorization to engage in occasional lectures or short-term consultations involving wages or other remuneration, the exchange visitor must present to the responsible officer:

(A) A letter from the offeror setting forth the terms and conditions of the offer to lecture or consult, including the duration, number of hours, field or subject, amount of compensation, and description of such activity; and

(B) A letter from the exchange visitor's department head or supervisor

recommending such activity and explaining how the activity would enhance the exchange visitor's program.

(ii) The responsible officer must review the letters required in paragraph (g)(2)(i) of this section and make a written determination whether such activity is warranted, will not interrupt the exchange visitor's original objective, and satisfies the criteria set forth in paragraph (g)(1) of this section.

(h) *Change of activity*. At the discretion and approval of the responsible officer, professors may freely engage in research and research scholars may freely engage in teaching and lecturing. Because these activities are intertwined, such a change of activity is not considered a change of category necessitating formal approval by the Department of State and does not require the issuance of a new Form DS–2019 to reflect a change in category. Such change in activity does not extend the exchange visitor's maximum duration of program participation.

(i) *Duration of participation*. The permitted duration of program participation for a professor or research scholar is as follows:

(1) *General limitation*. A professor or research scholar may be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete his or her program, provided such time does not exceed five years. The five-year period of permitted program participation is continuous and begins with the initial program begin date documented in SEVIS or the date such status was acquired via a petition submitted and approved by the Department of Homeland Security (DHS) as documented in SEVIS and ends five years from such date.

(2) *Repeat participation*. Exchange participants who have entered the United States under the Exchange Visitor Program as a professor or research scholar, or who have acquired such status while in the United States, and who have completed his or her program are not eligible for participation as a professor or research scholar for a period of two years following the end date of such program participation as identified in SEVIS.

(3) *Extensions*. A responsible officer may not extend the period of program duration beyond the five-year period of maximum program duration authorized for professor and research scholar participants. The Department may, in its sole discretion, authorize an extension beyond the permitted five-year period, as submitted by a ''G–7'' program sponsor, upon successful demonstration of the following:

(i) The participant for whom an extension is requested is engaged in a research project under the direct sponsorship of a Federally Funded National Research and Development Center (''FFNRDC'') or a U.S. Federal Laboratory;

(ii) The FFNRDC or U.S. Federal Laboratory requesting the extension on behalf of the participant has determined, through peer review, that the participant's continued involvement in the project is beneficial to its successful conclusion; and

(iii) The Secretary of the Department of Homeland Security has determined in his/her discretion that the extension may be approved;

(iv) The extension request is for not more than five years.

[70 FR 28817, May 19, 2005; 70 FR 36344, June 23, 2005]

§ 62.21 Short-term scholars.

(a) *Introduction*. These regulations govern scholars coming to the United States for a period of up to four months to lecture, observe, consult, and to participate in seminars, workshops, conferences, study tours, professional meetings, or similar types of educational and professional activities.

(b) *Purpose*. The Exchange Visitor Program promotes the interchange of knowledge and skills among foreign and American scholars. It does so by providing foreign scholars the opportunity to exchange ideas with their American colleagues, participate in educational and professional programs, confer on common problems and projects, and promote professional relationships and communications.

(c) *Designation*. The Department of State may, in its sole discretion, designate *bona fide* programs which offer foreign nationals the opportunity to engage in short-term visits for the purpose of lecturing, observing, consulting, training, or demonstrating

special skills at research institutions, museums, libraries, post-secondary accredited educational institutions, or similar types of institutions.

(d) *Visitor eligibility*. A person participating in the Exchange Visitor Program under this section shall satisfy the definition of a short-term scholar as set forth in § 62.4.

(e) *Cross-cultural activities and orientation*. Due to the nature of such exchanges, sponsors of programs for short-term scholars shall be exempted from the requirements of providing cross-cultural activities and orientation as set forth in § 62.8(d) and § 62.10(c). However, sponsors are encouraged to provide such programs for short-term scholars whenever appropriate.

(f) *Location of exchange*. The short-term scholar shall participate in the Exchange Visitor Program at the conferences, workshops, seminars, or other events or activities stated on his or her Form DS–2019. A participant may also lecture or consult at institutions not listed on the Form DS–2019 if his or her Responsible Officer issues a written authorization of such activity. Such written authorization must be attached to the participant's Form DS–2019.

(g) *Duration of participation*. The short-term scholar shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which time shall not exceed six months. Programs under this section are exempted from § 62.8(b) governing the minimum duration of a program. Extensions beyond the duration of participation are not permitted under this category.

[58 FR 15196, Mar. 19, 1993; 58 FR 48448, Sept. 16, 1993, as amended at 61 FR 39585, July 30, 1996; 64 FR 17975, Apr. 13, 1999. Redesignated at 64 FR 54539, Oct. 7, 1999]

§ 62.22 Trainees and interns.

(a) *Introduction*. These regulations govern Exchange Visitor Programs under which foreign nationals with significant experience in their occupational field have the opportunity to receive training in the United States in such field. These regulations also establish a new internship program under which foreign national students and recent graduates of foreign post-secondary academic institutions have the opportunity to receive training in the United States in their field of academic study. These regulations include specific requirements to ensure that both trainees and interns receive hands-on experience in their specific fields of study/expertise and that they do not merely participate in work programs. Regulations dealing with training opportunities for certain foreign students who are studying at post-secondary accredited educational institutions in the United States are located at § 62.23 (''College and University Students''). Regulations governing alien physicians in graduate medical education or training are located at § 62.27 (''Alien Physicians'').

(b) *Purpose*. (1)(i) The primary objectives of the programs offered under these regulations are to enhance the skills and expertise of exchange visitors in their academic or occupational fields through participation in structured and guided work-based training and internship programs and to improve participants' knowledge of American techniques, methodologies, and technology. Such training and internship programs are also intended to increase participants' understanding of American culture and society and to enhance Americans' knowledge of foreign cultures and skills through an open interchange of ideas between participants and their American associates. A key goal of the Fulbright-Hays Act, which authorizes these programs, is that participants will return to their home countries and share their experiences with their countrymen.

(ii) Exchange Visitor Program training and internship programs must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers. The requirements in these regulations for trainees are designed to distinguish between *bona fide* training, which is permitted, and merely gaining additional work experience, which is not permitted. The requirements in these regulations for interns are designed to distinguish between a period of work-based learning in the intern's academic

field, which is permitted (and which requires a substantial academic framework in the participant's field), and unskilled labor, which is not.

(2) In addition, a specific objective of the new internship program is to provide foreign nationals who are currently enrolled full-time and pursuing studies at a degree- or certificate-granting post-secondary academic institution or graduated from such an institution no more than 12 months prior to their exchange visitor program begin date a period of work-based learning to allow them to develop practical skills that will enhance their future careers. Bridging the gap between formal education and practical work experience and gaining substantive cross-cultural experience are major goals in educational institutions around the world. By providing training opportunities for current foreign students and recent foreign graduates at formative stages of their development, the U.S. Government will build partnerships, promote mutual understanding, and develop networks for relationships that will last through generations as these foreign nationals move into leadership roles in a broad range of occupational fields in their own societies. These results are closely tied to the goals, themes, and spirit of the Fulbright-Hays Act.

(c) *Designation*. (1) The Department may, in its sole discretion, designate as sponsors those entities it deems to meet the eligibility requirements set forth in Subpart A of 22 CFR part 62 and to have the organizational capacity successfully to administer and facilitate training and internship programs.

(2) Sponsors must provide training and internship programs only in the occupational category or categories for which the Department has designated them as sponsors. The Department may designate training and internship programs in any of the following occupational categories:

(i) Agriculture, Forestry, and Fishing;

(ii) Arts and Culture;

(iii) Construction and Building Trades;

(iv) Education, Social Sciences, Library Science, Counseling and Social Services;

(v) Health Related Occupations;

(vi) Hospitality and Tourism;

(vii) Information Media and Communications;

(viii) Management, Business, Commerce and Finance;

(ix) Public Administration and Law; and

(x) The Sciences, Engineering, Architecture, Mathematics, and Industrial Occupations.

(d) *Selection criteria*. (1) In addition to satisfying the general requirements set forth in § 62.10(a), sponsors must ensure that trainees and interns have verifiable English language skills sufficient to function on a day-to-day basis in their training environment. Sponsors must verify an applicant's English language proficiency through a recognized English language test, by signed documentation from an academic institution or English language school, or through a documented interview conducted by the sponsor either in-person or by videoconferencing, or by telephone if videoconferencing is not a viable option.

(2) Sponsors of training programs must verify that all potential trainees are foreign nationals who have either a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience in their occupational field acquired outside the United States or five years of work experience in their occupational field acquired outside the United States.

(3) Sponsors of internship programs must verify that all potential interns are foreign nationals who are currently enrolled full-time and pursuing studies in their advanced chosen career field at a degree- or certificate-granting post-secondary academic institution outside the United States or graduated from such an institution no more than 12 months prior to their exchange visitor program begin date.

(e) *Issuance of Forms DS–2019*. In addition to the requirements set forth in Subpart A, sponsors must ensure that:

(1) They do not issue Forms DS–2019 to potential participants in training

and internship programs until they secure placements for trainees or interns and complete and secure requisite signatures on Form DS–7002, Training/Internship Placement Plan (T/IPP);

(2) Trainees and interns have sufficient finances to support themselves for their entire stay in the United States, including housing and living expenses; and

(3) The training and internship programs expose participants to American techniques, methodologies, and technology and expand upon the participants' existing knowledge and skills. Programs must not duplicate the participants' prior work experience or training received elsewhere.

(f) *Obligations of training and internship program sponsors.* (1) Sponsors designated by the Department to administer training and internship programs must:

(i) Ensure that trainees and interns are appropriately selected, placed, oriented, supervised, and evaluated;

(ii) Be available to trainees and interns (and host organizations, as appropriate) to assist as facilitators, counselors, and information resources;

(iii) Ensure that training and internship programs provide a balance between the trainees' and interns' learning opportunities and their contributions to the organizations in which they are placed;

(iv) Ensure that the training and internship programs are full-time (minimum of 32 hours a week); and

(v) Ensure that any host organizations and third parties involved in the recruitment, selection, screening, placement, orientation, evaluation for, or the provision of training and internship programs are sufficiently educated on the goals, objectives, and regulations of the Exchange Visitor Program and adhere to all regulations set forth in this Part as well as all additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose.

(2) Sponsors must certify that they or any host organization acting on the sponsor's behalf:

(i) Have sufficient resources, plant, equipment, and trained personnel available to provide the specified training and internship program;

(ii) Provide continuous on-site supervision and mentoring of trainees and interns by experienced and knowledgeable staff;

(iii) Ensure that trainees and interns obtain skills, knowledge, and competencies through structured and guided activities such as classroom training, seminars, rotation through several departments, on-the-job training, attendance at conferences, and similar learning activities, as appropriate in specific circumstances;

(iv) Conduct periodic evaluations of trainees and interns, as set forth in § 62.22(l);

(v) Do not displace full- or part-time or temporary or permanent American workers or serve to fill a labor need and ensure that the positions that trainees and interns fill exist primarily to assist trainees and interns in achieving the objectives of their participation in training and internship programs; and

(vi) Certify that training and internship programs in the field of agriculture meet all the requirements of the Fair Labor Standards Act, as amended (29 U.S.C. 201 *et seq.*) and the Migrant and Seasonal Agricultural Worker Protection Act, as amended (29 U.S.C. 1801 *et seq.*).

(3) Sponsors or any third parties acting on their behalf must complete thorough screening of potential trainees or interns, including a documented interview conducted by the sponsor either in-person or by videoconferencing, or by telephone if videoconferencing is not a viable option.

(4) Sponsors must retain all documents referred to in § 62.22(f) for at least three years following the completion of all training and internship programs. Documents and any requisite signatures may be retained in either hard copy or electronic format.

(g) *Use of third parties*—(1) *Sponsors use of third parties.* Sponsors may engage third parties (including, but not limited to host organizations, partners, local businesses, governmental entities, academic institutions, and other foreign or domestic agents) to assist them in the conduct of their designated training and internship programs. Such

third parties must have an executed written agreement with the sponsor to act on behalf of the sponsor in the conduct of the sponsor's program. This agreement must outline the obligations and full relationship between the sponsor and third party on all matters involving the administration of their exchange visitor program. A sponsor's use of a third party does not relieve the sponsor of its obligations to comply with and to ensure third party compliance with Exchange Visitor Program regulations. Any failure by any third party to comply with the regulations set forth in this Part or with any additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose will be imputed to the sponsors engaging such third party.

(2) *Screening and vetting third parties operating outside the United States.* Sponsors must ascertain that third parties operating outside the United States are legitimate entities within the context of their home country environment. For third parties that operate as businesses, sponsors must obtain relevant home country documentation, such as a business registration or certification. Such home country documentation must include an English Language translation for any business registration or certification documents submitted in a foreign language. Written agreements between sponsors and third parties operating outside the United States must include annually updated price lists for training and internship programs offered by each third party, and must indicate that such overseas third parties are sufficiently trained in all aspects of the programs they represent, including the regulations set forth in this Part.

(3) *Screening and vetting host organizations.* Sponsors must adequately screen all potential host organizations at which a trainee or intern will be placed by obtaining the following information:

(i) Employer Identification Number (EIN) used for tax purposes;

(ii) Third party verification of telephone number, address, and professional activities, e.g., via advertising, brochures, Web site, and/or feedback from prior participants; and

(iii) Verification of Worker's Compensation Insurance Policy or equivalent in each state or, if applicable, evidence of state exemption from requirement of coverage.

(4) *Site visits of host organizations.* Sponsors must conduct site visits of host organizations that have not previously participated successfully in the sponsor's training and internship programs and that have fewer than 25 employees or less than three million dollars in annual revenue. Placements at academic institutions or at federal, state, or local government offices are specifically excluded from this requirement. The purpose of the site visits is for the sponsors to ensure that host organizations possess and maintain the ability and resources to provide structured and guided work-based learning experiences according to individualized T/IPPs and that host organizations understand and meet their obligations set forth in this Part.

(h) *Host organization obligations.* Sponsors must ensure that:

(1) Host organizations sign a completed Form DS–7002 to verify that all placements are appropriate and consistent with the objectives of the trainees or interns as outlined in their program applications and as set forth in their T/IPPs. All parties involved in internship programs should recognize that interns are seeking entry-level training and experience. Accordingly, all placements must be tailored to the skills and experience level of the individual intern;

(2) Host organizations notify sponsors promptly of any concerns about, changes in, or deviations from T/IPPs during training and internship programs and contact sponsors immediately in the event of any emergency involving trainees or interns;

(3) Host organizations abide by all federal, state, and local occupational health and safety laws; and

(4) Host organizations abide by all program rules and regulations set forth by the sponsors, including the completion of all mandatory program evaluations.

(i) *Training/internship placement plan (Form DS–7002).* (1) Sponsors must fully complete and obtain all requisite signatures on a Form DS–7002 for each

trainee or intern before issuing a Form DS–2019. Sponsors must provide each signatory an executed copy of the Form DS–7002. Upon request, trainees and interns must present their fully executed Form DS–7002 to Consular Officials during their visa interview.

(2) To further distinguish between *bona fide* training for trainees or work-based learning for interns, which are permitted, and unskilled or casual labor positions which are not, all T/IPPs must:

(i) State the specific goals and objectives of the training and internship program (for each phase or component, if applicable);

(ii) Detail the knowledge, skills, or techniques to be imparted to the trainee or intern (for each phase or component, if applicable); and

(iii) Describe the methods of performance evaluation and the supervision for each phase or component, if applicable.

(3) A T/IPP for trainees must be divided into specific and various phases or components, and for each phase or component must:

(i) Describe the methodology of training and

(ii) Provide a chronology or syllabus.

(4) A T/IPP for interns must:

(i) Describe the role of the intern in the organization and, if applicable, identify various departments or functional areas in which the intern will work; and

(ii) Identify the specific tasks and activities the intern will complete.

(j) *Program exclusions.* Sponsors designated by the Department to administer training and internship programs must not:

(1) Place trainees or interns in unskilled or casual labor positions, in positions that require or involve child care or elder care; or in clinical or any other kind of work that involves patient care or patient contact, including any work that would require trainees or interns to provide therapy, medication, or other clinical or medical care (e.g., sports or physical therapy, psychological counseling, nursing, dentistry, veterinary medicine, social work, speech therapy, early childhood education);

(2) Place trainees or interns in positions, occupations, or businesses that could bring the Exchange Visitor Program or the Department into notoriety or disrepute; or

(3) Engage or otherwise cooperate or contract with a Staffing/Employment Agency to recruit, screen, orient, place, evaluate, or train trainees or interns, or in any other way involve such agencies in an Exchange Visitor Program training and internship program.

(4) Issue a T/IPP for any trainee or intern for which the duties involve more than 20 per cent clerical work.

(5) Have less than three departmental or functional rotations for ''Hospitality and Tourism'' training and internship programs of six months or longer.

(k) *Duration.* The duration of participation in a training and internship program must be established before a sponsor issues a Form DS–2019 and must not exceed the sponsor's authorized designation as set forth in the sponsor's letter of designation or most recent letter of redesignation. Except as noted below, the maximum duration of a training program is 18 months, and the maximum duration of an internship program is 12 months. For training programs in the field of agriculture and in the occupational category of Hospitality and Tourism, the maximum duration of program participation is 12 months. If an original T/IPP specifies that at least six months of a program includes related classroom participation and studies, training programs in the field of agriculture may be designated for a total duration of 18 months. Program extensions are permitted within the maximum duration as set forth in the letter of designation/redesignation provided that the need for an extended training or internship program is documented by the full completion and execution of a new Form DS–7002. 12-month training programs in the field of agriculture may not be extended to 18 months by adding six months of classroom participation and studies at the end of the original 12-month program duration. Per above, the six months of related classroom participation and studies must have been part of the trainee's original T/IPP.

(l) *Evaluations*. In order to ensure the quality of training and internship programs, sponsors must develop procedures for evaluating all trainees and interns. All required evaluations must be completed prior to the conclusion of a training and internship program, and both the trainees and interns and their immediate supervisors must sign the evaluation forms. For programs exceeding six months' duration, at a minimum, midpoint and concluding evaluations are required. For programs of six months or less, at a minimum, concluding evaluations are required. Sponsors must retain trainee and intern evaluations (electronic or hard copy) for a period of at least three years following the completion of each training and internship program.

(m) *Issuance of certificate of eligibility for exchange visitor (J–1) status*. Sponsors must not deliver or cause to be delivered any Certificate of Eligibility for Exchange Visitor (J–1) Status (Form DS–2019) to potential trainees or interns unless the individualized Form DS–7002 required by § 62.22(i) has been completed and signed by all requisite parties.

(n) *Additional training and internship program participation*. Foreign nationals who enter the United States under the Exchange Visitor Program to participate in training and internship programs are eligible to participate in additional training and internship programs under certain conditions. For both trainees and interns, additional training and internship programs must address the development of more advanced skills or a different field of expertise. Interns may apply for additional internship programs if they:

(1) Are currently enrolled full-time and pursuing studies at degree- or certificate-granting post-secondary academic institutions outside the United States; or,

(2) Have graduated from such institutions no more than 12 months prior to the start of their proposed exchange visitor program. A new internship is also permissible when a student has successfully completed a recognized course of study (*i.e.*, associate, bachelors, masters, Ph.D., or their recognized equivalents) and has enrolled and is pursuing studies at the next higher level of academic study. Trainees are eligible for additional training programs after a period of at least two years residency outside the United States following completion of their training program. Participants who have successfully completed internship programs and no longer meet the selection criteria for an internship program may participate in a training program if they have resided outside the United States or its territories for at least two years. If participants meet these selection criteria and fulfill these conditions, there will be no limit to the number of times they may participate in a training and internship program.

[75 FR 48559, Aug. 11, 2010]

§ 62.23 College and university students.

(a) *Purpose*. A program under this section provides foreign students the opportunity to participate in a designated exchange visitor program while studying at a degree-granting post-secondary accredited academic institution or participating in a student internship program which fulfills the student's academic study. A student sponsored in this category may participate in a degree, non-degree, or student internship program. Such an exchange is intended to promote mutual understanding by fostering the exchange of ideas between foreign students and their American counterparts.

(b) *Designation*. The Department of State may, in its sole discretion, designate *bona fide* programs which offer foreign students the opportunity to study in the United States at a post-secondary accredited academic institution or to participate in a student internship program.

(c) *Selection criteria*. A sponsor selects the college and university students who participate in its exchange visitor program. A sponsor must secure sufficient background information on the students to ensure that they have the academic credentials required for its program. A student is eligible for participation in the Exchange Visitor Program if at any time during his or her educational program in the United States:

(1) The student or his or her program is financed directly or indirectly by:

(i) The United States Government;

(ii) The government of the student's home country; or

(iii) An international organization of which the United States is a member by treaty or statute;

(2) The program is carried out pursuant to an agreement between the United States Government and a foreign government;

(3) The program is carried out pursuant to written agreement between:

(i) American and foreign academic institutions;

(ii) An American academic institution and a foreign government; or

(iii) A state or local government in the United States and a foreign government;

(4) The student is supported substantially by funding from any source other than personal or family funds; or

(5) The student is participating in a student internship program as described in paragraph (i) of this section.

(d) *Admissions requirement.* In addition to satisfying the requirements of § 62.10(a), a sponsor must ensure that the student has been admitted to, or accepted for a student internship program offered by, the post-secondary accredited academic institution listed on the Form DS–2019 before issuing the Form.

(e) *Full course of study requirement.* A student, other than a student intern described in paragraph (h)(3)(i) of this section, must pursue a full course of study at a post-secondary accredited academic institution in the United States as defined in § 62.2, except under the following circumstances:

(1) *Vacation.* During official school breaks and summer vacations if the student is eligible and intends to register for the next term. A student attending a school on a quarter or trimester calendar may be permitted to take the annual vacation during any one of the quarters or trimesters instead of during the summer.

(2) *Medical illness.* If the student is compelled to reduce or interrupt a full course of study due to an illness or medical condition and the student presents to the responsible officer a written statement from a physician requiring or recommending an interruption or reduction in studies.

(3) *Bona fide academic reason.* If the student is compelled to pursue less than a full course of study for a term and the student presents to the responsible officer a written statement from the academic dean or advisor recommending the student to reduce his or her academic load to less than a full course of study due to an academic reason.

(4) *Non-degree program.* If the student is engaged full time in a prescribed course of study in a non-degree program of up to 24 months duration conducted by a post-secondary accredited academic institution.

(5) *Academic training.* If the student is participating in authorized academic training in accordance with paragraph (f) of this section.

(6) *Final term.* If the student needs less than a full course of study to complete the academic requirements in his or her final term.

(f) *Academic training*—(1) *Purpose.* The primary purpose of academic training is to permit a student, other than a student intern described in paragraph (i) of this section, to participate in an academic training program during his or her studies, without wages or other remuneration, with the approval of the academic dean or advisor and the responsible officer.

(2) *Conditions.* A student, other than a student intern described in paragraph (i) of this section, may be authorized to participate in an academic training program for wages or other remuneration:

(i) During his or her studies; or

(ii) Commencing not later than 30 days after completion of his or her studies, if the criteria, time limitations, procedures, and evaluations listed below in paragraphs (f)(3) through (f)(6) are satisfied:

(3) *Criteria.* (i) The student is primarily in the United States to study rather than engage in academic training;

(ii) The student is participating in academic training that is directly related to his or her major field of study at the post-secondary accredited academic institution listed on his or her Form DS–2019;

(iii) The student is in good academic standing with the post-secondary accredited academic institution; and

(iv) The student receives written approval in advance from the responsible officer for the duration and type of academic training.

(4) *Time limitations.* The student is authorized to participate in academic training for the length of time necessary to complete the goals and objectives of the training, provided that the amount of time for academic training:

(i) Is approved by the academic dean or advisor and approved by the responsible officer;

(ii) For undergraduate and pre-doctoral training, does not exceed 18 months, inclusive of any prior academic training in the United States, or the period of full course of study in the United States, whichever is less; except that additional time for academic training is allowed to the extent necessary for the exchange visitor to satisfy the mandatory requirements of his or her degree program in the United States;

(iii) For post-doctoral training, does not exceed a total of 36 months, inclusive of any prior academic training in the United States as an exchange visitor, or the period of the full course of study in the United States, whichever is less.

(5) *Procedures.* To obtain authorization to engage in academic training:

(i) The student must present to the responsible officer a letter of recommendation from the student's academic dean or advisor setting forth:

(A) The goals and objectives of the specific academic training program;

(B) A description of the academic training program, including its location, the name and address of the training supervisor, number of hours per week, and dates of the training;

(C) How the academic training relates to the student's major field of study; and

(D) Why it is an integral or critical part of the academic program of the student.

(ii) The responsible officer must:

(A) Determine if and to what extent the student has previously participated in academic training as a student, in order to ensure the student does not exceed the period permitted in paragraph (f) of this section;

(B) Review the letter of recommendation required in paragraph (f)(5)(i) of this section; and

(C) Make a written determination of whether the academic training currently being requested is warranted and the criteria and time limitations set forth in paragraph (f)(3) and (4) of this section are satisfied.

(6) *Evaluation requirements.* The sponsor must evaluate the effectiveness and appropriateness of the academic training in achieving the stated goals and objectives in order to ensure the quality of the academic training program.

(g) *Student employment.* A student, other than a student intern described in paragraph (i) of this section, may engage in part-time employment when the following criteria and conditions are satisfied.

(1) The student employment:

(i) Is pursuant to the terms of a scholarship, fellowship, or assistantship;

(ii) Occurs on the premises of the post-secondary accredited academic institution the visitor is authorized to attend; or

(iii) Occurs off-campus when necessary because of serious, urgent, and unforeseen economic circumstances which have arisen since acquiring exchange visitor status.

(2) A student may engage in employment as provided in paragraph (g)(1) of this section if the:

(i) Student is in good academic standing at the post-secondary accredited academic institution;

(ii) Student continues to engage in a full course of study, except for official school breaks and the student's annual vacation;

(iii) Employment totals no more than 20 hours per week, except during official school breaks and the student's annual vacation; and

(iv) The responsible officer has approved the specific employment in advance and in writing. Such approval may be valid for up to 12 months, but is automatically withdrawn if the student's program is transferred or terminated.

(h) *Duration of participation*—(1) *Degree student.* A student who is in a degree program may be authorized to participate in the Exchange Visitor Program as long as he or she is either:

(i) Studying at the post-secondary accredited academic institution listed on his or her Form DS–2019 and:

(A) Pursuing a full course of study as set forth in paragraph (e) of this section, and

(B) Maintaining satisfactory advancement towards the completion of the student's academic program; or

(ii) Participating in an authorized academic training program as permitted in paragraph (f) of this section.

(2) *Non-degree student.* A student who is in a non-degree program may be authorized to participate in the Exchange Visitor Program for up to 24 months. Such a student must be:

(i) Studying at the post-secondary accredited academic institution listed on his or her Form DS–2019 and:

(A) Participating full-time in a prescribed course of study; and

(B) Maintaining satisfactory advancement towards the completion of his or her academic program; or

(ii) Participating in an authorized academic training program as permitted in paragraph (f) of this section.

(3) *Student intern.* A student intern participating in a student internship program may be authorized to participate in the Exchange Visitor Program for up to 12 months for each degree/major as permitted in paragraph (i) of this section as long as the student intern is:

(i) Engaged full-time in a student internship program sponsored by the post-secondary accredited academic institution that issued Form DS–2019; and

(ii) Maintaining satisfactory advancement towards the completion of his or her student internship program.

(i) *Student intern.* The student intern is a foreign national enrolled in and pursuing a degree at an accredited post-secondary academic institution outside the United States and is participating in a student internship program in the United States that will fulfill the educational objectives for his or her current degree program at his or her home institution. The student intern must meet the following requirements:

(1) *Criteria.* (i) In addition to satisfying the general requirements set forth in § 62.10(a), a sponsor must ensure that the student intern has verifiable English language skills sufficient to function on a day-to-day basis in the internship environment. English language proficiency must be verified through a sponsor-conducted interview, by a recognized English language test, or by signed documentation from an academic institution or English language school.

(ii) The student intern is primarily in the United States to engage in a student internship program rather than to engage in employment or provide services to an employer;

(iii) The student intern has been accepted into a student internship program at the post-secondary accredited academic institution listed on his or her Form DS–2019;

(iv) The student intern is in good academic standing with the post-secondary academic institution outside the United States from which he or she is enrolled in and pursuing a degree; and

(v) The student intern will return to the academic program and fulfill and obtain a degree from such academic institution after completion of the student internship program.

(2) *Program requirements.* In addition to the requirements set forth in Subpart A, a sponsor must ensure that:

(i) It does not issue Form DS–2019 to a potential participant in a student internship program until it has secured a placement for the student intern and it completes and secures the requisite signatures on Form DS–7002 (T/IPP);

(ii) A student intern has sufficient finances to support himself or herself and dependants for their entire stay in the United States, including housing and living expenses; and

(iii) The student internship program exposes participants to American techniques, methodologies, and technology and expands upon the participants' existing knowledge and skills. A program must not duplicate the student intern's prior experience.

(3) *Obligations of student internship program sponsors.* (i) A sponsor designated by the Department to administer a student internship program must:

(A) Ensure that the student internship program is full-time (minimum of 32 hours a week); and

(B) Ensure that any host organization or other third party involved in the recruitment, selection, screening, placement, orientation, evaluation, or provision of a student internship program is sufficiently educated on the goals, objectives, and regulations of the Exchange Visitor Program and adheres to all regulations set forth in this part as well as all additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose.

(ii) A sponsor must ensure that it or any host organization acting on the sponsor's behalf:

(A) Has sufficient resources, plant, equipment, and trained personnel available to provide the specified student internship program;

(B) Does not displace full- or part-time or temporary or permanent American workers or serve to fill a labor need and ensures that the position that the student interns fills exists solely to assist the student intern in achieving the objectives of his or her participation in a student internship program; and

(C) Certifies that student internship programs in the field of agriculture meet all the requirements of the Fair Labor Standards Act, as amended (29 U.S.C. 201 *et seq.*) and the Migrant and Seasonal Agricultural Worker Protection Act, as amended (29 U.S.C. 1801 *et seq.*).

(iii) *Screening and vetting host organizations.* A sponsor must adequately screen all potential host organizations at which a student intern will be placed by obtaining the following information:

(A) The Dun & Bradstreet identification number (unless the host organization is an academic institution, government entity, or family farm);

(B) Employer Identification Number (EIN) used for tax purposes;

(C) Verification of telephone number, address, and professional activities via advertising, brochures, Web site, and/or feedback from prior participants; and

(D) Verification of Workman's Compensation Insurance Policy.

(iv) *Site visits.* A sponsor must conduct a site visit of any host organization that has not previously participated successfully in the sponsor's student internship program, has fewer than 25 employees, or has less than three million dollars in annual revenue. Any placement at an academic institution or at a Federal, State, or local government office is specifically excluded from this requirement. The purpose of the site visit is for the sponsor to ensure that each host organization possesses and maintains the ability and resources to provide structured and guided work-based learning experiences according to individualized T/IPPs, and that each host organization understands and meets its obligations set forth in this part.

(4) *Use of third parties.* A sponsor may engage a third party (including, but not limited to a host organization, partner, local business, governmental entity, academic institution, or any other foreign or domestic agent) to assist it in the conduct of its designated student internship program. Such a third party must have an executed written agreement with the sponsor to act on behalf of the sponsor in the conduct of the sponsor's program. This agreement must outline the full relationship between the sponsor and third party on all matters involving the administration of its exchange visitor program. A sponsor's use of a third party does not relieve the sponsor of its obligations to comply with and to ensure third party compliance with Exchange Visitor Program regulations. Any failure by any third party to comply with the regulations set forth in this part or with any additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose will be imputed to the sponsor.

(5) *Evaluation requirements.* In order to ensure the quality of a student internship program, a sponsor must develop procedures for evaluating all student interns. All required evaluations

must be completed prior to the conclusion of a student internship program, and the student intern and his or her immediate supervisor must sign the evaluation forms. At a minimum, all programs require a concluding evaluation, and programs lasting longer than six months also require a midpoint evaluation. For programs exceeding six months' duration, at a minimum, midpoint and concluding evaluations are required. A sponsor must retain student intern evaluations (electronic or hard copy) for a period of at least three years following the completion of each student internship program.

(6) *Employment, wages, or remuneration*. A student intern is permitted to engage in full-time employment during the student internship program as outlined on his or her T/IPP, with or without wages or other compensation. Employment is not required for participation in the program. A student intern may be employed, however, only with the approval of the responsible officer and the student's home institution's dean or academic advisor.

(7) *Training/Internship Placement Plan (Form DS–7002)*. (i) A sponsor must fully complete and obtain requisite signatures for a Form DS–7002 for each student intern before issuing a Form DS–2019. A sponsor must provide to each signatory an executed copy of the Form DS–7002. Upon request, a student intern must present his or her fully executed Form DS–7002 to a Consular Official during the visa interview.

(ii) To further distinguish between work-based learning for student interns, which is permitted, and ordinary employment or unskilled labor which is not, a T/IPP must:

(A) State the specific goals and objectives of the student internship program (for each phase or component, if applicable);

(B) Detail the knowledge, skills, or techniques to be imparted to the student intern (for each phase or component, if applicable); and

(C) Describe the methods of performance evaluation and the frequency of supervision (for each phase or component, if applicable).

(8) *Program exclusions*. A sponsor designated by the Department to administer a student internship program must:

(i) Not place a student intern in an unskilled or casual labor position, in a position that requires or involves child care or elder care, a position in the field of aviation, or, in clinical positions or engaging in any other kind of work that involves patient care or contact, including any work that would require student interns to provide therapy, medication, or other clinical or medical care (e.g., sports or physical therapy, psychological counseling, nursing, dentistry, veterinary medicine, social work, speech therapy, or early childhood education);

(ii) Not place a student intern in a position, occupation, or business that could bring the Exchange Visitor Program or the Department into notoriety or disrepute;

(iii) Not engage or otherwise cooperate or contract with a staffing/employment agency to recruit, screen, orient, place, evaluate, or train student interns, or in any other way involve such agencies in an Exchange Visitor Program student internship program;

(iv) Ensure that the duties of a student intern as outlined in the T/IPP will not involve more than 20 per cent clerical work, and that all tasks assigned to a student intern are necessary for the completion of the student internship program; and

(v) Ensure that all ''Hospitality and Tourism'' student internship programs of six months or longer contain at least three departmental or functional rotations.

[73 FR 35068, June 20, 2008]

§ 62.24 Teachers.

(a) *Purpose*. These regulations govern exchange visitors who teach full-time in primary and secondary accredited educational institutions. Programs under this section promote the interchange of American and foreign teachers in public and private schools and the enhancement of mutual understanding between people of the United States and other countries. They do so by providing foreign teachers opportunities to teach in primary and sec-

ondary accredited educational institutions in the United States, to participate actively in cross-cultural activities with Americans in schools and communities, and to return home ultimately to share their experiences and their increased knowledge of the United States. Such exchanges enable visitors to understand better American culture, society, and teaching practices at the primary and secondary levels, and enhance American knowledge of foreign cultures, customs, and teaching approaches.

(b) *Designation*. The Department of State may, in its discretion, designate *bona fide* programs satisfying the objectives in section (a) above as exchange visitor programs in the teacher category.

(c) *Visitor eligibility*. A foreign national shall be eligible to participate in an exchange visitor program as a full-time teacher if the individual:

(1) Meets the qualifications for teaching in primary or secondary schools in his or her country of nationality or last legal residence;

(2) Satisfies the standards of the U.S. state in which he or she will teach;

(3) Is of good reputation and character;

(4) Seeks to come to the United States for the purpose of full-time teaching at a primary or secondary accredited educational institution in the United States; and

(5) Has a minimum of three years of teaching or related professional experience.

(d) *Visitor selection*. Sponsors shall adequately screen teachers prior to accepting them for the program. Such screening, in addition to the requirements of § 62.10(a), shall include:

(1) Evaluating the qualifications of the foreign applicants to determine whether the criteria set forth in paragraph (c) of this section are satisfied; and

(2) Securing references from colleagues and current or former employers, attesting to the teachers' good reputation, character and teaching skills.

(e) *Teaching position*. Prior to the issuance of the Form DS–2019, the exchange visitor shall receive a written offer and accept in writing of a teaching position from the primary or secondary accredited educational institution in which he or she is to teach. Such position shall be in compliance with any applicable collective bargaining agreement, where one exists. The exchange visitor's appointment to a position at a primary or secondary accredited educational institution shall be temporary, even if the teaching position is permanent.

(f) *Program disclosure*. Before the program begins, the sponsor shall provide the teacher, in addition to what is required in § 62.10(b), with:

(1) Information on the length and location(s) of his or her exchange visitor program;

(2) A summary of the significant components of the program, including a written statement of the teaching requirements and related professional obligations; and

(3) A written statement which clearly states the compensation, if any, to be paid to the teacher and any other financial arrangements in regards to the exchange visitor program.

(g) *Location of the exchange*. The teacher shall participate in an exchange visitor program at the primary or secondary accredited educational institution(s) listed on his or her Form DS–2019 and at locations where the institution(s) are involved in official school activities (e.g., school field trips and teacher training programs).

(h) *Duration of participation*. The teacher shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which shall not exceed three years.

§ 62.25 Secondary school students.

(a) *Purpose*. This section governs Department of State designated exchange visitor programs under which foreign secondary school students are afforded the opportunity to study in the United States at accredited public or private secondary schools for an academic semester or an academic year, while living with American host families or residing at accredited U.S. boarding schools.

(b) *Program sponsor eligibility*. Eligibility for designation as a secondary

school student exchange visitor program sponsor is limited to organizations:

(1) With tax-exempt status as conferred by the Internal Revenue Service pursuant to section 501(c)(3) of the Internal Revenue Code; and

(2) Which are United States citizens as such term is defined in § 62.2.

(c) *Program eligibility*. Secondary school student exchange visitor programs designated by the Department of State must:

(1) Require all exchange students to be enrolled and participating in a full course of study at an accredited academic institution;

(2) Allow entry of exchange students for not less than one academic semester (or quarter equivalency) and not more than two academic semesters (or quarter equivalency) duration; and

(3) Ensure that the program is conducted on a U.S. academic calendar year basis, except for students from countries whose academic year is opposite that of the United States. Exchange students may begin an exchange program in the second semester of a U.S. academic year only if specifically permitted to do so, in writing, by the school in which the exchange student is enrolled. In all cases, sponsors must notify both the host family and school prior to the exchange student's arrival in the United States whether the placement is for an academic semester, an academic year, or a calendar year.

(d) *Program administration*. Sponsors must ensure that all organizational officers, employees, representatives, agents, and volunteers acting on their behalf:

(1) Are adequately trained. Sponsors must administer training for local coordinators that specifically includes, at a minimum, instruction in: Conflict resolution; procedures for handling and reporting emergency situations; awareness or knowledge of child safety standards; information on sexual conduct codes; procedures for handling and reporting allegations of sexual misconduct or any other allegations of abuse or neglect; and the criteria to be used to screen potential host families and exercise good judgment when identifying what constitutes suitable host family placements. In addition to their own training, sponsors must ensure that all local coordinators complete the Department of State mandated training module prior to their appointment as a local coordinator or assumption of duties. The Department of State training module will include instruction designed to provide a comprehensive understanding of the Exchange Visitor Program; its public diplomacy objectives; and the Secondary School Student category rules and regulations. Sponsors must demonstrate the individual's successful completion of all initial training requirements and that annual refresher training is also successfully completed.

(2) Are adequately supervised. Sponsors must create and implement organization-specific standard operating procedures for the supervision of local coordinators designed to prevent or deter fraud, abuse, or misconduct in the performance of the duties of these employees/agents/volunteers. They must also have sufficient internal controls to ensure that such employees/agents/volunteers comply with such standard operating procedures.

(3) Have been vetted annually through a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry);

(4) Place no exchange student with his or her relatives;

(5) Make no exchange student placement beyond 120 miles of the home of the local coordinator authorized to act on the sponsor's behalf in both routine and emergency matters arising from that exchange student's participation in the Exchange Visitor Program;

(6) Make no monetary payments or other incentives to host families;

(7) Provide exchange students with reasonable access to their natural parents and family by telephone and e-mail;

(8) Make certain that the exchange student's government issued documents (*i.e.*, passports, Forms DS–2019) are not removed from his/her possession;

(9) Conduct the host family orientation after the host family has been fully vetted and accepted;

(10) Refrain, without exception, from acting as:

(i) Both a host family and a local coordinator or area supervisor for an exchange student;

(ii) A host family for one sponsor and a local coordinator for another sponsor; or

(iii) A local coordinator for any exchange student over whom he/she has a position of trust or authority such as the student's teacher or principal. This requirement is not applicable to a boarding school placement.

(11) Maintain, at minimum, a monthly schedule of personal contact with the exchange student. The first monthly contact between the local coordinator and the exchange student must be in person. All other contacts may take place in-person, on the phone, or via electronic mail and must be properly documented. The sponsor is responsible for ensuring that issues raised through such contacts are promptly and appropriately addressed.

(12) That a sponsor representative other than the local coordinator who recruited, screened and selected the host family visit the exchange student/host family home within the first or second month following the student's placement in the home.

(13) Maintain, at a minimum, a monthly schedule of personal contact with the host family. At least once during the fall semester and at least once during the spring semester, (*i.e.*, twice during the academic year) the contact by the local coordinator with the host family must be in person. All other contacts may take place in person, on the phone, or via electronic mail and must be properly documented. The sponsor is responsible for ensuring the issues raised through such contacts are promptly and appropriately addressed.

(14) That host schools are provided contact information for the local organizational representative (including name, direct phone number, and e-mail address), the program sponsor, and the Department's Office of Designation; and

(15) Adhere to all regulatory provisions set forth in this Part and all additional terms and conditions governing program administration that the Department may impose.

(e) *Student selection.* In addition to satisfying the requirements of § 62.10(a), sponsors must ensure that all participants in a designated secondary school student exchange visitor program:

(1) Are secondary school students in their home countries who have not completed more than 11 years of primary and secondary study, exclusive of kindergarten; or are at least 15 years of age, but not more than 18 years and six months of age as of the program start date;

(2) Demonstrate maturity, good character, and scholastic aptitude; and

(3) Have not previously participated in an academic year or semester secondary school student exchange program in the United States or attended school in the United States in either F–1 or J–1 visa status.

(f) *Student enrollment.* (1) Sponsors must secure prior written acceptance for the enrollment of any exchange student in a United States public or private secondary school. Such prior acceptance must:

(i) Be secured from the school principal or other authorized school administrator of the school or school system that the exchange student will attend; and

(ii) Include written arrangements concerning the payment of tuition or waiver thereof if applicable.

(2) Under no circumstance may a sponsor facilitate the entry into the United States of an exchange student for whom a written school placement has not been secured.

(3) Under no circumstance may a sponsor charge a student private school tuition if such arrangements are not finalized in writing prior to the issuance of Form DS–2019.

(4) Sponsors must maintain copies of all written acceptances for a minimum of three years and make such documents available for Department of State inspection upon request.

(5) Sponsors must provide the school with a translated ''written English language summary'' of the exchange student's complete academic course work prior to commencement of school, in addition to any additional documents

the school may require. Sponsors must inform the prospective host school of any student who has completed secondary school in his/her home country.

(6) Sponsors may not facilitate the enrollment of more than five exchange students in one school unless the school itself has requested, in writing, the placement of more than five students from the sponsor.

(7) Upon issuance of a Form DS–2019 to a prospective participant, the sponsor accepts full responsibility for securing a school and host family placement for the student, except in cases of voluntary student withdrawal or visa denial.

(g) *Student orientation.* In addition to the orientation requirements set forth at § 62.10, all sponsors must provide exchange students, prior to their departure from their home countries, with the following information:

(1) A summary of all operating procedures, rules, and regulations governing student participation in the exchange visitor program along with a detailed summary of travel arrangements;

(2) A copy of the Department's welcome letter to exchange students;

(3) Age and language appropriate information on how to identify and report sexual abuse or exploitation;

(4) A detailed profile of the host family with whom the exchange student will be placed. The profile must state whether the host family is either a permanent placement or a temporary-arrival family;

(5) A detailed profile of the school and community in which the exchange student will be placed. The profile must state whether the student will pay tuition; and

(6) An identification card, that lists the exchange student's name, United States host family placement address and telephone numbers (landline and cellular), sponsor name and main office and emergency telephone numbers, name and telephone numbers (landline and cellular) of the local coordinator and area representative, the telephone number of Department's Office of Designation, and the Secondary School Student program toll free emergency telephone number. The identification card must also contain the name of the health insurance provider and policy number. Such cards must be corrected, reprinted, and reissued to the student if changes in contact information occur due to a change in the student's placement.

(h) *Student extra-curricular activities.* Exchange students may participate in school sanctioned and sponsored extracurricular activities, including athletics, if such participation is:

(1) Authorized by the local school district in which the student is enrolled; and

(2) Authorized by the state authority responsible for determination of athletic eligibility, if applicable. Sponsors shall not knowingly be party to a placement (inclusive of direct placements) based on athletic abilities, whether initiated by a student, a natural or host family, a school, or any other interested party.

(3) Any placement in which either the student or the sending organization in the foreign country is party to an arrangement with any other party, including receiving school personnel, whereby the student will attend a particular school or live with a particular host family must be reported to the particular school and the National Federation of State High School Associations prior to the first day of classes.

(i) *Student employment.* Exchange students may not be employed on either a full or part-time basis but may accept sporadic or intermittent employment such as babysitting or yard work.

(j) *Host family application and selection.* Sponsors must adequately screen and select all potential host families and at a minimum must:

(1) Provide potential host families with a detailed summary of the Exchange Visitor Program and of their requirements, obligations and commitment to host;

(2) Utilize a standard application form developed by the sponsor that includes, at a minimum, all data fields provided in Appendix F, ''Information to be Collected on Secondary School Student Host Family Applications''. The form must include a statement stating that: ''The income data collected will be used solely for the purposes of determining that the basic needs of the exchange student can be met, including three quality meals and

transportation to and from school activities.'' Such application form must be signed and dated at the time of application by all potential host family applicants. The host family application must be designed to provide a detailed summary and profile of the host family, the physical home environment (to include photographs of the host family home's exterior and grounds, kitchen, student's bedroom, bathroom, and family or living room), family composition, and community environment. Exchange students are not permitted to reside with their relatives.

(3) Conduct an in-person interview with all family members residing in the home where the student will be living;

(4) Ensure that the host family is capable of providing a comfortable and nurturing home environment and that the home is clean and sanitary; that the exchange student's bedroom contains a separate bed for the student that is neither convertible nor inflatable in nature; and that the student has adequate storage space for clothes and personal belongings, reasonable access to bathroom facilities, study space if not otherwise available in the house and reasonable, unimpeded access to the outside of the house in the event of a fire or similar emergency. An exchange student may share a bedroom, but with no more than one other individual of the same sex.

(5) Ensure that the host family has a good reputation and character by securing two personal references from within the community from individuals who are not relatives of the potential host family or representatives of the sponsor (*i.e.*, field staff or volunteers), attesting to the host family's good reputation and character;

(6) Ensure that the host family has adequate financial resources to undertake hosting obligations and is not receiving needs-based government subsidies for food or housing;

(7) Verify that each member of the host family household 18 years of age and older, as well as any new adult member added to the household, or any member of the host family household who will turn eighteen years of age during the exchange student's stay in that household, has undergone a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry);

(8) Maintain a record of all documentation on a student's exchange program, including but not limited to application forms, background checks, evaluations, and interviews, for all selected host families for a period of three years following program completion; and

(9) Ensure that a potential single adult host parent without a child in the home undergoes a secondary level review by an organizational representative other than the individual who recruited and selected the applicant. Such secondary review should include demonstrated evidence of the individual's friends or family who can provide an additional support network for the exchange student and evidence of the individual's ties to his/her community. Both the exchange student and his or her natural parents must agree in writing in advance of the student's placement with a single adult host parent without a child in the home.

(k) *Host family orientation*. In addition to the orientation requirements set forth in § 62.10, sponsors must:

(1) Inform all host families of the philosophy, rules, and regulations governing the sponsor's exchange visitor program, including examples of ''best practices'' developed by the exchange community;

(2) Provide all selected host families with a copy of the Department's letter of appreciation to host families;

(3) Provide all selected host families with a copy of Department of State-promulgated Exchange Visitor Program regulations;

(4) Advise all selected host families of strategies for cross-cultural interaction and conduct workshops to familiarize host families with cultural differences and practices; and

(5) Advise host families of their responsibility to inform the sponsor of any and all material changes in the status of the host family or student, including, but not limited to, changes in address, finances, employment and criminal arrests.

(l) *Host family placement.* (1) Sponsors must secure, prior to the student's departure from his or her home country, a permanent or arrival host family placement for each exchange student participant. Sponsors may not:

(i) Facilitate the entry into the United States of an exchange student for whom a host family placement has not been secured;

(ii) Place more than one exchange student with a host family without the express prior written consent of the host family, the natural parents, and the students being placed. Under no circumstance may more than two exchange students be placed with a host family, or in the home of a local coordinator, regional coordinator, or volunteer. Sponsors may not place students from the same countries or with the same native languages in a single home.

(2) Prior to the student's departure from his or her home country, sponsors must advise both the exchange student and host family, in writing, of the respective family compositions and backgrounds of each, whether the host family placement is a permanent or arrival placement, and facilitate and encourage the exchange of correspondence between the two.

(3) In the event of unforeseen circumstances that necessitate a change of host family placement, the sponsor must document the reason(s) necessitating such change and provide the Department of State with an annual statistical summary reflecting the number and reason(s) for such change in host family placement in the program's annual report.

(m) *Advertising and marketing for the recruitment of host families.* In addition to the requirements set forth in § 62.9 in advertising and promoting for host family recruiting, sponsors must:

(1) Utilize only promotional materials that professionally, ethically, and accurately reflect the sponsor's purposes, activities, and sponsorship;

(2) Not publicize the need for host families via any public media with announcements, notices, advertisements, etc. that are not sufficiently in advance of the exchange student's arrival, appeal to public pity or guilt, imply in any way that an exchange student will be denied participation if a host family is not found immediately, or identify photos of individual exchange students and include an appeal for an immediate family;

(3) Not promote or recruit for their programs in any way that compromises the privacy, safety or security of participants, families, or schools. Specifically, sponsors shall not include personal student data or contact information (including addresses, phone numbers or email addresses) or photographs of the student on Web sites or in other promotional materials; and

(4) Ensure that access to exchange student photographs and personally identifying information, either online or in print form, is only made available to potential host families who have been fully vetted and selected for program participation. Such information, if available online, must also be password protected.

(n) *Reporting requirements.* Along with the annual report required by regulations set forth at § 62.15, sponsors must file with the Department of State the following information:

(1) Sponsors must immediately report to the Department any incident or allegation involving the actual or alleged sexual exploitation or any other allegations of abuse or neglect of an exchange student. Sponsors must also report such allegations as required by local or state statute or regulation. Failure to report such incidents to the Department and, as required by state law or regulation, to local law enforcement authorities shall be grounds for the suspension and revocation of the sponsor's Exchange Visitor Program designation;

(2) A report of all final academic year and semester program participant placements by August 31 for the upcoming academic year or January 15 for the Spring semester and calendar year. The report must be in the format directed by the Department and must include at a minimum, the exchange student's full name, Form DS–2019 number (SEVIS ID #), host family placement (current U.S. address), school (site of activity) address, the local coordinator's name and zip code, and other information the Department may request; and

(3) A report of all situations which resulted in the placement of an exchange student with more than one host family or in more than one school. The report must be in a format directed by the Department and include, at a minimum, the exchange student's full name, Form DS–019 number (SEVIS ID #), host family placements (current U.S. address), schools (site of activity address), the reason for the change in placement, and the date of the move. This report is due by July 31 for the previous academic school year.

[75 FR 65981, Oct. 27, 2010]

§ 62.26 Specialists.

(a) *Introduction*. These regulations govern experts in a field of specialized knowledge or skill coming to the United States for observing, consulting, or demonstrating special skills, except:

(1) Research scholars and professors, who are governed by regulations set forth at § 62.20;

(2) Short-term scholars, who are governed by regulations set forth at § 62.21; and

(3) Alien physicians in graduate medical education or training, who are governed by regulations set forth in § 62.27.

(b) *Purpose*. The Exchange Visitor Program promotes the interchange of knowledge and skills among foreign and American specialists, who are defined as experts in a field of specialized knowledge or skills, and who visit the United States for the purpose of observing, consulting, or demonstrating their special skills. It does so by providing foreign specialists the opportunity to observe American institutions and methods of practice in their professional fields, and to share their specialized knowledge with their American colleagues. The exchange of specialists promotes mutual enrichment, and furthers linkages among scientific institutions, government agencies, museums, corporations, libraries, and similar types of institutions. Such exchanges also enable visitors to better understand American culture and society and enhance American knowledge of foreign cultures and skills. This category is intended for exchanges with experts in such areas, for example, as mass media communication, environmental science, youth leadership, international educational exchange, museum exhibitions, labor law, public administration, and library science. This category is not intended for experts covered by the exchange visitor categories listed in paragraphs (a) (1) through (3) of this section.

(c) *Designation*. The Department of State may, in its discretion, designate *bona fide* programs satisfying the objectives in section (b) above as an exchange visitor program in the specialist category.

(d) *Visitor eligibility*. A foreign national shall be eligible to participate in an exchange visitor program as a specialist if the individual:

(1) Is an expert in a field of specialized knowledge or skill;

(2) Seeks to travel to the United States for the purpose of observing, consulting, or demonstrating his or her special knowledge or skills; and

(3) Does not fill a permanent or long-term position of employment while in the United States.

(e) *Visitor selection*. Sponsors shall adequately screen and select specialists prior to accepting them for the program, providing a formal selection process, including at a minimum:

(1) Evaluation of the qualifications of foreign nationals to determine whether they meet the definition of specialist as set forth in § 62.4(g); and

(2) Screening foreign nationals to ensure that the requirements of § 62.10(a) are satisfied.

(f) *Program disclosure*. Before the program begins, the sponsor shall provide the specialist, in addition to what is required in § 62.10(b), with:

(1) Information on the length and location(s) of his or her exchange visitor program;

(2) A summary of the significant components of the program; and

(3) A written statement which clearly states the stipend, if any, to be paid to the specialist.

(g) *Issuance of Form IAP–66*. The Form DS–2019 shall be issued only after the specialist has been accepted by the organization(s) with which he or she will participate in an exchange visitor program.

(h) *Location of the exchange*. The specialist shall participate in an exchange

visitor program at the location(s) listed on his or her Form DS–2019.

(i) *Duration of participation.* The specialist shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which shall not exceed one year.

§ 62.27 Alien physicians.

(a) *Purpose.* Pursuant to the Mutual Educational and Cultural Exchange Act, as amended by the Health Care Professions Act, Public Law 94–484, the Department of State facilitates exchanges for foreign medical graduates seeking to pursue graduate medical education or training at accredited schools of medicine or scientific institutions. The Department of State also facilitates exchanges of foreign medical graduates seeking to pursue programs involving observation, consultation, teaching, or research activities.

(b) *Clinical exchange programs.* The Educational Commission for Foreign Medical Graduates must sponsor alien physicians who wish to pursue programs of graduate medical education or training conducted by accredited U.S. schools of medicine or scientific institutions. Such Foreign Medical Graduates shall:

(1) Have adequate prior education and training to participate satisfactorily in the program for which they are coming to the United States;

(2) Be able to adapt to the educational and cultural environment in which they will be receiving their education or training;

(3) Have the background, needs, and experiences suitable to the program as required in § 62.10(a)(1);

(4) Have competency in oral and written English;

(5) Have passed either Parts I and II of the National Board of Medical Examiners Examination, the Foreign Medical Graduate Examination in the Medical Sciences, the United States Medical Licensing Examination, Step I and Step II, or the Visa Qualifying Examination (VQE) prepared by the National Board of Medical Examiners, administered by the Educational Commission for Foreign Medical Graduates. [NB—Graduates of a school of medicine accredited by the Liaison Committee on Medical Education are exempted by law from the requirement of passing either Parts I and II of the National Board of Medical Examiners Examination or the Visa Qualifying Examination (VQE)]; and

(6) Provide a statement of need from the government of the country of their nationality or last legal permanent residence. Such statement must provide written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien physician seeks to acquire and shall be submitted to the Educational Commission for Foreign Medical Graduates by the participant's government. The statement of need must bear the seal of the concerned government and be signed by a duly designated official of the government. The text of such statement of need shall read as follows:

Name of applicant for Visa: _____. There currently exists in (Country) a need for qualified medical practitioners in the speciality of _____. (Name of applicant for Visa) has filed a written assurance with the government of this country that he/she will return to this country upon completion of training in the United States and intends to enter the practice of medicine in the specialty for which training is being sought. Stamp (or Seal and signature) of issuing official of named country.

Dated: _____

_____

Official of Named Country.

(7) Submit an agreement or contract from a U.S. accredited medical school, an affiliated hospital, or a scientific institution to provide the accredited graduate medical education. The agreement or contract must be signed by both the alien physician and the official responsible for the training.

(c) *Non-clinical exchange programs.* (1) A United States university or academic medical center which has been designated an exchange visitor program by the Secretary of State of the Department of State is authorized to issue From DS–2019 to alien physicians to enable them to come to the United States for the purposes of observation, consultation, teaching, or research if:

(i) The responsible officer or duly designated alternate of the exchange visitor program involved signs and

appends to the Form DS–2019 a certification which states ''this certifies that the program in which (name of physician) is to be engaged is solely for the purpose of observation, consultation, teaching, or research and that no element of patient care is involved'' or

(ii) The dean of the involved accredited United States medical school or his or her designee certifies to the following five points and such certification is appended to the Form DS–2019 issued to the perspective exchange visitor alien physician:

(A) The program in which (name of physician) will participate is predominantly involved with observation, consultation, teaching, or research.

(B) Any incidental patient contact involving the alien physician will be under the direct supervision of a physician who is a U.S. citizen or resident alien and who is licensed to practice medicine in the State of _____.

(C) The alien physician will not be given final responsibility for the diagnosis and treatment of patients.

(D) Any activities of the alien physician will conform fully with the State licensing requirements and regulations for medical and health care professionals in the State in which the alien physician is pursuing the program.

(E) Any experience gained in this program will not be creditable towards any clinical requirements for medical specialty board certification.

(2) The Educational Commission for Foreign Medical Graduates may also issue Form DS–2019 to alien physicians who are coming to the United States to participate in a program of observation, consultation, teaching, or research provided the required letter of certification as outlined in this paragraph is appended to the Form DS–2019.

(d) *Public health and preventive medicine programs.* A United States university, academic medical center, school of public health, or other public health institution which has been designated as an exchange visitor program sponsor by the Secretary of State of the Department of State is authorized to issue Forms DS–2019 to alien physicians to enable them to come to the United States for the purpose of entering into those programs which do not include any clinical activities involving direct patient care. Under these circumstances, the special eligibility requirements listed in paragraphs (b) and (c) of this section need not be met. The responsible officer or alternate responsible officer of the exchange visitor program involved shall append a certification to the Form DS–2019 which states.

This certifies that the program in which (name of physician) is to be engaged does not include any clinical activities involving direct patient care.

(e) *Duration of participation.* (1) The duration of an alien physician's participation in a program of graduate medical education or training as described in paragraph (b) of this section is limited to the time typically required to complete such program. Duration shall be determined by the Secretary of State of the Department of State at the time of the alien physician's entry into the United States. Such determination shall be based on criteria established in coordination with the Secretary of Health and Human Services and which take into consideration the requirements of the various medical specialty boards as evidenced in the Director of Medical Specialties published by Marquis Who's Who for the American Board of Medical Specialties.

(2) Duration of participation is limited to seven years unless the alien physician has demonstrated to the satisfaction of the Secretary of State that the country to which the alien physician will return at the end of additional specialty education or training has an exceptional need for an individual with such additional qualification.

(3) Subject to the limitations set forth above, duration of participation may, for good cause shown, be extended beyond the period of actual training or education to include the time necessary to take an examination required for certification by a specialty board.

(4) The Secretary of State may include within the duration of participation a period of supervised medical practice in the United States if such practice is an eligibility requirement for certification by a specialty board.

(i) Alien physicians shall be permitted to undertake graduate medical

education or training in a specialty or subspecialty program whose board requirements are not published in the Director of Medical Specialists if the Board requirements are certified to the Secretary of State and to the Educational Commission for Foreign Medical Graduates by the Executive Secretary of the cognizant component board of the American Board of Medical Specialties.

(ii) The Secretary of State may, for good cause shown, grant an extension of the program to permit an alien physician to repeat one year of clinical medical training.

(5) The alien physician must furnish the Attorney General each year with an affidavit (Form I–644) that attests the alien physician:

(i) Is in good standing in the program of graduate medical education or training in which the alien physician is participating; and

(ii) Will return to the country of his nationality or last legal permanent resident upon completion of the education or training for which he came to the United States.

(f) *Change of program.* The alien physician may, once and not later than two years after the date the alien physician enters the United States as an exchange visitor or acquires exchange visitor status, change his designated program of graduate medical education or training if the Secretary of State approves the change and if the requirements of paragraphs (b) and (e) of this section are met for the newly designated specialty.

(g) *Applicability of section 212(e) of the Immigration and Nationality Act.* (1) Any exchange visitor physician coming to the United States on or after January 10, 1977 for the purpose of receiving graduate medical education or training is automatically subject to the two-year home-country physical presence requirement of section 212(e) of the Immigration and Nationality Act, as amended. Such physicians are not eligible to be considered for section 212(e) waivers on the basis of ''No Objection'' statements issued by their governments.

(2) Alien physicians coming to the United States for the purpose of observation, consultation, teaching, or research are not automatically subject to the two-year home-country physical presence requirement of section 212(e) of the Immigration and Nationality Act, as amended, but may be subject to this requirement if they are governmentally financed or pursuing a field of study set forth on their countries' Exchange Visitor Skills List. Such alien physicians are eligible for consideration of waivers under section 212(e) of the Immigration and Nationality Act, as amended, on the basis of ''No Objection'' statements submitted by their governments in their behalf through diplomatic channels to the Secretary of State of the Department of State.

[58 FR 15196, Mar. 19, 1993; 58 FR 48448, Sept. 16, 1993. Redesignated at 64 FR 54539, Oct. 7, 1999]

§ 62.28 International visitors.

(a) *Purpose.* The international visitor category is for the exclusive use of the Department of State. Programs under this section are for foreign nationals who are recognized or potential leaders and are selected by the Department of State to participate in observation tours, discussions, consultation, professional meetings, conferences, workshops, and travel. These programs are designed to enable the international visitors to better understand American culture and society and contribute to enhanced American knowledge of foreign cultures. The category is for people-to-people programs which seek to develop and strengthen professional and personal ties between key foreign nationals and Americans and American institutions.

(b) *Selection.* The Department of State and third parties assisting the Department of State shall adequately screen and select prospective international visitors to determine compliance with § 62.10(a) and the visitor eligibility requirements set forth below.

(c) *Visitor eligibility.* An individual participating in an exchange visitor program as an international visitor shall be:

(1) Selected by the Department of State;

(2) Engaged in consultation, observation, research, training, or demonstration of special skills; and

(3) A recognized or potential leader in a field of specialized knowledge or skill.

(d) *Program disclosure*. At the beginning of the program, the sponsor shall provide the international visitor with:

(1) Information on the length and location(s) of his or her exchange visitor program; and

(2) A summary of the significant components of the program.

(e) *Issuance of Form DS–2019*. The Form DS–2019 shall be issued only after the international visitor has been selected by the Department of State.

(f) *Location of the exchange*. The international visitor shall participate in an exchange visitor program at locations approved by the Department of State.

(g) *Duration of participation*. The international visitor shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which shall not exceed one year.

§ 62.29 Government visitors.

(a) *Purpose*. The government visitor category is for the exclusive use of the U.S. federal, state, or local government agencies. Programs under this section are for foreign nationals who are recognized as influential or distinguished persons, and are selected by U.S. federal, state, or local government agencies to participate in observation tours, discussions, consultation, professional meetings, conferences, workshops, and travel. These are people-to-people programs designed to enable government visitors to better understand American culture and society, and to contribute to enhanced American knowledge of foreign cultures. The objective is to develop and strengthen professional and personal ties between key foreign nationals and Americans and American institutions. The government visitor programs are for such persons as editors, business and professional persons, government officials, and labor leaders.

(b) *Designation*. The Department of State may, in its sole discretion, designate as sponsors U.S. federal, state, and local government agencies which offer foreign nationals the opportunity to participate in people-to-people programs which promote the purpose as set forth in (a) above.

(c) *Selection*. Sponsors shall adequately screen and select prospective government visitors to determine compliance with § 62.10(a) and the visitor eligibility requirements set forth below.

(d) *Visitor eligibility*. An individual participating in an exchange visitor program as a government visitor shall be:

(1) Selected by a U.S. federal, state, and local government agency;

(2) Engaged in consultation, observation, training, or demonstration of special skills; and

(3) An influential or distinguished person.

(e) *Program disclosure*. Before the beginning of the program, the sponsor shall provide the government visitor with:

(1) Information on the length and location(s) of his or her exchange visitor program;

(2) A summary of the significant components of the program; and

(3) A written statement which clearly states the stipend, if any, to be paid to the government visitor.

(f) *Issuance of Form DS–2019*. The Form DS–2019 shall be issued only after the government visitor has been selected by a U.S. federal, state, or local government agency and accepted by the private and/or public organization(s) with whom he or she will participate in the exchange visitor program.

(g) *Location of the exchange*. The government visitor shall participate in an exchange visitor program at the locations listed on his or her Form DS–2019.

(h) *Duration of participation*. The government visitor shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which shall not exceed eighteen months.

§ 62.30 Camp counselors.

(a) *Introduction*. In order to promote diverse opportunities for participation in educational and cultural exchange programs, the Department of State designates exchange sponsors to facilitate the entry of foreign nationals to serve as counselors in U.S. summer

camps. These programs promote international understanding by improving American knowledge of foreign cultures while enabling foreign participants to increase their knowledge of American culture. The foreign participants are best able to carry out this objective by serving as counselors per se, that is, having direct responsibility for supervision of groups of American youth and of activities that bring them into interaction with their charges. While it is recognized that some non-counseling chores are an essential part of camp life for all counselors, this program is not intended to assist American camps in bringing in foreign nationals to serve as administrative personnel, cooks, or menial laborers, such as dishwashers or janitors.

(b) *Participant eligibility*. Participation in camp counselor exchange programs is limited to foreign nationals who:

(1) Are at least 18 years of age;

(2) Are *bona fide* youth workers, students, teachers, or individuals with specialized skills; and

(c) *Participant selection*. In addition to satisfying the requirements in § 62.10(a), sponsors shall adequately screen all international candidates for camp counselor programs and at a minimum:

(1) Conduct an in-person interview; and

(2) Secure references from a participant's employer or teacher regarding his or her suitability for participation in a camp counselor exchange.

(d) *Participant orientation*. Sponsors shall provide participants, prior to their departure from the home country, detailed information regarding:

(1) Duties and responsibilities relating to their service as a camp counselor;

(2) Contractual obligations relating to their acceptance of a camp counselor position; and

(3) Financial compensation for their service as a camp counselor.

(e) *Participant placements*. Sponsors shall place eligible participants at camping facilities which are:

(1) Accredited;

(2) A member in good standing of the American Camping Association;

(3) Officially affiliated with a nationally recognized non-profit organization; or

(4) Have been inspected, evaluated, and approved by the sponsor.

(f) *Participant compensation*. Sponsors shall ensure that international participants receive pay and benefits commensurate with those offered to their American counterparts.

(g) *Participant supervision*. Sponsors shall provide all participants with a phone number which allows 24 hour immediate contact with the sponsor.

(h) *Program administration*. Sponsors shall:

(1) Comply with all provisions set forth in subpart A of this part;

(2) Not facilitate the entry of any participant for a program of more than four months duration; and

(3) Under no circumstance facilitate the entry into the United States of a participant for whom a camp placement has not been pre-arranged.

(i) *Placement report*. In lieu of listing the name and address of the camp facility at which the participant is placed on Form DS–2019, sponsors shall submit to the Department of State, no later than July 1st of each year, a report of all participant placements. Such report shall reflect the participant's name, camp placement, and the number of times the participant has previously participated in a camp counselor exchange.

(j) In order to ensure that as many different individuals as possible are recruited for participation in camp counselor programs, sponsors shall limit the number of participants who have previously participated more than once in any camp counselor exchange to not more than ten percent of the total number of participants that the sponsor placed in the immediately preceding year.

[58 FR 15196, Mar. 19, 1993, as amended at 59 FR 16984, Apr. 11, 1994. Redesignated at 64 FR 54539, Oct. 7, 1999]

§ 62.31 Au pairs.

(a) *Introduction*. This section governs Department of State-designated exchange visitor programs under which foreign nationals are afforded the opportunity to live with an American host family and participate directly in

the home life of the host family. All au pair participants provide child care services to the host family and attend a U.S. post-secondary educational institution. Au pair participants provide up to forty-five hours of child care services per week and pursue not less than six semester hours of academic credit or its equivalent during their year of program participation. Au pairs participating in the EduCare program provide up to thirty hours of child care services per week and pursue not less than twelve semester hours of academic credit or its equivalent during their year of program participation.

(b) *Program designation*. The Department of State may, in its sole discretion, designate bona fide programs satisfying the objectives set forth in paragraph (a) of this section. Such designation shall be for a period of two years and may be revoked by the Department of State for good cause.

(c) *Program eligibility*. Sponsors designated by the Department of State to conduct an au pair exchange program shall;

(1) Limit the participation of foreign nationals in such programs to not more than one year;

(2) Limit the number of hours an EduCare au pair participant is obligated to provide child care services to not more than 10 hours per day or more than 30 hours per week and limit the number of hours all other au pair participants are obligated to provide child care services to not more than 10 hours per day or more than 45 hours per week;

(3) Require that EduCare au pair participants register and attend classes offered by an accredited U.S. post-secondary institution for not less than twelve semester hours of academic credit or its equivalent and that all other au pair participants register and attend classes offered by an accredited U.S. post-secondary institution for not less than six semester hours of academic credit or its equivalent;

(4) Require that all officers, employees, agents, and volunteers acting on their behalf are adequately trained and supervised;

(5) Require that the au pair participant is placed with a host family within one hour's driving time of the home of the local organizational representative authorized to act on the sponsor's behalf in both routine and emergency matters arising from the au pair's participation in their exchange program;

(6) Require that each local organizational representative maintain a record of all personal monthly contacts (or more frequently as required) with each au pair and host family for which he or she is responsible and issues or problems discussed;

(7) Require that all local organizational representatives contact au pair participants and host families twice monthly for the first two months following a placement other than the initial placement for which the au pair entered the United States.

(8) Require that local organizational representatives not devoting their full time and attention to their program obligations are responsible for no more than fifteen au pairs and host families; and

(9) Require that each local organizational representative is provided adequate support services by a regional organizational representative.

(d) *Au pair selection*. In addition to satisfying the requirements of §62.10(a), sponsors shall ensure that all participants in a designated au pair exchange program:

(1) Are between the ages of 18 and 26;

(2) Are a secondary school graduate, or equivalent;

(3) Are proficient in spoken English;

(4) Are capable of fully participating in the program as evidenced by the satisfactory completion of a physical;

(5) Have been personally interviewed, in English, by an organizational representative who shall prepare a report of the interview which shall be provided to the host family; and

(6) Have successfully passed a background investigation that includes verification of school, three, non-family related personal and employment references, a criminal background check or its recognized equivalent and a personality profile. Such personality profile will be based upon a psychometric test designed to measure differences in characteristics among applicants against those characteristics

considered most important to successfully participate in the au pair program.

(e) *Au pair placement.* Sponsors shall secure, prior to the au pair's departure from the home country, a host family placement for each participant. Sponsors shall not:

(1) Place an au pair with a family unless the family has specifically agreed that a parent or other responsible adult will remain in the home for the first three days following the au pair's arrival;

(2) Place an au pair with a family having a child aged less than three months unless a parent or other responsible adult is present in the home;

(3) Place an au pair with a host family having children under the age of two, unless the au pair has at least 200 hours of documented infant child care experience. An au pair participating in the EduCare program shall not be placed with a family having pre-school children in the home unless alternative full-time arrangements for the supervision of such pre-school children are in place;

(4) Place an au pair with a host family having a special needs child, as so identified by the host family, unless the au pair has specifically identified his or her prior experience, skills, or training in the care of special needs children and the host family has reviewed and acknowledged in writing the au pair's prior experience, skills, or training so identified;

(5) Place an au pair with a host family unless a written agreement between the au pair and the host family detailing the au pair's obligation to provide child care has been signed by both the au pair and the host family prior to the au pair's departure from his or her home country. Such agreement shall clearly state whether the au pair is an EduCare program participant or not. Such agreement shall limit the obligation to provide child care services to not more than 10 hours per day or more than 45 hours per week unless the au pair is an EduCare participant. Such agreement shall limit the obligation of an EduCare participant to provide child care service to not more than 10 hours per day or more than 30 hours per week.

(6) Place the au pair with a family who cannot provide the au pair with a suitable private bedroom; and

(7) Place an au pair with a host family unless the host family has interviewed the au pair by telephone prior to the au pair's departure from his or her home country.

(f) *Au pair orientation.* In addition to the orientation requirements set forth at § 62.10, all sponsors shall provide au pairs, prior to their departure from the home country, with the following information:

(1) A copy of all operating procedures, rules, and regulations, including a grievance process, which govern the au pair's participation in the exchange program;

(2) A detailed profile of the family and community in which the au pair will be placed;

(3) A detailed profile of the educational institutions in the community where the au pair will be placed, including the financial cost of attendance at these institutions;

(4) A detailed summary of travel arrangements; and

(5) A copy of the Department of State's written statement and brochure regarding the au pair program.

(g) *Au pair training.* Sponsors shall provide the au pair participant with child development and child safety instruction, as follows:

(1) Prior to placement with the host family, the au pair participant shall receive not less than eight hours of child safety instruction no less than 4 of which shall be infant-related; and

(2) Prior to placement with the American host family, the au pair participant shall receive not less than twenty-four hours of child development instruction of which no less than 4 shall be devoted to specific training for children under the age of two.

(h) *Host family selection.* Sponsors shall adequately screen all potential host families and at a minimum shall:

(1) Require that the host parents are U.S. citizens or legal permanent residents;

(2) Require that host parents are fluent in spoken English;

(3) Require that all adult family members resident in the home have

been personally interviewed by an organizational representative;

(4) Require that host parents and other adults living full-time in the household have successfully passed a background investigation including employment and personal character references;

(5) Require that the host family have adequate financial resources to undertake all hosting obligations;

(6) Provide a written detailed summary of the exchange program and the parameters of their and the au pair's duties, participation, and obligations; and

(7) Provide the host family with the prospective au pair participant's complete application, including all references.

(i) *Host family orientation.* In addition to the requirements set forth at §62.10 sponsors shall:

(1) Inform all host families of the philosophy, rules, and regulations governing the sponsor's exchange program and provide all families with a copy of the Department of State's written statement and brochure regarding the au pair program;

(2) Provide all selected host families with a complete copy of Department of State-promulgated Exchange Visitor Program regulations, including the supplemental information thereto;

(3) Advise all selected host families of their obligation to attend at least one family day conference to be sponsored by the au pair organization during the course of the placement year. Host family attendance at such a gathering is a condition of program participation and failure to attend will be grounds for possible termination of their continued or future program participation; and

(4) Require that the organization's local counselor responsible for the au pair placement contacts the host family and au pair within forth-eight hours of the au pair's arrival and meets, in person, with the host family and au pair within two weeks of the au pair's arrival at the host family home.

(j) *Wages and hours.* Sponsors shall require that au pair participants:

(1) Are compensated at a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor. EduCare participants shall be compensated at a weekly rate that is 75% of the weekly rate paid to non-EduCare participants;

(2) Do not provide more than 10 hours of child care per day, or more than 45 hours of child care in any one week. EduCare participants may not provide more than 10 hours of child care per day or more than 30 hours of child care in any one week;

(3) Receive a minimum of one and one half days off per week in addition to one complete weekend off each month; and

(4) Receive two weeks of paid vacation.

(k) *Educational component.* Sponsors must:

(1) Require that during their initial period of program participation, all EduCare au pair participants complete not less than 12 semester hours (or their equivalent) of academic credit in formal educational settings at accredited U.S. post-secondary institutions and that all other au pair participants complete not less than six semester hours (or their equivalent) of academic credit in formal educational settings at accredited U.S. post-secondary institutions. As a condition of program participation, host family participants must agree to facilitate the enrollment and attendance of au pairs in accredited U.S. post secondary institutions and to pay the cost of such academic course work in an amount not to exceed $1,000 for EduCare au pair participants and in an amount not to exceed $500 for all other au pair participants.

(2) Require that during any extension of program participation, all participants (*i.e.*, Au Pair or EduCare) satisfy an additional educational requirement, as follows:

(i) For a nine or 12-month extension, all au pair participants and host families shall have the same obligation for coursework and payment therefore as is required during the initial period of program participation.

(ii) For a six-month extension, EduCare au pair participants must complete not less than six semester hours (or their equivalent) of academic

credit in formal educational settings at accredited U.S. post-secondary institutions. As a condition of participation, host family participants must agree to facilitate the enrollment and attendance of au pairs at accredited U.S. post secondary institutions and to pay the cost of such academic coursework in an amount not to exceed $500. All other au pair participants must complete not less than three semester hours (or their equivalent) of academic credit in formal educational settings at accredited U.S. post-secondary institutions. As a condition of program participation, host family participants must agree to facilitate the enrollment and attendance of au pairs at accredited U.S. post secondary institutions and to pay the cost of such academic coursework in an amount not to exceed $250.

(l) *Monitoring.* Sponsors shall fully monitor all au pair exchanges, and at a minimum shall:

(1) Require monthly personal contact by the local counselor with each au pair and host family for which the counselor is responsible. Counselors shall maintain a record of this contact;

(2) Require quarterly contact by the regional counselor with each au pair and host family for which the counselor is responsible. Counselors shall maintain a record of this contact;

(3) Require that all local and regional counselors are appraised of their obligation to report unusual or serious situations or incidents involving either the au pair or host family; and

(4) Promptly report to the Department of State any incidents involving or alleging a crime of moral turpitude or violence.

(m) *Reporting requirements.* Along with the annual report required by regulations set forth at § 62.17, sponsors shall file with the Department of State the following information:

(1) A summation of the results of an annual survey of all host family and au pair participants regarding satisfaction with the program, its strengths and weaknesses;

(2) A summation of all complaints regarding host family or au pair participation in the program, specifying the nature of the complaint, its resolution, and whether any unresolved complaints are outstanding;

(3) A summation of all situations which resulted in the placement of au pair participant with more than one host family;

(4) A report by a certified public accountant, conducted pursuant to a format designated by the Department of State, attesting to the sponsor's compliance with the procedures and reporting requirements set forth in this subpart;

(5) A report detailing the name of the au pair, his or her host family placement, location, and the names of the local and regional organizational representatives; and

(6) A complete set of all promotional materials, brochures, or pamphlets distributed to either host family or au pair participants.

(n) *Sanctions.* In addition to the sanctions provisions set forth at § 62.50, the Department of State may undertake immediate program revocation procedures upon documented evidence that a sponsor has failed to:

(1) Comply with the au pair placement requirements set forth in paragraph (e) of this section;

(2) Satisfy the selection requirements for each individual au pair as set forth in paragraph (d) of this section; and

(3) Enforce and monitor host family's compliance with the stipend and hours requirements set forth in paragraph (j) of this section.

(o) *Extension of program.* The Department, in its sole discretion, may approve extensions for au pair participants beyond the initial 12-month program. Applications to the Department for extensions of six, nine, or 12 months, must be received by the Department not less than 30 calendar days prior to the expiration of the exchange visitor's initial authorized stay in either the Au Pair or EduCare program (*i.e.*, 30-calendar days prior to the program end date listed on the exchange visitor's Form DS–2019). The request for an extension beyond the maximum duration of the initial 12-month program must be submitted electronically in the Department of Homeland

Security's Student and Exchange Visitor Information System (SEVIS). Supporting documentation must be submitted to the Department on the sponsor's organizational letterhead and contain the following information:

(1) Au pair's name, SEVIS identification number, date of birth, the length of the extension period being requested;

(2) Verification that the au pair completed the educational requirements of the initial program; and

(3) Payment of the required non-refundable fee (see 22 CFR 62.90) via Pay.gov.

(p) *Repeat participation.* A foreign national who enters the United States as an au pair Exchange Visitor Program participant and who has successfully completed his or her program is eligible to participate again as an au pair participant, provided that he or she has resided outside the United States for at least two years following completion of his or her initial au pair program.

[60 FR 8552, Feb. 15, 1995, as amended at 62 FR 34633, June 27, 1997; 64 FR 53930, Oct. 5, 1999. Redesignated at 64 FR 54539, Oct. 7, 1999; 66 FR 43087, Aug. 17, 2001; 71 FR 33238, June 8, 2006; 73 FR 34862, June 19, 2008]

§ 62.32 Summer work travel.

(a) *Introduction.* The regulations in this section (in combination with any other provisions of 22 CFR part 62, as applicable) govern participation in Summer Work Travel programs conducted by Department of State-designated sponsors pursuant to the authority granted the Department of State under Public Law 105–277.

(b) *Purpose.* The purpose of this program is to provide foreign college and university students with opportunities to interact with U.S. citizens, experience U.S. culture while sharing their own cultures with Americans they meet, travel in the United States, and work in jobs that require minimal training and are seasonal or temporary in order to earn funds to help defray a portion of their expenses. Employment is of a seasonal nature when the required service is tied to a certain time of the year by an event or pattern and requires labor levels above and beyond existing worker levels. Employment is of a temporary nature when an employer's need for the duties to be performed is a one-time occurrence, a peak load need, or an intermittent need. It is the nature of employers' needs, not the nature of the duties that is controlling.

(c) *Duration of participation.* Summer Work Travel participants are authorized to participate in the Exchange Visitor Program for up to four months during the long break between academic years as determined by the Department of State. Extensions of program participation are not permitted.

(d) *Participant screening and selection.* In addition to satisfying the requirements set forth at § 62.10(a), sponsors are solely responsible for adequately screening and making the final selection. The screening process requires that sponsors (or vetted foreign entities acting on their behalf) at a minimum must:

(1) Conduct and document interviews with potential participants either in-person or by video-conference;

(2) Verify proficiency in conversational English and reading comprehension through either recognized language tests administered by academic institutions or English language schools or through the required documented interviews;

(3) Select applicants who demonstrate their intention to participate in the cultural aspects of the Summer Work Travel Program.

(4) Confirm that at the time of application, applicants (including final year students) are enrolled full-time and pursuing studies at accredited post-secondary, classroom-based, academic institutions physically located outside of the United States and have successfully completed at least one semester, or equivalent, of post-secondary academic study.

(e) *Participant orientation.* In addition to satisfying the requirements set forth at § 62.10(b) and (c), sponsors must provide program participants, prior to participants' departures from their home countries, the following information and/or documentation:

(1) A copy of the Department of State's Summer Work Travel Participant Letter;

(2) A copy of the Department of State's Summer Work Travel Program Brochure;

(3) The Department of State's toll-free help line telephone number;

(4) The sponsor's 24/7 immediate contact telephone number;

(5) Information advising participants of their obligations to notify their sponsors within ten days after they arrive in the United States and within ten days after they initially secure or change residences;

(6) Information advising participants that they may not begin working at initial, replacement, or additional jobs until their sponsors have verified the terms and conditions of such employment and fully vetted their host employers as set forth at paragraph (n) of this section;

(7) For participants with jobs secured prior to departing from selected home countries, documentation explaining the terms and conditions of such jobs and providing information about available housing and transportation to and from work;

(8) Information explaining the cultural component of the Summer Work Travel Program, including guidance on how to best experience U.S. culture and/or descriptions of cultural opportunities arranged by the sponsor; and

(9) Information explaining that sponsors will terminate the programs of participants who fail to comply with enumerated program regulations (*i.e.*, reporting their arrivals, reporting changes of residence, not starting work at unverified jobs, responding to sponsor monthly outreach/monitoring efforts).

(f) *Cultural exchange.* (1) Sponsors must ensure that all participants have opportunities to work alongside U.S. citizens and interact regularly with U.S. citizens to experience U.S. culture during the workday portion of their Summer Work Travel programs; and

(2) Sponsors must ensure that all participants have opportunities to engage in cultural activities or events outside of work by planning, initializing, and carrying out events or other activities that provide participants' exposure to U.S. culture.

(g) *Participant placement.* (1) Sponsors and third parties acting on their behalf may not pay or otherwise provide any incentive to employers to accept program participants for job placements with such employers.

(2) Sponsors must confirm initial, replacement, and additional jobs placements of all Summer Work Travel Program participants before participants may start work by verifying, at a minimum, the terms and conditions of such employment and fully vetting their host employers as set forth at paragraph (n) of this section. Once participants have arrived in the United States and identified initial, replacement, or additional jobs, sponsors must vet such jobs within 72 hours.

(3) Sponsors must not pose obstacles to job changes, but must offer reasonable assistance to participants wishing to change jobs regardless of whether their jobs were secured by the sponsors (direct-placed) or by the participants (self-placed).

(4) Sponsors may place participants only in jobs that:

(i) Are seasonal or temporary as defined in paragraph (b) of this section; and

(ii) Provide opportunities for regular communication and interaction with U.S. citizens and allow participants to experience U.S. culture.

(5) Sponsors may not place participants in jobs:

(i) That require licensing;

(ii) That are on the program exclusion list set forth at paragraph (h) of this section; or

(iii) For which there is another specific J visa category (e.g., Camp Counselor, Trainee, Intern).

(6) Sponsors may not place participants with staffing agencies unless the placements meet the following three criteria:

(i) Participants must be employees of and paid by the staffing agencies;

(ii) Staffing agencies must provide full-time, primary, on-site supervision of the participants;

(iii) Staffing agencies must effectively control the work sites, e.g., have hands-on management responsibility for the participants.

(7) Sponsors may not place participants with employers that fill non-seasonal or non-temporary job openings with exchange visitors with staggered vacation schedules.

(8) Sponsors must use extra caution when placing students in positions at employers in lines of business that are frequently associated with trafficking persons (e.g., modeling agencies, housekeeping, janitorial services).

(9) Sponsors must consider the availability of suitable, affordable housing (e.g., that meets local codes and ordinances) and reliable, affordable, and convenient transportation to and from work when making job placements.

(i) If employers do not provide or arrange housing and/or transportation, or if participants decline employer-provided housing or transportation, sponsors must actively and immediately assist participants with arranging appropriate housing and transportation.

(ii) If employers provide housing and/or transportation to and from work, job offers must include details of all such arrangements, including the cost to participants; whether such arrangements deduct such costs from participants' wages; and the market value of housing and/or transportation in accordance with the Fair Labor Standards Act regulations set forth at 29 CFR part 531, if they are considered part of the compensation packages.

(10) For participants who are nationals of non-Visa Waiver Program countries and participants who are nationals of Visa Waiver Program countries with job placements screened in advance by the sponsors (direct placement) or jobs found by the participants (self-placement), prior to issuing Form DS–2019, sponsors must vet the potential employers as set forth at paragraph (n) of this section, confirm the terms and conditions of the job offers, and input complete and correct data into the Student and Exchange Visitor Information System (SEVIS) pursuant to the requirements set forth in § 62.70(f).

(11) Sponsors of applicants who are nationals of Visa Waiver Program countries and who have not secured jobs prior to departing from their home countries must:

(i) Ensure that such participants receive pre-departure information that explains how to seek employment and secure lodging in the United States, and clearly identifies the criteria for appropriate jobs set forth at paragraph (g) of this section and the categories of employment and positions that are on the program exclusion list set forth at paragraph (h) of this section;

(ii) Ensure that such participants have sufficient financial resources to support themselves during their searches for employment;

(iii) Assist participants who have not found suitable employment within one week of commencing their job searches;

(iv) Instruct participants of their obligation to notify their sponsors when they obtain job offers (and that they cannot start such jobs until the sponsors vet them); and

(v) Promptly (*i.e.*, within 72 hours) confirm the initial jobs of such participants, at a minimum, by verifying the terms and conditions of such employment and fully vetting their host employers as set forth at paragraph (n) of this section.

(h) *Program exclusions.* Sponsors must not place participants:

(1) In positions that could bring notoriety or disrepute to the Exchange Visitor Program;

(2) In sales positions that require participants to purchase inventory that they must sell in order to support themselves;

(3) In domestic help positions in private homes (e.g., child care, elder care, gardener, chauffeur);

(4) As pedicab or rolling chair drivers or operators;

(5) As operators or drivers of vehicles or vessels for which drivers' licenses are required regardless of whether they carry passengers or not;

(6) In positions related to clinical care that involves patient contact;

(7) In any position in the adult entertainment industry (including, but not limited to jobs with escort services, adult book/video stores, and strip clubs);

(8) In positions requiring work hours that fall predominantly between 10:00 p.m. and 6:00 a.m.;

(9) In positions declared hazardous to youth by the Secretary of Labor at Subpart E of 29 CFR part 570;

(10) In positions that require sustained physical contact with other people and/or adherence to the Centers for

Disease Control and Prevention's Universal Blood and Body Fluid Precautions guidelines (e.g., body piercing, tattooing, massage, manicure);

(11) In positions that are substantially commission-based and thus do not guarantee that participants will be paid minimum wage in accordance with federal and state standards;

(12) In positions involved in gaming and gambling that include direct participation in wagering and/or betting;

(13) In positions in chemical pest control, warehousing, catalogue/online order distribution centers;

(14) In positions with travelling fairs or itinerant concessionaires;

(15) In positions for which there is another specific J category (e.g., camp counselor, intern, trainee); or

(16) After November 1, 2012, in positions in the North American Industry Classification System's (NAICS) Goods-Producing Industries occupational categories industry sectors 11, 21, 23, 31–33 numbers (set forth at *http://www.bls.gov/iag/tgs/iag_index_naics.htm)*.

(i) *Participant compensation*. (1) Sponsors must inform program participants of Federal, State, and Local Minimum Wage requirements, and ensure that at a minimum, participants are compensated at the higher of:

(i) The applicable Federal, State, or Local Minimum Wage (including overtime); or

(ii) Pay and benefits commensurate with those offered to their similarly situated U.S. counterparts.

(2) Sponsors must demonstrate that participants are also compensated according to the above standards in the following (and similar) situations:

(i) The host employers provide housing and/or transportation as part of participants' compensation, but the compensation package does not explain that the lower hourly wage reflects such benefits; or

(ii) The employers compensate participants on a ''piece'' basis (e.g., number of rooms cleaned). If at the end of each pay period, the participant's earnings under the piece rate do not equal at least the amount the participant would have earned had the participant been paid the predominant local wage as provided in subparagraph (1), the participant's pay must be supplemented at that time so that the participant's earnings are at least as much as the required local wage as provided in subparagraph (1).

(3) Sponsors must ensure that appropriate assistance is provided to participants on an as-needed basis and that sponsors are available to participants (and host employers) to assist as facilitators, counselors, and information resources.

(j) *Monitoring*. Sponsors must:

(1) Maintain, at a minimum, monthly personal contacts with program participants. Such contact may be in-person, by telephone, or via exchanges of electronic mail (including a response from the participant) and must be properly documented. Sponsors must promptly and appropriately address issues affecting the participants' health, safety, and welfare identified through such contacts; and

(2) Provide appropriate assistance to participants on an as-needed basis and be available to participants (and host employers) to assist as facilitators, counselors, and information resources.

(k) *Internal controls*. Sponsors must utilize organization-specific standard operating procedures for training and supervising all organization employees. In addition, sponsors must establish internal controls to ensure that employers and/or foreign entities comply with the terms of agreements with such third parties involved in the administration of the sponsors' exchange visitor programs (*i.e.*, affect the core programmatic functions).

(l) *Sponsors' use of third parties*. (1) If sponsors utilize foreign third party entities to assist in fulfilling the core programmatic functions of screening and orientation that may be conducted outside the United States, they must first obtain written and executed agreements with such third parties. For the purpose of this section, U.S. entities operating outside the United States (or its possessions or territories) are considered foreign entities. At a minimum, these written agreements must:

(i) Outline the obligations and full relationship between the sponsors and

such third parties on all matters involving the administration of the sponsors' exchange visitor programs;

(ii) Delineate the parties' respective responsibilities;

(iii) Include annually updated price lists for Summer Work Travel Programs marketed by the foreign entities including itemizations of all costs charged to participants;

(iv) Contain representations that such foreign entities will not engage in, permit the use of, or otherwise cooperate or contract with other third parties (including staffing or employment agencies or subcontractors) for the purpose of outsourcing any core programmatic functions of screening and orientation covered by the agreement; and

(v) Confirm that the foreign entities agree not to pay or provide incentives to employers in the United States to accept program participants for job placements.

(2) If sponsors utilize domestic third party entities to assist in fulfilling the core programmatic functions of orientation and promoting mutual understanding, they must first obtain written and executed agreements with such third parties. Domestic third parties engaged by sponsors may not engage or subcontract any other parties to assist in fulfilling these core programmatic functions. Only host employers may assist in providing orientation to program participants. At a minimum, these written agreements must:

(i) Outline the obligations and full relationship between the sponsors and such third parties on all matters involving the administration of the sponsors' exchange visitor programs; and

(ii) Delineate the parties' respective responsibilities.

(m) *Vetting third party foreign entities.* Sponsors must undertake appropriate due diligence in the review of potential overseas agents or partners (*i.e.*, foreign entities) who assist in fulfilling the sponsors' core programmatic functions that may be conducted outside the United States (*i.e.*, screening and orientation) and must, at a minimum, annually review and maintain the following documentation for potential or existing foreign entities:

(1) Proof of business licensing and/or registration to enable them to conduct business in the venue(s) where they operate;

(2) Disclosure of any previous bankruptcy and of any pending legal actions or complaints against such an entity on file with local authorities;

(3) Written references from three current business associates or partner organizations;

(4) Summary of previous experience conducting J–1 Exchange Visitor Program activities;

(5) Criminal background check reports (including original and English translations) for all owners and officers of the organizations;

(6) A copy of the sponsor-approved advertising materials the foreign entities intend to use to market the sponsors' programs (including original and English translations); and

(7) A copy of the foreign entity's notarized recent financial statements.

(n) *Vetting domestic third party entities.* Annually, sponsors must undertake appropriate due diligence in the vetting of domestic third parties who assist in the promotion of mutual understanding and potential host employers.

(1) Sponsors must ensure that third parties assisting in promoting mutual understanding (*i.e.*, providing opportunities for participants to engage in cultural activities) are reputable individuals or organizations that are qualified to perform the activities agreed to and that they have sufficient liability insurance, if appropriate. All third parties that are registered business entities must be vetted according to the host employer procedures set forth in paragraphs (n)(2)(i) through (iii) of this section.

(2) Sponsors must ensure that potential host employers are legitimate and reputable businesses by, at a minimum:

(i) Making direct contact in person or by telephone with potential employers to verify the business owners' and/or managers' names, telephone numbers, email addresses, street addresses, and professional activities;

(ii) Utilizing publicly available information, for example, but not limited to, state registries, advertisements, brochures, Web sites, and/or feedback from prior participants to confirm that

all job offers have been made by viable business entities;

(iii) Obtaining potential host employers' Employer Identification Numbers and copies of their current business licenses; and

(iv) Verifying the potential host employers' Worker's Compensation Insurance Policy or equivalent in each state where a participant will be placed or, if applicable, evidence of that state's exemption from requirement of such coverage.

(3) At the beginning of each placement season, sponsors must confirm:

(i) The number of job placements available with host employers;

(ii) That host employers will not displace domestic U.S. workers at worksites where they will place program participants; and

(iii) That host employers have not experienced layoffs in the past 120 days and do not have workers on lockout or on strike.

(o) *Host employer cooperation*. Sponsors may place participants only with host employers that agree to:

(1) Make good faith efforts to provide participants the number of hours of paid employment per week as identified on their job offers and agreed to when the sponsors vetted the jobs;

(2) Pay eligible participants for overtime worked in accordance with applicable State or Federal law;

(3) Notify sponsors promptly when participants arrive at the work sites to begin their programs; when there are any changes or deviations in the job placements during the participants' programs; when participants are not meeting the requirements of their job placements; or when participants leave their positions ahead of their planned departures;

(4) Contact sponsors immediately in the event of any emergency involving participants or any situations that impact their health, safety, or welfare; and

(5) In those instances when the employer provides housing or transportation, agree to provide suitable and acceptable accommodations and/or reliable, affordable, and convenient transportation.

(p) *Reporting requirements*. Sponsors must electronically comply with the following reporting requirements utilizing Department-provided templates:

(1) Submit placement reports on January 31 and July 31 of each year, identifying all Summer Work Travel Program participants who began exchange programs during the preceding six-month period. The reports must include the exchange visitors' names, SEVIS Identification Numbers, countries of citizenship or legal permanent residence, names of host employers, and the length of time it took non-preplaced participants to secure job placements. For participants who change jobs or have multiple jobs during their programs, the report must include all such placements;

(2) Maintain listings of all active foreign agents or partners on the Foreign Entity Report by promptly informing the Department of any additions, deletions, or changes to foreign entity information by submitting new versions of their reports that reflect all current information. Reports must include the names, addresses, and contact information, including physical and mailing addresses, telephone numbers, and email addresses of all foreign entities that assist the sponsors in fulfilling the provision of core programmatic services. Sponsors must utilize only vetted foreign entities identified in the Foreign Entity Report to assist in fulfilling the sponsors' core programmatic functions outside the United States, and they must inform the Department promptly when and why they have cancelled contractual arrangements with foreign entities; and

(3) Submit annual participant price lists to the Department on January 31 of each year in a format approved by the Department to provide itemized breakdowns of the costs that exchange visitors must pay to both foreign agents and sponsors to participate in the Summer Work Travel Program on a country-specific (and, if appropriate, foreign agent-specific) basis.

[77 FR 27609, May 11, 2012]

Subpart C—Status of Exchange Visitors

§ 62.40 Termination of program participation.

(a) A sponsor shall terminate an exchange visitor's participation in its program when the exchange visitor:

(1) Fails to pursue the activities for which he or she was admitted to the United States;

(2) Is unable to continue, unless otherwise exempted pursuant to these regulations;

(3) Violates the Exchange Visitor Program regulations and/or the sponsor's rules governing the program, if, in the sponsor's opinion, termination is warranted;

(4) Willfully fails to maintain the insurance coverage required under § 62.14 of these regulations; or

(b) An exchange visitor's participation in the Exchange Visitor Program is subject to termination when he or she engages in unauthorized employment. Upon establishing such violation, the Department of State shall terminate the exchange visitor's participation in the Exchange Visitor Program.

§ 62.41 Change of category.

(a) The Department of State may, in its discretion, permit an exchange visitor to change his or her category of exchange participation. Any change in category must be clearly consistent with and closely related to the participant's original exchange objective and necessary due to unusual or exceptional circumstances.

(b) A request for change of category along with supporting justification must be submitted to the Department of State by the participant's sponsor. Upon Department of State approval the sponsor shall issue to the exchange visitor a duly executed Form DS–2019 reflecting such change of category and provide a notification copy of such form to the Department of State.

(c) Requests for change of category from research scholar to student will be evaluated recognizing the fact that, in some cases, research skills can be substantially enhanced by doctoral study.

(d) An exchange visitor who applies for a change of category pursuant to these regulations is considered to be maintaining lawful status during the pendency of the application.

(e) An exchange visitor who applies for a change of category and who subsequently receives notice from the Department of State that the request has been denied is considered to be maintaining lawful status for an additional period of thirty days from the day of such notice, during which time the exchange visitor is expected to depart the country, or for a period of thirty days from expiration of the exchange visitors' Form DS–2019, whichever is later.

§ 62.42 Transfer of program.

(a) Program sponsors may, pursuant to the provisions set forth in this section, permit an exchange visitor to transfer from one designated program to another designated program.

(b) The responsible officer of the program to which the exchange visitor is transferring:

(1) Shall verify the exchange visitor's visa status and program eligibility;

(2) Execute the Form DS–2019; and

(3) Secure the written release of the current sponsor.

(c) Upon return of the completed Form DS–2019, the responsible officer of the program to which the exchange visitor has transferred shall provide:

(1) The exchange visitor his or her copy of the Form DS–2019; and

(2) A notification copy of such form to the Department of State.

§ 62.43 Extension of Program.

(a) Responsible officers may extend an exchange visitor's participation in the Exchange Visitor Program up to the limit of the permissible period of participation authorized for his or her specific program category.

(b) A responsible officer extending the program of an exchange visitor shall issue to the exchange visitor a duly executed Form DS–2019 reflecting such extension and provide a notification copy of such form to the Department of State.

(c) The responsible officer seeking a program extension on behalf of an exchange visitor in excess of that authorized for his or her specific category of participation shall:

(1) Adequately document the reasons which justify such extension; and

(2) Secure the prior written approval of the Department of State for such extension.

(d) In addition to individual requests, the Department of State shall entertain requests for groups of similarly situated exchange visitors.

§ 62.45 Reinstatement to valid program status.

(a) *Definitions.* For purpose of this section—

You means the Responsible Officer or Alternate Responsible Officer;

Exchange visitor means the person who enters the United States on a J visa in order to participate in an exchange program designated by the Secretary of State of the Department of State.

Fails or failed maintain valid program status means the status of an exchange visitor who has completed, concluded, ceased, interrupted, graduated from, or otherwise terminated the exchange visitor's participation in the exchange program, or who remains in the United States beyond the end date on the exchange visitor's current Form DS–2019.

Unauthorized employment means any employment not properly authorized by you or by the Attorney General, *i.e.*, the Immigration and Naturalization Service, prior to commencement of employment. Unauthorized employment does not include activities that are normally approvable, as described in paragraph (c)(3) of this section.

We, our, or us means the office of Exchange Visitor Program Services of the Department of State.

(b) *Who is authorized to correct minor or technical infractions of the Exchange Visitor Program regulations?* (1) If the exchange visitor committed a technical or minor infraction of the regulations, you are authorized to correct the exchange visitor's records with respect to such technical or minor infractions of the regulations in this part. Your correction of such an infraction(s) returns the exchange visitor to the status quo ante, *i.e.*, it is as if the infraction never occurred.

(2) You may only correct the exchange visitor's record with respect to a technical or minor infraction of the regulations in this part if the exchange visitor is pursuing or intending to pursue the exchange visitor's original program objective.

(3) You may not correct the exchange visitor's records with respect to a technical or minor infraction of the regulations in this part if the exchange visitor has willfully failed to maintain insurance coverage during the period for which the record is being corrected; if the exchange visitor has engaged in unauthorized employment during that period, as defined in paragraph (a) of this section, of if the exchange visitor was involuntarily suspended or terminated from his or her program during the period.

(4) If the exchange visitor has failed to maintain valid program status because of a substantive violation of the regulations in this part, you must apply to us for reinstatement.

(c) *What violations or infractions of the regulations in this part do we consider to be technical or minor ones, and how do you correct the record?* We consider the following to be examples of technical or minor infractions which you are authorized to correct:

(1) Failure to extend the Form DS–2019 in a timely manner (*i.e.*, prior to the end date on the current Form DS–2019) due to inadvertence or neglect on your part or on the part of the exchange visitor.

(2) Failure on the part of the exchange visitor to conclude a transfer of program prior to the end date on the current Form DS–2019 due to administrative delay or oversight, inadvertence or neglect on your part or on the part of the exchange visitor;

(3) Failure to receive your prior approval and/or an amended Form DS–2019 before accepting an honorarium or other type of payment for engaging in a normally approvable and appropriate activity. Example, a lecture, consultation, or other activity appropriate to the category which is provided by a professor, research scholar, short-term scholar or specialist without prior approval or an amended Form DS–2019

issued prior to the occurrence of the activity.

(4) You correct the record *status quo ante* by issuing a Form DS–2019 or by writing an authorization letter to reflect the continuity in the program or the permission to engage in the activity that a timely issued document would have reflected.

(i) Forms DS–2019 should be:

(A) Issued to show continued authorized stay without interruption;

(B) Marked in the ''purpose'' box with the appropriate purpose (*i.e.*, extension, transfer, etc.) and with the additional notation of ''correct the record'' typed in;

(C) Dated as of the date the Form was actually executed; and,

(D) Submitted to the Department of State in the same way as any other notification.

(ii) Letters or other authorization documents should be:

(A) Issued according to the regulations in this part appropriate to the category and the activity;

(B) Marked or annotated to show ''correct the record,''

(C) Dated as of the date the letter or document was actually executed; and,

(D) Attached to the exchange visitor's Form DS–2019 and/or retained in the sponsor's file as required by the regulations in this part for that particular type of letter or document.

(d) *How do you determine if an infraction, other than those examples listed above is a technical or minor infraction?* It is impossible to list every example of a technical or minor infraction. To guide you in making a determination, you are to examine the following criteria:

(1) Regardless of the reason, has the exchange visitor failed to maintain valid program status for more than 120 calendar days after the end date on the current Form DS–2019?

(2) Has the exchange visitor, by his or her actions, failed to maintain, at all relevant times, his or her original program objective?

(3) Has the exchange visitor willfully failed to comply with our insurance coverage requirements (§ 62.14)?

(4) Has the exchange visitor engaged in unauthorized employment, as that term is defined in paragraph (a) of this section?

(5) Has the exchange visitor category been involuntarily suspended or terminated from his or her program?

(6) Has an exchange visitor in the student category failed to maintain a full course of study (as defined in § 62.2) without prior consultation with you and the exchange visitor's academic advisor?

(7) Has the exchange visitor failed to pay the fee mandated by Public Law 104–208 (the ''CIPRIS'' fee)?

(8) If the answer to any of the above questions is ''yes,'' then the infraction is not a technical or minor one and you are not authorized to reinstate the exchange visitor to valid program status.

(e) *Which violations or infractions do we consider to be substantive ones requiring you to apply to us for reinstatement?* The following are substantive violations or infractions of the regulations in this part by the exchange visitor which require you to apply to us for reinstatement to valid program status:

(1) Failure to maintain valid program status for more than 120 days after the end date on the current Form DS–2019;

(2) If a student, failure to maintain a full course of study (as defined in § 62.2) without prior consultation with you and the exchange visitor's academic advisor.

(f) *Which, if any, violations of the regulations in this part or other conditions preclude reinstatement and will result in a denial if application is made?* We will not consider requests for reinstatement (nor should you) when an exchange visitor has:

(1) Knowingly or willfully failed to obtain or maintain the required health insurance (§ 62.14) at all times while in the United States;

(2) Engaged in unauthorized employment, as that term is defined in paragraph (a) of this section;

(3) Been suspended or terminated from the most recent exchange visitor program;

(4) Failed to maintain valid program status for more than 270 calendar days;

(5) Received a favorable recommendation from the Department of State on an application for waiver of section 212(e) of the Immigration and Nationality Act [8 U.S.C. 1182(e)]; or,

(6) Failed to pay the fee mandated by Public Law 104–208 (the ''CIPRIS'' fee.)

(g) *What if you cannot determine which category (technical, substantive, or non-reinstatable) the violation or infraction falls within?* If you cannot determine which category the violation or condition falls within, then you must, on behalf of the exchange visitor, apply to us for reinstatement.

(h) *If you determine that the exchange visitor's violation of the regulations in this part is a substantive one, how do you apply for a reinstatement to valid program status?* (1) If you determine that the violation of the regulations in this part is a substantive one, and that the exchange visitor has failed to maintain valid program status for 120 days or less, you must apply to us for reinstatement of the exchange visitor to valid program status. Your application must include:

(i) All copies of the exchange visitor's Forms DS–2019 issued to date;

(ii) A new, completed Form DS–2019, showing in Block 3 the date of the period for which reinstatement is sought, *i.e.*, the new program end date;

(iii) A copy of the receipt showing that the Public Law 104–208 fee has been paid; and,

(iv) A written statement (and documentary information supporting such statement):

(A) Declaring that the exchange visitor is pursuing or was at all times intending to pursue the original exchange visitor program activity for which the exchange visitor was admitted to the United States; and,

(B) Showing that the exchange visitor failed to maintain valid program status due to circumstances beyond the control of the exchange visitor, or from administrative delay or oversight, inadvertence, or excusable neglect on your part or the exchange visitor's part; or,

(C) Showing that it would be an unusual hardship to the exchange visitor if we do not grant the reinstatement to valid program status.

(2) If you determine that the violation of the regulations is a substantive one, and that the exchange visitor has failed to maintain valid program status for more than 120 days, then you must apply to us for reinstatement of the exchange visitor to valid program status. Your application must include:

(i) Copies of all the exchange visitor's Forms DS–2019 issued to date;

(ii) A new, completed Form DS–2019, showing in Block 3 the date for which reinstatement is sought, *i.e.*, the new program end date;

(iii) A copy of the receipt showing that the Pub. L. 104–208 fee has been paid; and,

(iv) A written statement (together with documentary evidence supporting such statement):

(A) Declaring that the exchange visitor is pursuing or was at all times intending to pursue the exchange visitor program activity for which the exchange visitor was admitted to the United States; and,

(B) Showing that the exchange visitor failed to maintain valid program status due to circumstances beyond the control of the exchange visitor, or from administrative delay or oversight, inadvertence, or excusable neglect on your part or the exchange visitor's part; and,

(C) Showing that it would be an unusual hardship to the exchange visitor if we do not grant the reinstatement to valid program status.

(i) *How will we notify you of our decision on your request for reinstatement?* (1) If we deny your request for reinstatement, we will notify you by letter.

(2) If we approve your request for reinstatement, we will notify you:

(i) By stamping Box 6 on the new Form DS–2019 to show that reinstatement was granted, effective as of the date on which the application for reinstatement was received by the Exchange Visitor Program Services office; and

(ii) By returning the new Form DS–2019 for the exchange visitor.

(j) *How long will it take us to act on your request for reinstatement?* We will act on your request for reinstatement within forty-five days from the date on which we receive the request *and* supporting documentation.

(k) *Are you required to notify us each time that you correct a record?* No special notification is necessary. Submission of the notification copy of Form DS–2019 to the Department of State serves

as notice that a record has been corrected. Following the regulations in this part in issuing a letter or document serves as correction in the sponsor's file for those items not normally sent to the Department of State under existing notification procedures.

[64 FR 44126, Aug. 13, 1999. Redesignated at 64 FR 54539, Oct. 7, 1999]

Subpart D—Sanctions

§ 62.50 Sanctions.

(a) *Reasons for sanctions.* The Department of State (Department) may impose sanctions against a sponsor upon a finding by its Office of Exchange Coordination and Designation (Office) that the sponsor has:

(1) Violated one or more provisions of this Part;

(2) Evidenced a pattern of failure to comply with one or more provisions of this Part;

(3) Committed an act of omission or commission, which has or could have the effect of endangering the health, safety, or welfare of an exchange visitor; or

(4) Otherwise conducted its program in such a way as to undermine the foreign policy objectives of the United States, compromise the national security interests of the United States, or bring the Department or the Exchange Visitor Program into notoriety or disrepute.

(b) *Lesser sanctions.* (1) In order to ensure full compliance with the regulations in this Part, the Department, in its discretion and depending on the nature and seriousness of the violation, may impose any or all of the following sanctions (''lesser sanctions'') on a sponsor upon a finding that the sponsor engaged in any of the acts or omissions set forth in paragraph (a) of this section:

(i) A written reprimand to the sponsor, with a warning that repeated or persistent violations of the regulations in this part may result in suspension or revocation of the sponsor's Exchange Visitor Program designation, or other sanctions as set forth herein;

(ii) A declaration placing the exchange visitor sponsor's program on probation, for a period of time determined by the Department in its discretion, signifying a pattern of violation of regulations such that further violations could lead to suspension or revocation of the sponsor's Exchange Visitor Program designation, or other sanctions as set forth herein;

(iii) A corrective action plan designed to cure the sponsor's violations; or

(iv) Up to a 15 percent (15%) reduction in the authorized number of exchange visitors in the sponsor's program or in the geographic area of its recruitment or activity. If the sponsor continues to violate the regulations in this Part, the Department may impose subsequent additional reductions, in ten-percent (10%) increments, in the authorized number of exchange visitors in the sponsor's program or in the geographic area of its recruitment or activity.

(2) Within ten (10) days after service of the written notice to the sponsor imposing any of the sanctions set forth in paragraph (b)(1) of this section, the sponsor may submit to the Office a statement in opposition to or mitigation of the sanction. Such statement may not exceed 20 pages in length, double-spaced and, if appropriate, may include additional documentary material. Sponsors shall include with all documentary material an index of the documents and a summary of the relevance of each document presented. Upon review and consideration of such submission, the Office may, in its discretion, modify, withdraw, or confirm such sanction. All materials the sponsor submits will become a part of the sponsor's file with the Office.

(3) The decision of the Office is the final Department decision with regard to lesser sanctions in paragraphs (b)(1)(i) through (iv) of this section.

(c) *Suspension.* (1) Upon a finding that a sponsor has committed a serious act of omission or commission which has or could have the effect of endangering the health, safety, or welfare of an exchange visitor, or of damaging the national security interests of the United States, the Office may serve the sponsor with written notice of its decision to suspend the designation of the sponsor's program for a period not to exceed one hundred twenty (120) days. Such notice must specify the grounds

for the sanction and the effective date thereof, advise the sponsor of its right to oppose the suspension, and identify the procedures for submitting a statement of opposition thereto. Suspension under this paragraph need not be preceded by the imposition of any other sanction or notice.

(2)(i) Within five (5) days after service of such notice, the sponsor may submit to the Principal Deputy Assistant Secretary for Educational and Cultural Affairs (Principal Deputy Assistant Secretary, or PDAS) a statement in opposition to the Office's decision. Such statement may not exceed 20 pages in length, double-spaced and, if appropriate, may include additional documentary material. A sponsor shall include with all documentary material an index of the documents and a summary of the relevance of each document presented. The submission of a statement in opposition to the Office's decision will not serve to stay the effective date of the suspension.

(ii) Within five (5) days after receipt of, and upon consideration of, such opposition, the Principal Deputy Assistant Secretary shall confirm, modify, or withdraw the suspension by serving the sponsor with a written decision. Such decision must specify the grounds therefore, and advise the sponsor of the procedures for requesting review of the decision.

(iii) All materials the sponsor submits will become a part of the sponsor's file with the Office.

(3) The procedures for review of the decision of the Principal Deputy Assistant Secretary are set forth in paragraphs (d)(3) and (4), (g), and (h) of this section, except that the submission of a request for review will not serve to stay the suspension.

(d) *Revocation of designation.* (1) Upon a finding of any act or omission set forth at paragraph (a) of this section, the Office may serve a sponsor with not less than thirty (30) days' written notice of its intent to revoke the sponsor's Exchange Visitor Program designation. Such notice must specify the grounds for the proposed sanction and its effective date, advise the sponsor of its right to oppose the proposed sanction, and identify the procedures for submitting a statement of opposition thereto. Revocation of designation under this paragraph need not be preceded by the imposition of any other sanction or notice.

(2)(i) Within ten (10) days after service of such written notice of intent to revoke designation, the sponsor may submit to the Principal Deputy Assistant Secretary a statement in opposition to or mitigation of the proposed sanction, which may include a request for a meeting.

(ii) The submission of such statement will serve to stay the effective date of the proposed sanction pending the decision of the Principal Deputy Assistant Secretary.

(iii) The Principal Deputy Assistant Secretary shall provide a copy of the statement in opposition to or mitigation of the proposed sanction to the Office. The Office shall submit a statement in response, and shall provide the sponsor with a copy thereof.

(iv) A statement in opposition to or mitigation of the proposed sanction, or statement in response thereto, may not exceed 25 pages in length, double-spaced and, if appropriate, may include additional documentary material. Any additional documentary material may include an index of the documents and a summary of the relevance of each document presented.

(v) Upon consideration of such statements, the Principal Deputy Assistant Secretary shall modify, withdraw, or confirm the proposed sanction by serving the sponsor with a written decision. Such decision shall specify the grounds therefor, identify its effective date, advise the sponsor of its right to request a review, and identify the procedures for requesting such review.

(vi) All materials the sponsor submits will become a part of the sponsor's file with the Office.

(3) Within ten (10) days after service of such written notice of the decision of the Principal Deputy Assistant Secretary, the sponsor may submit a request for review with the Principal Deputy Assistant Secretary. The submission of such request for review will serve to stay the effective date of the decision pending the outcome of the review.

(4) Within ten (10) days after receipt of such request for review, the Department shall designate a panel of three Review Officers pursuant to paragraph (g) of this section, and the Principal Deputy Assistant Secretary shall forward to each panel member all notices, statements, and decisions submitted or provided pursuant to the preceding paragraphs of paragraph (d) of this section. Thereafter, the review will be conducted pursuant to paragraphs (g) and (h) of this section.

(e) *Denial of application for redesignation*. Upon a finding of any act or omission set forth at paragraph (a) of this section, the Office may serve a sponsor with not less than thirty (30) days' written notice of its intent to deny the sponsor's application for redesignation. Such notice must specify the grounds for the proposed sanction and its effective date, advise the sponsor of its right to oppose the proposed sanction, and identify the procedures for submitting a statement of opposition thereto. Denial of redesignation under this section need not be preceded by the imposition of any other sanction or notice. The procedures for opposing a proposed denial of redesignation are set forth in paragraphs (d)(2), (d)(3), (d)(4), (g), and (h) of this section.

(f) *Responsible officers*. The Office may direct a sponsor to suspend or revoke the appointment of a responsible officer or alternate responsible officer for any of the reasons set forth in paragraph (a) of this section. The procedures for suspending or revoking a responsible officer or alternate responsible officer are set forth at paragraphs (d), (g), and (h) of this section.

(g) *Review officers*. A panel of three Review Officers shall hear a sponsor's request for review pursuant to paragraphs (c), (d), (e), and (f) of this section. The Under Secretary of State for Public Diplomacy and Public Affairs shall designate one senior official from an office reporting to him/her, other than from the Bureau of Educational and Cultural Affairs, as a member of the Panel. The Assistant Secretary of State for Consular Affairs and the Legal Adviser shall each designate one senior official from their bureaus as members of the Panel.

(h) *Review*. The Review Officers may affirm, modify, or reverse the sanction imposed by the Principal Deputy Assistant Secretary. The following procedures shall apply to the review:

(1) Upon its designation, the panel of Review Officers shall promptly notify the Principal Deputy Assistant Secretary and the sponsor in writing of the identity of the Review Officers and the address to which all communications with the Review Officers shall be directed.

(2) Within fifteen (15) days after service of such notice, the sponsor may submit to the Review Officers four (4) copies of a statement identifying the grounds on which the sponsor asserts that the decision of the Principal Deputy Assistant Secretary should be reversed or modified. Any such statement may not exceed 25 pages in length, double-spaced; and any attachments thereto shall not exceed 50 pages. A sponsor shall include with all attachments an index of the documents and a summary of the relevance of each document presented. The Review Officers shall transmit one (1) copy of any such statement to the Principal Deputy Assistant Secretary, who shall, within fifteen (15) days after receipt of such statement, submit four (4) copies of a statement in response. Any such statement may not exceed 25 pages in length, double-spaced; and any attachments thereto shall not exceed 50 pages. The Principal Deputy Assistant Secretary shall include with all attachments an index of the documents and a summary of the relevance of each document presented. The Review Officers shall transmit one (1) copy of any such statement to the sponsor. No other submissions may be made unless specifically authorized by the Review Officers.

(3) If the Review Officers determine, in their sole discretion, that a meeting for the purpose of clarification of the written submissions should be held, they shall schedule a meeting to be held within twenty (20) days after the receipt of the last written submission. The meeting will be limited to no more than two (2) hours. The purpose of the meeting will be limited to the clarification of the written submissions. No

transcript may be taken and no evidence, either through documents or by witnesses, will be received. The sponsor and the representative of the Principal Deputy Assistant Secretary may attend the meeting on their own behalf and may be accompanied by counsel.

(4) Following the conclusion of the meeting, or the submission of the last written submission if no meeting is held, the Review Officers shall promptly review the submissions of the sponsor and the Principal Deputy Assistant Secretary, and shall issue a signed written decision within thirty (30) days, stating the basis for their decision. A copy of the decision will be delivered to the Principal Deputy Assistant Secretary and the sponsor.

(5) If the Review Officers decide to affirm or modify the sanction, a copy of their decision shall also be delivered to the Department of Homeland Security and to the Bureau of Consular Affairs of the Department of State. The Office, at its discretion, may further distribute the decision.

(6) Unless otherwise indicated, the sanction, if affirmed or modified, is effective as of the date of the Review Officers' written decision, except in the case of suspension of program designation, which is effective as of the date specified pursuant to paragraph (c) of this section.

(i) *Effect of suspension, revocation, or denial of redesignation.* A sponsor against which an order of suspension, revocation, or denial of redesignation has become effective may not thereafter issue any Certificate of Eligibility for Exchange Visitor (J–1) Status (Form DS–2019) or advertise, recruit for, or otherwise promote its program. Under no circumstances shall the sponsor facilitate the entry of an exchange visitor into the United States. An order of suspension, revocation, or denial of redesignation will not in any way diminish or restrict the sponsor's legal or financial responsibilities to existing program applicants or participants.

(j) *Miscellaneous*—(1) *Computation of time.* In computing any period of time prescribed or allowed by these regulations, the day of the act or event from which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, a Sunday, or a Federal legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is fewer than eleven (11) days, intermediate Saturdays, Sundays, or Federal legal holidays are excluded in the computation.

(2) *Service of notice to sponsor.* Service of notice to a sponsor pursuant to this section may be accomplished through written notice by mail, delivery, or facsimile, upon the president, chief executive officer, managing director, General Counsel, responsible officer, or alternate responsible officer of the sponsor.

[72 FR 72247, Dec. 20, 2007]

Subpart E—Termination and Revocation of Programs

SOURCE: 72 FR 72249, Dec. 20, 2007, unless otherwise noted.

§ 62.60 Termination of designation

Designation will be terminated upon the occurrence of any of the circumstances set forth in this section.

(a) *Voluntary termination.* A sponsor notifies the Department of its intent to terminate its designation voluntarily and withdraws its program in SEVIS via submission of a ''cancel program'' request. The sponsor's designation shall terminate upon submission of such notification. Such sponsor may apply for a new program designation.

(b) *Inactivity.* A sponsor fails to comply with the minimum program size or duration requirements, as specified in § 62.8 (a) and (b), in any 12-month period. Such sponsor may apply for a new program designation.

(c) *Failure to file annual reports.* A sponsor fails to file annual reports for two (2) consecutive years. Such sponsor is eligible to apply for a new program designation.

(d) *Failure to file an annual management audit.* A sponsor fails to file an annual management audit, if such audits are required in the relevant program category. Such sponsor is eligible to apply for a new program designation

upon the filing of the past due management audit.

(e) *Change in ownership or control.* An exchange visitor program designation is not assignable or transferable. A major change in ownership or control automatically terminates the designation. However, the successor sponsor may apply for designation of the new entity, and it may continue to administer the exchange visitor activities of the previously-designated program while the application for designation is pending before the Department of State:

(1) With respect to a for-profit corporation, a major change in ownership or control is deemed to have occurred when one third (33.33%) or more of its stock is sold or otherwise transferred within a 12-month period;

(2) With respect to a not-for-profit corporation, a major change of control is deemed to have occurred when 51 percent (51%) or more of the board of trustees or other like body, vested with its management, is replaced within a 12-month period.

(f) *Non-compliance with other requirements.* A sponsor fails to remain in compliance with Federal, State, local, or professional requirements necessary to carry out the activity for which it is designated, including loss of accreditation, or licensure.

(g) *Failure to apply for redesignation.* A sponsor fails to apply for redesignation, pursuant to the terms and conditions of § 62.7, prior to the conclusion of its current designation period. If so terminated, the former sponsor may apply for a new program designation, but the program activity will be suspended during the pendency of the application.

§ 62.61 Revocation.

The Department may terminate a sponsor's program designation by revocation for cause as specified in § 62.50. Such sponsor may not apply for a new designation for five (5) years following the effective date of the revocation.

§ 62.62 Termination of, or denial of redesignation for, a class of designated programs.

The Department may, in its sole discretion, determine that a class of designated programs compromises the national security of the United States or no longer furthers the public diplomacy mission of the Department of State. Upon such a determination, the Office shall:

(a) Give all sponsors of such class of designated programs not less than thirty (30) days' written notice of the revocation of Exchange Visitor Program designations for such programs, specifying therein the grounds and effective date for such revocations; or

(b) Give any sponsor of such class of designated programs not less than thirty (30) days' written notice of its denial of the sponsor's application for redesignation, specifying therein the grounds for such denial and effective date of such denial. Revocation of designation or denial of redesignation on the above-specified grounds for a class of designated programs is the final decision of the Department.

§ 62.63 Responsibilities of the sponsor upon termination or revocation.

Upon termination or revocation of its program designation, a sponsor must:

(a) Fulfill its responsibilities to all exchange visitors who are in the United States at the time of the termination or revocation; and

(b) Notify exchange visitors who have not entered the United States that the program has been terminated or revoked, unless a transfer to another designated program can be obtained.

Subpart F—Student and Exchange Visitor Information System (SEVIS)

SOURCE: 67 FR 76314, Dec. 12, 2002, unless otherwise noted.

§ 62.70 SEVIS reporting requirements.

(a) *Enrollment and initial use of SEVIS.* Sponsors shall apply for enrollment in SEVIS no later than December 16, 2002. Upon notification that they have been successfully enrolled in SEVIS, sponsors shall:

(1) Create a SEVIS record for any program participant seeking visa issuance or for whom an extension, transfer, change of category, or reinstatement request is sought;

(2) Create a SEVIS record to replace a previously issued but lost or stolen

copy of a participant's Form IAP–66 or Form DS–2019;

(3) Create a SEVIS record if an amendment or change is made in the start or end date of a program participant's program;

(4) Create a SEVIS record for a program participant's accompanying spouse and all accompanying dependent children if a SEVIS record has been created for the participant;

(5) Utilize SEVIS to up-date information on any participant, spouse, or dependent child for whom a SEVIS record has been created; and

(6) No later than August 1, 2003, create a separate SEVIS record for each participant, accompanying spouse and dependent child that will continue to have Exchange Visitor Program participant status after August 1, 2003.

(b) *Current U.S. address.* Sponsors shall ensure that the actual and current U.S. address of all sponsored participants is reported to SEVIS. Sponsors shall update the actual and current U.S. address information for participants within 21 days of being notified by a participant of a change in his or her address. A sponsor's failure to update the actual and current U.S. address information within 21 days of receipt may be grounds for revocation of their Exchange Visitor Program status. Sponsors shall report a U.S. mailing address, *i.e.*, P.O. box address, in those limited circumstances where mail cannot be delivered to the current and actual U.S. address. If a U.S. mailing address is reported to SEVIS, sponsors shall also maintain a record of the actual and current U.S. address, e.g., dorm, building and room number, for that exchange visitor.

(c) *Notification to program participants.* Sponsors shall notify all participants in their exchange visitor program and accompanying spouse and dependent children that any change in the U.S. address must be reported to the sponsor within 10 days of such change. Sponsors may direct the participant to provide the notification of change in address in a format acceptable to the sponsor.

(d) *Validation of program participation.* Sponsors shall within 30 calendar days of a program participant's start date verify that the participant has in fact begun their program participation. Sponsors shall update the participant's SEVIS record and current U.S. address.

§ 62.71 Control and production of the electronic Form DS–2019.

(a) SEVIS generated Forms DS–2019 shall only be completed, printed and signed by a responsible officer and/or alternate responsible officer(s) who are physically present in the United States or a U.S. territory at the time of the Form's production.

(b) Responsible officers and alternate responsible officers shall secure their SEVIS logon IDs and passwords at all times.

(1) At no time and under no circumstances are SEVIS logon IDs and passwords to be shared with anyone, either on a transitory or permanent basis.

(2) Sponsors for whom the responsible officer or alternate responsible officers have been found to have willfully or negligently violated the requirements of this section will be subject to sanctions as set forth in § 62.50(a)(2).

§ 62.72 Staffing and support services.

(a) Sponsors shall appoint a responsible officer and may appoint up to ten (10) alternate responsible officers to adequately administer their exchange visitor program to fulfill the duties set forth in § 62.11.

(1) The Department may limit the number of alternate responsible officers appointed by the sponsor at its discretion.

(2) The Department reserves the right to withdraw the appointment of a responsible or alternate responsible officer at its discretion.

(b) [Reserved]

§ 62.73 Academic training.

(a) Students meeting the definition listed in § 62.4(a)(1)(ii) and (iii) may, if approved by the academic dean or advisor and approved by the responsible officer or alternate responsible officer, engage in academic training pursuant to § 62.23(f).

(b) The responsible officer or alternate responsible shall update the exchange visitor's SEVIS record to reflect the details of any academic training pursuant to § 62.23(f)(5)(i). An update of the SEVIS record constitutes compliance with § 62.23(f)(5)(ii).

§ 62.74 Student employment.

(a) Students meeting the definition listed in § 62.4(a)(1)(ii) and (iii) may engage in student employment pursuant to § 62.23(g).

(b) The responsible officer or alternate responsible officer shall update the exchange visitor's SEVIS record to reflect the details of such employment pursuant to § 62.23(g)(1). An update of the SEVIS record constitutes compliance with § 62.23(g)(2)(iv).

§ 62.75 Extension of program participation.

(a) A sponsor may extend an exchange visitor's participation in the Exchange Visitor Program up to the limit of the permissible period of participation authorized for the specified program category by entering a new end program date and an optional comment—all other information collected on a DS–2019 will be automatically completed by SEVIS.

(1) A sponsor extending the program of an exchange visitor who is not currently listed in the SEVIS database is required to create a record for the exchange participant (and the accompanying spouse and any dependents as a ''continuing exchange visitor''. In creating the exchange visitor's SEVIS record, the sponsor shall issue the exchange visitor (and the accompanying spouse and any dependent children) a duly executed Form DS–2019 reflecting such extension.

(2) When creating a SEVIS record for a ''continuing exchange visitor,'' the initial program start date and Form number taken from the non-SEVIS Form IAP–66 or DS–2019 issued to begin new program must be entered in the exchange visitor's SEVIS record.

(b) A responsible officer or alternate responsible officer seeking an extension of program status on behalf of an exchange visitor in excess of the duration of program participation authorized for the specific category shall:

(1) Submit an electronic request to the Department through the real-time interactive mode in SEVIS.

(2) Create a record for the exchange participant (and the accompanying spouse and any dependent children) as a ''continuing exchange visitor'' listing the initial program start date and Form number taken from the non-SEVIS Form IAP–66 or DS–2019 issued to begin new program.

(3) Submit written supporting documentation and the required non-reimbursable fee to the Department within 30 calendar days of the SEVIS submission date.

§ 62.76 Transfer procedures.

(a) Program sponsors may, pursuant to the provisions set forth in § 62.42, permit an exchange visitor to transfer from one designated program to another designated program. Transfers will not extend the maximum duration of participation for the category in which the exchange visitor is currently participating.

(b) Current sponsor and transfer sponsor shall communicate appropriately to ensure an uninterrupted transfer, continuous status of the exchange visitor and proper change of address reporting and shall utilize the provisions of this section to effect such transfer.

(1) SEVIS-to-SEVIS transfer. When both the transfer and current sponsors are enrolled in SEVIS, a transfer is enacted as follows:

(i) The nonimmigrant shall notify the current sponsor of the intention to transfer.

(ii) Upon verification of the current status and eligibility to transfer by the transfer sponsor, the current sponsor shall update the exchange visitor's record by processing a ''transfer out'' in SEVIS. The current sponsor must enter the name and program number of the transfer sponsor and the effective date of transfer. The ''transfer out'' process gives the transfer sponsor access to the SEVIS record of the exchange visitor (and accompanying spouse and any dependent children).

(iii) The transfer sponsor shall initiate a ''transfer in,'' issue a Form DS–2019 for the exchange visitor (an accompanying spouse and any dependent

children), and advise the exchange visitor of the effective date of transfer.

(iv) The exchange visitor shall report to the transfer sponsor in a manner and at a time specified by the transfer sponsor, and shall provide updated U.S. address information.

(v) The transfer sponsor shall validate the exchange visitor's participation in its program within 30 calendar days of the effective date of transfer and update the exchange visitor's current U.S. address.

(2) Non-SEVIS to SEVIS transfer: When the transfer sponsor is enrolled in SEVIS but the current sponsor is not, the transfer is enacted as follows:

(i) The nonimmigrant shall notify the current sponsor of the intention to transfer.

(ii) Upon verification of current status and eligibility to transfer, the transfer sponsor shall create a Form DS–2019 to enact a transfer and will send the Form to the current sponsor to acquire the written release of the exchange visitor by obtaining a signature in Section 8.

(iii) Upon receipt of the Form DS–2019 with signature, the transfer sponsor shall record the effective date of transfer; the date, name and title of person who signed the release; the name and program number of the current sponsor. The transfer sponsor shall print a Form DS–2019 for the exchange visitor, and advise the exchange visitor of the effective date of transfer.

(iv) The exchange visitor shall report to the transfer sponsor in a manner and at a time specified by the transfer sponsor and shall provide updated U.S. address information.

(v) The transfer sponsor shall validate the exchange visitor's participation in its program within 30 calendar days of the effective date of transfer and update the exchange visitor's current U.S. address.

(3) SEVIS to Non-SEVIS transfer. When the transfer sponsor is not enrolled in SEVIS and the current sponsor is a SEVIS-enrolled sponsor, a transfer is enacted as follows:

(i) The exchange visitor shall notify the current sponsor of the intention to transfer.

(ii) Upon verification of current status and eligibility to transfer, the transfer sponsor shall create a non-SEVIS Form DS–2019 and submit it to the transfer sponsor for the release of the exchange visitor by acquiring a signature in Section 8 of the Form.

(iii) The transfer is required to update the exchange visitor's SEVIS record by recording the effective date of transfer; name and program number of the transfer sponsor; and, name of the responsible officer/alternate responsible officer of the transfer (non-SEVIS) sponsor requesting the transfer as noted on the four-color, four-page paper Form DS–2019.

(4) The transfer sponsor will provide the exchange visitor with the pink copy of the Form DS–2019 and submit the yellow copy of the form to the Department.

§ 62.77 Reinstatement.

(a) Reinstatements will continue to be handled in accordance with the procedures established in § 62.45. A SEVIS reinstatement is processed as follows:

(1) The responsible officer must submit an electronic request for reinstatement to the Department through SEVIS.

(2) The responsible officer must print a copy of the reinstatement request (draft copy of the Form DS–2019) from the SEVIS system.

(3) The responsible officer must submit the official request along with the required supporting documentation justifying the reinstatement and the required, non-reimbursable fee (refer to § 62.90-Fee) to the Department within 30 calendar days of the SEVIS submission date.

(4) The Department will review the request. If approved, the Department will enter the approval in SEVIS, thereby opening the file so that the responsible officer may print a Form DS–2019. How is the sponsor going to know they received an answer to their request? The Department's approval is required before a Form DS–2019 can be printed. What happens if the request is denied?

(b) An exchange visitor (and the accompanying spouse and any dependent children) who failed to submit a change of current U.S. address as required under § 62.63 is in violation of the Exchange Visitor Program regulations

and is not eligible for reinstatement. The Department will deny any such application for reinstatement.

(c) An exchange visitor (and accompanying spouse and any dependent children) who is ineligible for reinstatement or whose request for reinstatement has been denied is no longer an Exchange Visitor Program participant. He or she cannot remain in the United States unless another lawful immigration status is obtained.

§ 62.78 Termination.

An exchange visitor who willfully or negligently fails to comply with the requirements established in Public Law 104–208, as amended, shall be terminated from the Exchange Visitor Program by the sponsor.

§ 62.79 Sanctions.

(a) The Department of State shall impose sanctions against a sponsor that has:

(1) Willfully or negligently failed to comply with the reporting requirements established in Public Law 104–208, as amended; or,

(2) Produced SEVIS Forms DS–2019 outside the United States or a United States territory; or,

(3) Whose authorized representatives fail to secure their SEVIS logon ID and password.

(b) [Reserved]

Subpart G [Reserved]

Appendix A to Part 62—Certification of Responsible Officers and Sponsors

In accordance with the requirement at § 514.5(c)(6), the text of the certifications shall read as follows:

1. Responsible Officers and Alternate Responsible Officers

I hereby certify that I am the responsible officer (or alternate responsible officer, specify) for exchange visitor program number _____, and that I am a United States citizen or permanent resident. I understand that the Department of State may request supporting documentation as to my citizenship or permanent residence at any time and that I must supply such documentation when and as requested. (Name of organization) agrees that my inability to substantiate the representation of citizenship or permanent residence made in this certification will result in the immediate withdrawal of its designation and the immediate return of or accounting for all Forms IAP–66 transferred to it.

Signed in ink by

_____

(Name)

_____

(Title)

Witness: _____

This _____ day of _____, 19____.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____

Notary Public

2. *Sponsors.*

I hereby certify that I am the chief executive officer of (Name of Organization) with the title of (specify); that I am authorized to sign this certification and bind (Name of Organization). I further certify that (Name of Organization) is a citizen of the United States as that term is defined at 22 CFR § 514.2. (Name of Organization) agrees that inability to substantiate the representation of citizenship made in this certification will result in the immediate withdrawal of its designation and the immediate return of or accounting for all Forms IAP–66 transferred to it.

Signed in ink by

_____

(Name)

_____

(Title)

Attestation/Witness: _____

This _____ day of _____, 19____.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____

Notary Public

Appendix B to Part 62—Exchange Visitor Program Services, Exchange-Visitor Program Application

Form Approved OMB _____

Serial No. _____

_____

1. Name and Address of Sponsoring Organization

_____

2. Name and Title of Responsible Officer

_____

Telephone Number

_____

3. Name and Title of Alternate Responsible Officer

_____

Telephone Number

_____

4. Type of Application
(check one)
New _____ Re-Apply _____

Re-Designation _____

SECTION I—PROGRAM PARTICIPANT DATA (FOR DEFINITION & LENGTH OF STAY SEE 22 CFR _____)

5. Participation by Category (indicate total no. and approximate duration of stay in each category)
A. Student _____
B. Teacher _____
C. Professor _____
D. Researcher _____
E. Short-term Scholar _____
F. Specialist _____
G. Trainee _____
1. Specialty _____
2. Nonspecialty _____
H. Int'l Visitor _____
I. Gov't Visitor _____
J. Physicians _____
K. Camp Cnslr _____
L. Sumr/Wk/Trvl _____

_____
6. Method Of Selection

_____
7. Arrangements for Financial Support of Exchange Visitor while in the U.S.

_____

SECTION II—PROGRAM DATA

8. Outline of Proposed Activities (If training, See Reverse)

_____
9. Arrangements for Supervision and Direction

_____
10. Purpose of Objective

_____
11. Role of other Organizations Associated with Program (if any)

_____

SECTION III—CERTIFICATION

12. Citizenship Certification of Organization and Responsible Officer (see reverse)
13. I certify that information given in this application is true to the best of my knowledge and belief and that I have completed appropriate information on reverse of this form.

_____
Signature of Responsible Officer

_____
Date

INSTRUCTIONS FOR ALL PROGRAMS

If additional space is needed in supplying answers to any questions, please use continuation sheets on plain white paper.

1–3. Names and addresses of organization and telephone numbers.

4. Select type of application.

5. Select appropriate categories (see 22 CFR prior to filling out this data).

6–7. Complete information on program sponsor.

8–11. Complete information on program.

IF TRAINING PROGRAM, identify appropriate fields: 01—Arts & Culture; 02—Information Media and Communications; 03—Education; 04—Business and Commercial; 05—Banking and Financial; 06—Aviation; 07—Science, Mechanical and Industrial; 08—Construction and Building Trades; 09—Agricultural; 10—Public Administration; 11—Training, Other

Reapplication and Redesignation:

If your organization is making reapplication as an exchange visitor program, or applying for redesignation under 22 CFR ____, please certify to the following:

I hereby certify that as an officer of the organization making application for an exchange program under 22 CFR ____ or 22 CFR ____ that the following documents which have been submitted to the Department of State, Exchange Visitor Program Services, remain in effect and not altered in any way:

(1) Legal status as a corporation such as Articles of Incorporation and By Laws. Provide dates and state of both:_____

(2) Accreditation. Provide date, type of accreditation, and State of accreditation:_____

(3) Evidence of Licensure. Provide date, type of license, and state of licensure:_____.

(4) Authorization of governing body authorizing application. Please provide date of such authorization and authorizing body:_____.

(5) Activities in which the organization has been engaged have not changed since application dated:_____.

(6) Citizenship. Provide the date of compliance with citizenship requirements:_____. If citizenship compliance is not current, please complete the following:

Organization: I hereby certify that I am an officer of _____ with the title of _____; that I am authorized by the (Board of Directors, Trustees, etc.) to sign this certification and bind _____; and that a true copy certified by the (Board of Directors, Trustees, etc.) of such authorization is attached. I further certify that _____ is a citizen of the United States as that term is defined at 22 CFR 514.1.

Responsible Officer or Alternate Responsible Officer: I hereby certify that I am the responsible officer (or alternate responsible officer) for _____, and that I am a citizen of the United States (or a person lawfully admitted to the United States for permanent residence. _____ agrees that my inability to substantiate my citizenship or status as a permanent resident will result in the immediate withdrawal of its designation and immediate return of or accounting for all IAP–66 forms transferred to it.

Certification as to (1)–(6) Requirements:

I understand that false certification may subject me to criminal prosecution under 18 U.S.C. 1001, which reads: ''Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact or makes any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.''

Signed in ink by (Name) _____

Title _____

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public

Department of State Use Only

Type of program: _____

Subtype if applicable: _____

No. Forms IAP–66: _____

Categories: _____

Please return form to:

Exchange Visitor Program Services-GC/V, Department of State, Washington, DC 20547

NOTE: Public reporting burden for this collection of information (Paperwork Reduction Project: OMB No. 3116–0011) is estimated to average ____ minutes/hours per response, including time for reviewing instructions, researching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of State Clearance Officer, M/ASP, Department of State, 301 4th Street, SW., Washington, DC 20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

APPENDIX C TO PART 62—UPDATE OF INFORMATION ON EXCHANGE-VISITOR PROGRAM SPONSOR

Please amend the Department of State records for Exchange-Visitor Program Number _____ assigned to _____ as follows:
(Name of institution/organization)

1. Change the name of the Program Sponsor from the above to _____

_____

2. Change the address of the Program Sponsor

From: _____

_____

_____

_____

(city) (state) (zip)

To:

_____

_____

_____

_____

(city) (state) (zip)

3. ( ) Change the telephone number from _____ to _____

( ) Change the fax number from _____ to _____

4. ( ) Change the name of the Responsible Officer of the above program from _____ to _____

5. a. Delete the following Alternate Responsible Officer:

_____

_____

_____

_____

5. b. Add the following Alternate Responsible Officer:

_____

_____

_____

_____

(Citizenship is required for all Responsible and Alternate Responsible Officers-See Reverse)

6. ( ) Send _____ (indicate number) IAP–66 forms. (PLEASE ALLOW FOUR TO SIX WEEKS FOR RESPONSE AND REMEMBER TO SUBMIT THE ANNUAL REPORT)

7. ( ) Send _____ copies of this form.

8. ( ) Send _____ copies of *Codes for Educational and Cultural Exchange*.

9. ( ) Cancel the above named Exchange Visitor Program.

_____

(Signature of Responsible or Alternate Responsible Officer)

_____

(Date)

_____

(Title of Signing Officer)

APPENDIX D TO PART 62—ANNUAL REPORT—EXCHANGE VISITOR PROGRAM SERVICES (GC/V), DEPARTMENT OF STATE, WASHINGTON, DC 20547, (202–401–7964)

Exchange Visitor Program No. _____ Reporting Period _____ Provide Range of Forms IAP–66 Documents Covered by this Report (_____-_____).

(a) STATISTICAL REPORT

(1) ACTIVITY BY CATEGORY

	Number
Professor	_____
Research Scholar	_____
Short-term Scholar	_____
Trainee	_____
Student (College and University)	_____

	Number
Student (Practical Trainee)	_____
Teacher	_____
Student (Secondary)	_____
Specialists	_____
Physicians	_____
International Visitors	_____
Government Visitors	_____
Camp Counselors	_____
Total	_____

(2) Forms IAP–66 Reconciliation

(i) Number of Forms IAP–66 voided or otherwise not used by participant _____.

(ii) Number of Forms IAP–66 issued for dependents _____.

(iii) Number of Forms IAP–66 currently on hand _____.

(b) PROGRAM EVALUATION

On a separate sheet, please provide a brief narrative report on program activity, difficulties encountered and their resolution, program transfers, anticipated growth and the proposed new activity, cross-cultural activities, as well as the reciprocal component of the program.

I, The Responsible Officer of the program indicated above, certify that we have complied with the insurance requirement (22 CFR 514.14). I also certify that the information contained in this report is complete and correct to the best of my knowledge and belief.

_____

Responsible Officer (signed)

Date _____

_____

Name and address of sponsoring institution

APPENDIX E TO PART 62—UNSKILLED OCCUPATIONS

For purposes of 22 CFR 514.22(c)(1), the following are considered to be ''unskilled occupations'':

(1) Assemblers
(2) Attendants, Parking Lot
(3) Attendants (Service Workers such as Personal Services Attendants, Amusement and Recreation Service Attendants)
(4) Automobile Service Station Attendants
(5) Bartenders
(6) Bookkeepers
(7) Caretakers
(8) Cashiers
(9) Charworkers and Cleaners
(10) Chauffeurs and Taxicab Drivers
(11) Cleaners, Hotel and Motel
(12) Clerks, General
(13) Clerks, Hotel
(14) Clerks and Checkers, Grocery Stores
(15) Clerk Typist
(16) Cooks, Short Order
(17) Counter and Fountain Workers
(18) Dining Room Attendants
(19) Electric Truck Operators
(20) Elevator Operators
(21) Floorworkers
(22) Groundskeepers
(23) Guards
(24) Helpers, any industry
(25) Hotel Cleaners
(26) Household Domestic Service Workers
(27) Housekeepers
(28) Janitors
(29) Key Punch Operators
(30) Kitchen Workers
(31) Laborers, Common
(32) Laborers, Farm
(33) Laborers, Mine
(34) Loopers and Toppers
(35) Material Handlers
(36) Nurses' Aides and Orderlies
(37) Packers, Markers, Bottlers and Related
(38) Porters
(39) Receptionists
(40) Sailors and Deck Hands
(41) Sales Clerks, General
(42) Sewing Machine Operators and Handstitchers
(43) Stock Room and Warehouse Workers
(44) Streetcar and Bus Conductors
(45) Telephone Operators
(46) Truck Drivers and Tractor Drivers
(47) Typist, Lesser Skilled
(48) Ushers, Recreation and Amusement
(49) Yard Workers

APPENDIX F TO PART 62—INFORMATION TO BE COLLECTED ON SECONDARY SCHOOL STUDENT HOST FAMILY APPLICATIONS

Basic Family Information:

a. Host Family Member—Full name and relationship (children and adults) either living full-time or part-time in the home or who frequently stay at the home)

b. Date of Birth (DOB) of all family members

c. Street Address

d. Contact information (telephone; e-mail address) of host parents

e. Employment—employer name, job title, and point of contact for each working resident of the home

f. Is the residence the site of a functioning business? (e.g., daycare, farm)

g. Description of each household member (e.g., level of education, profession, interests, community involvement, and relevant behavioral or other characteristics of such household members that could affect the successful integration of the exchange visitor into the household)

h. Has any member of your household ever been charged with any crime?

Household Pets:

a. Number of Pets

b. Type of Pets

Financial Resources:

a. Average Annual Income Range: Less than $25,000; $25,000–$35,000; $35,000–$45,000; $45,000–$55,000; $55,000–$65,000; $65,000–$75,000; and $75,000 and above. Note: The form must include a statement stating that: ''The income data collected will be used solely for the purposes of ensuring that the basic needs of the exchange students can be met, including three quality meals and transportation to and from school activities''

b. Describe if anyone residing in the home receives any kind of public assistance (financial needs-based government subsidies for food or housing)

c. Identify those personal expenses expected to be covered by the student

Diet:

a. Does anyone in the family follow any dietary restrictions? (Y/N)

If yes, describe:

b. Do you expect the student to follow any dietary restrictions? (Y/N)

If yes, describe:

c. Would you feel comfortable hosting a student who follows a particular dietary restriction (ex. Vegetarian, Vegan, etc.)? (Y/N)

d. Would the family provide three (3) square meals daily?

High School Information:

a. Name and address of school (private or public school)

b. Name, address, e-mail and telephone number of school official

c. Approximate size of the school student body

d. Approximate distance between the school and your home

e. Approximate start date of the school year

f. How will the exchange student get to the school (e.g. bus, carpool, walk)?

g. Would the family provide special transportation for extracurricular activities after school or in the evenings, if required?

h. Which, if any, of your family's children, presently attend the school in which the exchange visitor is enrolled?

If applicable list sports/clubs/activities, if any, your child(ren) participate(s) in at the school

i. Does any member of your household work for the high school in a coaching/teaching/or administrative capacity?

j. Has any member of your household had contact with a coach regarding the hosting of an exchange student with particular athletic ability?

If yes, please describe the contact and sport.

Community Information:

a. In what type of community do you live (e.g.: Urban, Suburban, Rural, Farm)

b. Population of community

c. Nearest Major City (Distance and population)

d. Nearest Airport (Distance)

e. City or town website

f. Briefly describe your neighborhood and community

g. What points of interest are near your area (parks, museums, historical sites)?

h. Areas in or near neighborhood to be avoided?

Home Description:

a. Describe your type of home (e.g., single family home, condominium, duplex, apartment, mobile home) and include photographs of the host family home's exterior and grounds, kitchen, student's bedroom, student's bathroom, and family and living areas.

b. Describe Primary Rooms and Bedrooms

c. Number of Bathrooms

d. Will the exchange student share a bedroom? (Y/N)

If yes, with which household resident?

e. Describe the student's bedroom

f. Describe amenities to which the student has access

g. Utilities

Family Activities:

a. Language spoken in home

b. Please describe activities and/or sports each family member participates in: (e.g., camping, hiking, dance, crafts, debate, drama, art, music, reading, soccer, baseball, horseback riding)

c. Describe your expectations regarding the responsibilities and behavior of the student while in your home (e.g., homework, household chores, curfew (school night and weekend), access to refrigerator and food, drinking of alcoholic beverages, driving, smoking, computer/Internet/E-Mail)

Would you be willing voluntarily to inform the exchange visitor in advance of any religious affiliations of household members? (Y/N)

Would any member of the household have difficulty hosting a student whose religious beliefs were different from their own? (Y/N) Note: A host family may want the exchange visitor to attend one or more religious services or programs with the family. The exchange visitor cannot be required to do so, but may decide to experience this facet of U.S. culture at his or her discretion.

How did you learn about being a host family?

References:

[75 FR 65984, Oct. 27, 2010]

PART 63—PAYMENTS TO AND ON BEHALF OF PARTICIPANTS IN THE INTERNATIONAL EDUCATIONAL AND CULTURAL EXCHANGE PROGRAM

Sec.

63.1 Definitions.

63.2 Applicability of this part under special circumstances.
63.3 Grants to foreign participants to observe, consult, demonstrate special skills, or engage in specialized programs.
63.4 Grants to foreign participants to lecture, teach, and engage in research.
63.5 Grants to foreign participants to study.
63.6 Assignment of United States Government employees to consult, lecture, teach, engage in research, or demonstrate special skills.
63.7 Grants to United States participants to consult, lecture, teach, engage in research, demonstrate special skills, or engage in specialized programs.
63.8 Grants to United States participants to study.
63.9 General provisions.

AUTHORITY: Sec. 4, 63 Stat. 111, as amended, 75 Stat. 527–538; 22 U.S.C. 2658, 2451 note; Reorganization Plan No. 2 of 1977; Executive Order 12048 of March 27, 1978.

SOURCE: 44 FR 18019, Mar. 26, 1979, unless otherwise noted. Redesignated at 64 FR 54540, Oct. 7, 1999.

EDITORIAL NOTE: Nomenclature changes to part 63 appear at 64 FR 54540, Oct. 7, 1999.

§ 63.1 Definitions.

For the purpose of this part the following terms shall have the meaning here given:

(a) *International educational and cultural exchange program of the Department of State.* A program to promote mutual understanding between the people of the United States and those of other countries and to strengthen cooperative international relations in connection with which payments are made direct by the Department of State, as well as similar programs carried out by other Government departments and agencies and by private organizations with funds appropriated or allocated to the Department of State when the regulations in this part apply under the provisions of § 515.2 (a) and (b).

(b) *Program and Agency.* For convenience, the international educational and cultural exchange program of the Department of State will hereinafter be referred to as the ''program,'' and the Department of State will hereinafter be referred to as the ''Agency.''

(c) *Participant.* Any person taking part in the program for purposes listed in § 515.3 through § 515.8 including both citizens of the United States and citizens and nationals of the other countries with which the program is conducted.

(d) *Transportation.* All necessary travel on railways, airplanes, steamships, buses, streetcars, taxicabs, and other usual means of conveyance.

(e) *Excess baggage.* Baggage in excess of the weight or size carried free by public carriers on first class service.

(f) *Per diem allowance.* Per diem in lieu of subsistence includes all charges for meals and lodging; fees and tips; telegrams and telephone calls reserving hotel accommodations; laundry, cleaning and pressing of clothing; transportation between places of lodging or business and places where meals are taken.

§ 63.2 Applicability of this part under special circumstances.

(a) *Funds administered by another department or agency.* The regulations in this part shall apply to payments made to or on behalf of participants from funds appropriated or allocated to the Agency and transferred by the Agency to some other department, agency or independent establishment of the Government unless the terms of the transfer provide that such regulations shall not apply in whole or in part or with such modification as may be prescribed in each case to meet the exigencies of the particular situation.

(b) *Funds administered by private organizations.* The regulations in this part shall apply to payments made to or on behalf of participants from funds appropriated or allocated to the Agency and administered by an institution, facility, or organization in accordance with the terms or a contract or grant made by the Agency with or to such private organizations, unless the terms of such contract or grant provide that the regulations in this part are not to be considered applicable or that they are to be applied with such modifications as may be prescribed in each case to meet the exigencies of the particular situation.

(c) *Appropriations or allocations.* The regulations in this part shall apply to payments made by the Agency with respect to appropriations or allocations which are or may hereafter be made

available to the Agency for the program so far as the regulations in this part are not inconsistent therewith.

§ 63.3 Grants to foreign participants to observe, consult, demonstrate special skills, or engage in specialized programs.

A citizen or national of a foreign country who has been awarded a grant to observe, consult with colleagues, demonstrate special skills, or engage in specialized programs, may be entitled to any or all of the following benefits when authorized by the Agency.

(a) *Transportation.* Accommodations, as authorized, on steamship, airplane, railway, or other means of conveyance. For travel in a privately owned vehicle, reimbursement will be in accordance with the provisions of the Federal Travel Regulations.

(b) *Excess baggage.* Excess baggage as deemed necessary by the Agency.

(c) *Per diem allowance.* Per diem allowances in lieu of subsistence expenses while participating in the program in the United States, its territories or possessions and while traveling within or between the United States, its territories or possessions shall be established by the Secretary of State from time to time, within limitations prescribed by law. The participant shall be considered as remaining in a travel status during the entire period covered by his or her grant unless otherwise designated.

(d) *Allowance.* A special allowance in lieu of per diem while traveling to and from the United States may be established by the Secretary of State, within limitations prescribed by law.

(e) *Tuition and related expenses.* Tuition and related expenses in connection with attendance at seminars and workshops, professional meetings, or other events in keeping with the purpose of the grant.

(f) *Books and educational materials allowance.* A reasonable allowance for books and educational materials.

(g) *Advance of funds.* Advance of funds including per diem.

[44 FR 18019, Mar. 26, 1979, as amended at 49 FR 12214, Mar. 29, 1984. Redesignated at 64 FR 54540, Oct. 7, 1999]

§ 63.4 Grants to foreign participants to lecture, teach, and engage in research.

A citizen or national of a foreign country who has been awarded a grant to lecture, teach, and engage in research may be entitled to any or all of the following benefits when authorized by the Agency:

(a) *Transportation.* Accommodations, as authorized on steamship, airplane, railway, or other means of conveyance. For travel in a privately owned vehicle, reimbursement will be in accordance with the provisions of the Federal Travel Regulations.

(b) *Excess baggage.* Excess baggage as deemed necessary by the Agency.

(c) *Per diem allowance.* Per diem allowance in lieu of subsistence expenses while participating in the program in the United States, its territories or possessions and while traveling within or between the United States, its territories or possessions shall be established by the Secretary of State from time to time, within limitations prescribed by law.

(d) *Allowance.* A special allowance in lieu of per diem while traveling to and from the United States may be established by the Secretary of State, within limitations prescribed by law.

(e) *Tuition and related expenses.* Tuition and related expenses in connection with attendance at educational institutions, seminars and workshops, professional meetings or other events in keeping with the purpose of the grant.

(f) *Books and educational materials allowance.* A reasonable allowance for books and educational materials.

(g) *Advance of funds.* Advance of funds including per diem.

§ 63.5 Grants to foreign participants to study.

A citizen or national of a foreign country who has been awarded a grant to study may be entitled to any or all of the following benefits when authorized by the Agency:

(a) *Transportation.* Accommodations, as authorized, on steamship, airplane, railway, or other means of conveyance. For travel in a privately owned vehicle, reimbursement will be accordance with the provisions of the Federal Travel Regulations.

(b) *Excess baggage.* Excess baggage as deemed necessary by the Agency.

(c) *Per diem allowance.* Per diem allowance in lieu of subsistence expenses while traveling (1) from point of entry in the United States, its territories or possessions to orientation centers and while in attendance at such centers for purposes of orientation, not to exceed 30 days, (2) to educational institutions of affiliation, and (3) to point of departure and while participating in authorized field trips or conferences, shall be established by the Secretary of State from time to time, within limitations prescribed by law.

(d) *Allowances.* (1) A maintenance allowance while present and in attendance at an educational institution, facility or organization, and

(2) A travel allowance in lieu of per diem while traveling to and from the United States may be established by the Secretary of State, within limitations prescribed by law.

(e) *Tuition.* Tuition and related fees for approved courses of study.

(f) *Books and educational materials allowance.* A reasonable allowance for books and educational materials.

(g) *Tutoring assistance.* Special tutoring assistance in connection with approved courses of study.

(h) *Advance of funds.* Advance of funds including per diem.

§ 63.6 Assignment of United States Government employees to consult, lecture, teach, engage in research, or demonstrate special skills.

An employee of the United States Government who has been assigned for service abroad to consult, lecture, teach, engage in research, or demonstrate special skills, may be entitled to any or all of the following benefits when authorized by the Agency.

(a) *Transportation.* Transportation and miscellaneous expenses in the United States and abroad, including baggage charges, and per diem in lieu of subsistence at the maximum rates allowable while in a travel status in accordance with the provisions of the Federal Travel Regulations. The participant shall be considered as remaining in a travel status during the entire period covered by his or her assignment unless otherwise designated.

(b) *Advance of funds.* Advances of per diem as provided by law.

(c) *Compensation.* Compensation in accordance with Civil Service rules; or in accordance with the grade in which the position occupied may be administratively classified; or Foreign Service Act, as amended.

(d) *Allowances for cost of living and living quarters.* Allowances for living quarters, heat, fuel, light, and to compensate for the increased cost of living in accordance with the Federal Travel Regulations (Government Civilians, Foreign Areas), when not in a travel status as provided in paragraph (a) of this section.

(e) *Books and educational materials allowance.* A reasonable allowance for books and educational materials. Such books and materials, unless otherwise specified, shall be selected by the employee and purchased and shipped by the Agency or its agent. At the conclusion of the assignment, the books and educational materials shall be transferred to and become the property of an appropriate local institution or be otherwise disposed of as directed by the Agency.

(f) *Families and effects.* Cost of transportation of immediate family and household goods and effects when going to and returning from posts of assignment in foreign countries in accordance with the provisions of the Foreign Service Regulations of the United States of America.

§ 63.7 Grants to United States participants to consult, lecture, teach, engage in research, demonstrate special skills, or engage in specialized programs.

A citizen or resident of the United States who has been awarded a grant to consult, lecture, teach, engage in research, demonstrate special skills, or engage in specialized programs may be entitled to any or all of the following benefits when authorized by the Agency.

(a) *Transportation.* Transportation in the United States and abroad, including baggage charges.

(b) *Subsistence and miscellaneous travel expenses.* Per diem, in lieu of subsistence while in a travel status, at the maximum rates allowable in accordance with the provisions of the Federal

Travel Regulations, unless otherwise specified, and miscellaneous travel expenses, in the United States and abroad. Alternatively, a travel allowance may be authorized to cover subsistence and miscellaneous travel expenses. The participant shall be considered as remaining in a travel status during the entire period covered by his or her grant unless otherwise designated.

(c) *Orientation and debriefing within the United States.* For the purpose of orientation and debriefing within the United States, compensation, travel, and per diem at the maximum rates allowable in accordance with the provisions of the Federal Travel Regulations, unless otherwise specified. Alternatively, a travel allowance may be authorized to cover subsistence and miscellaneous travel expenses.

(d) *Advance of funds.* Advance of funds, including allowance for books and educational materials and per diem, or alternatively, the allowance to cover subsistence and miscellaneous travel expenses.

(e) *Compensation.* Compensation at a rate to be specified in each grant.

(f) *Allowances.* Appropriate allowance as determined by the Agency.

(g) *Books and educational materials allowance.* Where appropriate, an allowance for books and educational materials. Such books and materials, unless otherwise specified, shall be selected by the grantee and purchased and shipped either by the grantee, or the Agency or its agent. At the conclusion of the grant, the books and materials shall be transferred to and become the property of an appropriate local institution or be otherwise disposed of as directed by the Agency.

§63.8 Grants to United States participants to study.

A citizen of the United States who has been awarded a grant to study may be entitled to any or all of the following benefits when authorized by the Agency.

(a) *Transportation.* Transportation and miscellaneous expenses in the United States and abroad, including baggage charges, and per diem in lieu of subsistence while in a travel status. Per diem at the maximum rates allowable in accordance with the provisions of the Federal Travel Regulations, unless otherwise specified. Travel status shall terminate upon arrival at the place of study designated in the grant and shall recommence upon departure from the place to return home.

(b) *Orientation and debriefing within the United States.* For the purpose of orientation and debriefing within the United States travel and per diem at the maximum rates allowable in accordance with the provisions of the Federal Travel Regulations, unless othewise specified.

(c) *Advance of funds.* Advance of funds including per diem.

(d) *Maintenance allowance.* A maintenance allowance at a rate to be specified in each grant.

(e) *Tuition.* Tuition and related fees for approved courses of study.

(f) *Books and educational materials allowance.* A reasonable allowance for books and educational materials.

(g) *Tutoring assistance.* Special tutoring assistance in connection with approved courses of study.

§63.9 General provisions.

The following provisions shall apply to the foregoing regulations:

(a) *Health and accident insurance.* Payment for the costs of health and accident insurance for United States and foreign participants while such participants are enroute or absent from their homes for purposes of participation in the program when authorized by the Agency.

(b) *Transportation of remains.* Payments for the actual expenses of preparing and transporting to their former homes the remains of persons not United States Government employees, who may die away from their homes while participating in the program are authorized.

(c) *Maxima not controlling.* Payments and allowances may be made at the rate or in the amount provided in the regulations in this part unless an individual grant or travel order specifies that less than the maximum will be allowed under any part of the regulation in this part. In such case, the grant or travel order will control.

(d) *Individual authorization.* Where the regulations in this part provide for

compensation, allowance, or other payment, no payment shall be made therefor unless a definite amount or basis of payment is authorized in the individual case, or is approved as provided in paragraph (f) of this section.

(e) *Computation of per diem and allowance.* In computing per diem and allowance payable while on a duty assignment, except for travel performed under the Federal Travel Regulations, fractional days shall be counted as full days, the status at the end of the calendar day determining the status for the entire day.

(f) *Subsequent approval.* Whenever without prior authority expense has been incurred by a participant, or an individual has commenced his or her participation in the program as contemplated by the regulations in this part, the voucher for payments in connection therewith may be approved by an official designated for this purpose, such approval constituting the authority for such participation or the incurring of such expense.

(g) *Additional authorization.* Any emergency, unusual or additional payment deemed necessary under the program if allowable under existing authority, may be authorized whether or not specifically provided for by this part.

(h) *Biweekly payment.* Unless otherwise specified in the grant, all compensation and allowance for United States participants shall be payable biweekly and shall be computed as follows: An annual rate shall be derived by multiplying a monthly rate by 12; a biweekly rate shall be derived by dividing an annual rate by 26; and a calendar day rate shall be derived by dividing an annual rate by 364. If any maximum compensation or allowance authorized by these regulations or by the terms of any grant is exceeded by this method of computation and payment, such excess payment is hereby authorized. This paragraph may apply to payments made to participants from funds administrered as provided in § 515.2(a) and (b) in the discretion of the department, agency, independent establishment, institution, facility, or organization concerned.

(i) *Payments.* Payments of benefits authorized under any part of the regulations in this part may be made either by the Department of State or by such department, agency, institution, or facility as may be designated by the Agency.

(j) *Duration.* The duration of the grant shall be specified in each case.

(k) *Cancellation.* If a recipient of a grant under this program fails to maintain a satisfactory record or demonstrates unsuitability for furthering the purposes of the program as stated in § 515.1(a), his or her grant shall, in the discretion of the Secretary of State of the Department of State or such officer as he or she may designate, be subject to cancellation.

(l) *Outstanding grant authorization.* Grants and other authorizations which are outstanding and in effect on the date the present regulations become effective, and which do not conform to this part, shall nevertheless remain in effect and be governed by the regulations under which they were originally issued, unless such grants or other authorizations are specifically amended and made subject to the present regulations in which case the individual concerned will be notified.

PART 64—PARTICIPATION BY FEDERAL EMPLOYEES IN CULTURAL EXCHANGE PROGRAMS OF FOREIGN COUNTRIES

Sec.

64.1 Purpose.
64.2 Definitions.
64.3 Submission of application.
64.4 Contents of application.
64.5 Criteria for approval of program.
64.6 Request for further information.
64.7 Approval of application.
64.8 Obligation of employee to advise agency.
64.9 Termination of approval.
64.10 Grant not to constitute a gift.

AUTHORITY: Sec. 108A (Pub. L. 94–350, 90 Stat. 823) added to the Mutual Educational and Cultural Exchange Act, as amended, 75 Stat. 527–28, 22 U.S.C. 2451 *et seq.;* and under Executive Orders 11034 and 12048, as amended; Pub. L. 105–277, 112 Stat. 2681 *et seq.;* Reorganization Plan No. 2 of 1977 and the Continuity Order (Continuity of Operations) of April 1, 1978 (43 FR 15371).

SOURCE: 44 FR 42247, Sept. 20, 1978, unless otherwise noted. Redesignated at 64 FR 54540, Oct. 7, 1999.

EDITORIAL NOTE: Nomenclature changes to part 64 appear at 64 FR 54540, Oct. 7, 1999.

§ 64.1 Purpose.

This part sets forth the procedures for the application for approval of a cultural exchange program of a foreign government, so that Federal employees may participate in such program; the grant and termination of such approval; and related procedures.

§ 64.2 Definitions.

For the purpose of this part:

(a) *Federal employee* means: (1) An employee as defined by section 2105 of title 5, United States Code; (2) an individual employed by, or occupying an office or position in, the government of a territory or possession of the United States or the District of Columbia; (3) a member of a uniformed service; (4) the President and Vice President; and (5) a Member of the Senate or the House of Representatives, a Delegate from the District of Columbia in Congress, and the Resident Commissioner from Puerto Rico in Congress.

(b) A *foreign government* means a foreign government and an official agent or representative thereof; a group of governments and an official agent or representative thereof; an international organization composed of governments, and an official agent or representative thereof.

(c) A program of the *type described in section 102(a)(2)(i) of the Act* means a cultural exchange program involving ''visits and interchanges between the United States and other countries of leaders, experts in fields of specialized knowledge or skill, and other influential or distinguished persons.''

(d) The ''purpose stated in section 101 of the Act'' is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of the other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.''

(e) *Secretary of State* means the Secretary of State of the Department of State.

(f) *Department of State* means the Department of State.

(g) *Act* means the Mutual Educational Cultural Exchange Act of 1961, as amended (22 U.S.C. 2451 *et seq.*).

(h) *Member of the family or household* of a Federal employee means a relative of the employee by blood, marriage, or adoption or any person who is a resident of the household of the employee.

[44 FR 42247, Sept. 20, 1978, as amended at 51 FR 11016, Apr. 1, 1986. Redesignated at 64 FR 54540, Oct. 7, 1999]

§ 64.3 Submission of application.

A foreign government intending to provide grants or other assistance to facilitate the participation of Federal employees in a program of cultural exchange shall submit to the Department of State an application for approval of the program through its embassy, mission, or office at Washington, D.C. If there is no embassy, mission, or office at Washington, D.C., of the foreign government the application may be submitted by the home office or headquarters of the foreign government. The application shall be addressed to the Secretary of State.

§ 64.4 Contents of application.

The foreign government shall provide information in the application showing that its program meets the criteria set forth in § 516.5, and shall include in such application the following:

(a) Name and description of the program and the provisions of legislation or regulation authorizing the program;

(b) Number of annual U.S. citizen participants expected, including the number of U.S. Federal employees;

(c) Average duration of stay abroad;

(d) Department of State of the foreign government responsible for the program;

(e) Name and address of contact in the United States with whom communication may be made with respect to the program; in the absence of such a contact in the United States, the name and address of a contact in the home office or headquarters of the foreign government.

§ 64.5 Criteria for approval of program.

To obtain approval of its program of cultural exchanges, a foreign government is required to show that:

(a) The cultural exchange program is of the type described in section 102(a)(2)(i) of the Act;

(b) The cultural exchange program is conducted for a purpose comparable to the purpose stated in section 101 of the Act; and

(c) A grant under such program will not provide assistance with respect to any expenses incurred by or for any member of the family or household of such Federal employee.

§ 64.6 Request for further information.

The Department of State may request the foreign government to supply additional information.

§ 64.7 Approval of application.

The Secretary of State shall review the application and if satisfied that the criteria of § 516.5 are met shall inform the foreign government of the approval of its program.

§ 64.8 Obligation of employee to advise agency.

Any Federal employee receiving any offer of a grant or other assistance under a cultural exchange program approved by the Secretary of State shall advise the employee's agency of such offer and shall not accept such offer unless the employee's agency states that it has no objection to such acceptance. In the case of the Department, an employee shall advise the DAEO who may, after consultation with appropriate officials of the Department, furnish a ''no objection'' statement.

[44 FR 42247, Sept. 20, 1978. Redesignated and amended at 64 FR 54540, Oct. 7, 1999]

§ 64.9 Termination of approval.

If at any time it appears to the Secretary of State that the purpose of a program which has been approved has been changed so that it no longer meets the criteria of § 516.5 or that the program is being misused, the Secretary of State may terminate such approval, or suspend such approval pending the supplying of additional information. However, a termination or suspension shall not affect a grant which has been made under a previously approved program.

§ 64.10 Grant not to constitute a gift.

A grant made under an approved program shall not constitute a gift for purposes of 22 CFR 10.735–203 and section 7342 of title 5, United States Code.

PART 65—FOREIGN STUDENTS

Sec.

65.1 Regulations to be drafted.
65.2 Applications.
65.3 Reference of applications.
65.4 Copies of regulations to Department of State.
65.5 Granting of application.

AUTHORITY: 52 Stat. 1034, as amended; 20 U.S.C. 221, E.O. 7964, 3 FR 2105; 3 CFR, 1943–1958, Comp.; Reorganization Plan No. 2 of 1977.

SOURCE: 44 FR 18021, Mar. 26, 1979, unless otherwise noted. Redesignated at 64 FR 54540, Oct. 7, 1999.

EDITORIAL NOTE: Nomenclature changes to part 65 appear at 64 FR 54540, Oct. 7, 1999.

§ 65.1 Regulations to be drafted.

Subject to the provisions and requirements of this part, appropriate administrative regulations shall be drafted by each executive department or agency of the Government which maintains and administers educational institutions and schools coming within the scope of the legislation. Such regulations shall carefully observe the limitations imposed by the Act of June 24, 1938, and shall in each case include:

(a) A list of the institutions and courses in the department or agency concerned in which instruction is available under the terms of the legislation.

(b) A statement of the maximum number of students of the other American republics who may be accommodated in each such institution or course at any one time.

(c) A statement of the qualifications to be required of students of the other American republics for admission, including examinations, if any, to be passed.

(d) Provisions to safeguard information that may be vital to the national defense or other interests of the United States.

§65.2 Applications.

Applications for citizens of the other American republics to receive the instruction contemplated by the Act of June 24, 1938, shall be made formally through diplomatic channels to the Secretary of State of the Department of State by the foreign governments concerned.

§65.3 Reference of applications.

The Secretary of State of the Department of State shall refer the applications to the proper department or agency of the Government for advice as to what reply should be made to the application.

§65.4 Copies of regulations to Department of State.

In order to enable the Secretary of State of the Department of State to reply to inquiries received from the governments of the other American republics, the Department of State shall be promptly supplied with copies of the regulations drafted by the other departments and agencies of the Government and of subsequent amendments thereto.

§65.5 Granting of application.

Upon receipt of a reply from another department or agency of the Government, as contemplated by §517.3, in which it is recommended that an application be granted, the Secretary of State of the Department of State shall notify the government of the American republic concerned, through diplomatic channels, that permission to receive the instruction requested in the application is granted, provided the applicant complies with the terms of this part and with the terms of the administrative regulations of the department or agency concerned.

PART 66—AVAILABILITY OF THE RECORDS OF THE NATIONAL ENDOWMENT FOR DEMOCRACY

Sec.

66.1 Introduction.
66.2 Location of description of organization and substantive rules of general applicability adopted as authorized by law, and statements of general applicability formulated and adopted by NED.
66.3 Places at which forms and instructions for use by the public may be obtained.
66.4 Availability of final opinions, orders, policies, interpretations, manuals and instructions.
66.5 Availability of NED records.
66.6 Exemptions.
66.7 Limitation of exemptions.
66.8 Reports.

AUTHORITY: 22 U.S.C. 4411 *et seq.;* Pub. L. 99–570, Secs. 1801–1804, 100 Stat. 3207–48 (1986); Pub. L. 105–277, 112 Stat. 2681 *et seq.*

SOURCE: 51 FR 40162, Nov. 5, 1986, unless otherwise noted. Redesignated at 64 FR 54540, Oct. 7, 1999.

EDITORIAL NOTE: Nomenclature changes to part 66 appear at 64 FR 54540, Oct. 7, 1999.

§66.1 Introduction.

These regulations amend the Code of Federal Regulations to conform with Pub. L. 99–93. Pub. L. 99–93 amended the National Endowment for Democracy Act (22 U.S.C. 4411, et. seq.) to require the National Endowment for Democracy (hereinafter ''NED'') to comply fully with the provisions of the Freedom of Information Act (5 U.S.C. 552) (hereinafter ''FOIA''), notwithstanding that NED is not an agency or establishment of the United States Government. NED will make information about its operation, organization, procedures and records available to the public in accordance with the provisions of FOIA.

§ 66.2 Location of description of organization and substantive rules of general applicability adopted as authorized by law, and statements of general applicability formulated and adopted by NED.

See 22 CFR part 527 for a description of the organization of NED and substantive rules of general applicability formulated and adopted by NED.

§ 66.3 Places at which forms and instructions for use by the public may be obtained.

(a) All forms and instructions pertaining to procedures under FOIA may be obtained from the FOIA officer of the National Endowment for Democracy, 1101 15th St., NW; Suite 700, Washington, D.C. 20005–5000.

(b) Grant guidelines may be obtained from the Program Office of NED to the address shown in paragraph (a) of this section.

(c) General information may be obtained from the Public Affairs Office of NED at the address shown in paragraph (a) of this section.

[51 FR 40162, Nov. 5, 1986. Redesignated and amended at 64 FR 54540, Oct. 7, 1999]

§ 66.4 Availability of final opinions, orders, policies, interpretations, manuals and instructions.

NED is not an adjudicatory organization and therefore does not issue final opinions and orders made in the adjudication of cases. NED will, however, in accordance with the rules in this section and § 526.7, make available for public inspection and copying those statements of policy and interpretation that have been adopted by NED and are not published in the FEDERAL REGISTER, and administrative staff manuals and instructions to staff that affect any member of the public.

(a) *Deletion to protect privacy*. To the extent required to prevent a clearly unwarranted invasion of personal privacy, NED may delete identifying details when it makes available or publishes a statement of policy, interpretation, or staff manual or instruction. Whenever NED finds any such deletion necessary, the responsible officer or employee must fully explain the justification therefor in writing.

(b) *Current index*. NED will maintain and make available on its premises for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted or promulgated after July 4, 1967, and required by this section to be made available or published. NED will provide copies on request at a cost of $0.15 per page.

§ 66.5 Availability of NED records.

Except with respect to the records made available under § 526.4, NED will, upon request that reasonably describes records in accordance with the requirements of this section, and subject to the exemptions listed in 5 U.S.C. 552(b), make such records promptly available to any person.

(a) Requests for records—How made and addressed. (1) Requesters seeking access to NED records under FOIA should direct all requests in writing to: Freedom of Information Act Officer, National Endowment for Democracy, 1101 15th St., NW; Suite 700, Washington, D.C. 20005–5000.

Although requesters are encouraged to make their requests for access to NED records directly to NED, requests for access to NED records also may be submitted to Department of State's Office of General Counsel and Congressional Liaison at the following address: Freedom of Information/Privacy Acts Coordinator, U.S. Information Agency, Room M–04, 301 Fourth Street SW., Washington, DC 20547.

(2) Appeals of denials of initial requests must be addressed to NED in the same manner or to the Department of State pursuant to the procedures set forth at part 171 of this Title, with the addition of the word ''APPEAL'' preceding the address on the envelope. Appeals addressed directly to the Department of State will not be deemed to have been received by NED for purposes of the time period set forth in 5 U.S.C. 552(a)(6)(A)(1) until actually received by NED. The Department of State shall forward any appeal received by it to NED within 2 working days from the actual day of receipt by the Department of State.

(3) The request letter should contain all available data concerning the desired records, including a description of

the material, dates, titles, authors, and other information that may help identify the records. The first paragraph of a request letter should state whether it is an initial request or an appeal.

(b) *Administrative time limits.* (1) Within 10 working days after NED's receipt of any request for access to NED records in compliance with paragraph (a) of this section, NED shall make an initial determination whether to provide the requested information and NED shall notify the requester in writing of its initial determination. In the event of an adverse determination, notification shall include the reasons for the adverse determination, the officials responsible for such determination, the right of the requester to appeal within NED, and that the final determination by NED to deny a request for records in whole or in part shall be submitted to the Secretary of State of Department of State for review. NED shall also provide Department of State a copy of its response as soon as practicable after it responds to the requester.

(2) When a request for records has been denied in whole or in part, the requester may, within 30 days of the date of receipt by the requester of the adverse determination from NED, appeal the denial to the President of NED or his designee, who will make a determination whether to grant or deny such appeal within 20 working days of receipt thereof. All appeals should be addressed in compliance with paragraph (a) of this section. If on appeal, the denial of the request for records is upheld, in whole or in part, NED shall notify the requester in writing of such determination, the reasons therefor, the officials responsible for such determination, the right of the requester to judicial review, and that the final determination by NED whether to deny a request for records in whole or in part shall be submitted to the Secretary of State of Department of State for review.

(3) If the requester elects not to appeal to the President of NED or his designee within the appeal period specified above, NED's initial determination will become the final NED determination upon expiration of said appeal period or receipt by NED of notice from the requester that he does not elect to appeal, whichever is earlier. If the requester chooses to appeal NED's initial determination within NED, the decision on appeal will become NED's final determination.

(4)(i) Once NED's determination to deny a request in whole or in part becomes final, NED shall submit a report to the Secretary of State of Department of State explaining the reasons for such denial no later than 5 working days thereafter.

(ii) The Secretary of State of Department of State shall review NED's final determination within 20 working days. If the Secretary of State of Department of State or his designee approves NED's denial in whole or in part, Department of State shall inform the requester and NED in writing of such determination, the reasons therefor, the officials responsible for such determination, and the right of the requester to judicial review of NED's determination. In the event of such a determination, Department of State shall assume full responsibility, including financial responsibility, for defending NED in any litigation relating to such request.

(iii) If the Secretary of State of Department of State or his designee disapproves NED's denial in whole or in part, Department of State shall promptly notify NED and thereafter NED shall promptly comply with the request for the pertinent records.

(iv) Because review by the Secretary of State of Department of State may resolve any dispute over access to NED records in the requester's favor, the requester is encouraged (but not required) to wait for the determination on review by the Secretary of State of Department of State before seeking judicial review of NED's final determination.

(5) In unusual circumstances as defined in 5 U.S.C. 552(a)(6)(B), the time limit provisions noted in paragraphs (b)(1) and (b)(2) of this section may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination can be expected. Such extensions of the time limits may not exceed 10 working days in the aggregate.

(6) Any person making a request for records pursuant to § 526.5 may consider administrative remedies exhausted if NED fails to comply within the applicable time limit provisions of this section. When no determination can be dispatched within the applicable time limits set forth in this section, NED shall nevertheless continue to process the request. On the expiration of the time limit, NED shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be dispatched, and of the requester's right to treat the delay as a denial and of the requester's right to appeal. NED may ask the requester to forego appeal until a determination is made. A copy of any such notice of delay will be sent to the Secretary of State of Department of State or to his designee no later than 2 working days after it has been sent to the requester. A court may retain jurisdiction and allow NED additional time to complete its review of the records, if it can be determined that exceptional circumstances exist and that NED is exercising due diligence in responding to the request.

(c) *Definitions governing schedule of standard fees and fee waivers.* For purposes of these regulations governing fees and fee waivers:

(1) All of the terms defined in FOIA apply;

(2) A *statute specifically providing for setting the level of fees for particular types of records* means any statute that specifically requires the NED to set the level of fees for particular types of records;

(3) The term *direct costs* means those expenditures that NED actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents, photographs, drawings or any other material to respond to a FOIA request. [Direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus 16% of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, any heating or lighting, the facility in which the records are stored];

(4) The term *search* includes all time spent looking for material that is responsive to a request, including page by page or line by line identification of material within documents. Searches shall be conducted to ensure that they are undertaken in the most efficient and least expensive manner so as to minimize costs for both NED and the requester. ''Search'' is distinguished from ''review'' of material in order to determine whether the material is exempt from disclosure (*see* subparagraph (c)(6) below);

(5) The term *duplication* refers to the process of making a copy of a document, drawing, photograph, or any other material necessary to respond to a FOIA request. The copy provided by NED will be in a form that is reasonably usable by requesters;

(6) The term *review* refers to the process of examining documents that are located in response to a request that is for a commercial use (*see* subparagraph (c)(7) below) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, *e.q.*, doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions;

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

(8) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher

education, an institution of professional education, and an institution of vocational education, that operates a program or programs of scholarly study and/or research;

(9) The term *non-commercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis as that term is referenced in paragraph (c)(7) 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;

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

(d) *Fees to be charged—general.* NED shall charge fees that recoup the full allowable direct costs it incurs. NED shall use the most efficient and least costly methods to comply with requests for documents, drawings, photographs, and any other materials made under the FOIA.

(e) *Specific fees.* The specific fees for which NED shall charge the requester when so required by the FOIA are as follows:

(1) Manual searches for records—$8.00 per hour for clerical personnel; $15.00 per hour for supervisory personnel;

(2) Computer searches for records—In any case where a computer search is possible and the most efficient means by which to conduct a search, NED will charge the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and the operator-programmer salary apportionable to the search. The charge for the cost of the operator-programmer time shall be based on the salary of the operator-programmer plus 16 percent;

(3) Review of records—Requesters who seek documents for commercial use shall be charged for the time NED spends reviewing records to determine whether such records are exempt from mandatory disclosure. These charges shall be assessed only for the initial review; *i.e.*, the review undertaken the first time NED analyzes the applicability of a specific exemption to a particular record or portion of a record. Neither NED nor the Department of State will charge for review at the administrative appeal level for an exemption already applied. However, NED will charge for review of records or portions of records withheld in full under an exemption that is subsequently determined not to apply. The fee for review as that term is used in these regulations shall be $15.00 per hour;

(4) Duplication of records—(i) making photocopies—15¢ per page; (ii) for copies prepared by computer, such as tapes or printouts, NED shall charge the actual cost, including operator time, of production of the tape or printout; (iii) for other methods of reproduction or duplication, NED shall charge the actual direct costs of producing the document(s);

(5) Other charges—(i) there shall be no fee for a signed statement of non-availability of a record; (ii) NED will not incur expenses arising out of sending records by special methods such as express mail;

(6) Restrictions on assessing fees—With the exception of requesters seeking documents for a commercial use, section (a)(4)(A)(iv) of the Freedom of Information Act, as amended, requires NED to provide the first 100 pages of duplication and the first two hours of search time without charge. NED shall

not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. NED will not begin to assess fees until it has first provided the above-referenced free search and reproduction. The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs to NED of receiving and recording a requester's remittance and processing the fee for deposit in NED's account. For purposes of these restrictions on assessment of fees, the word ''pages'' refers to paper copies of a standard size, which will normally be 8½ × 11 or 11 × 14. Thus, for example, requesters shall not be entitled to 100 microfiche or 100 computer disks without charge.

(f) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The fees to be charged each of these categories of requesters are as follows:

(1) Commercial use requesters—when NED receives a request for documents for commercial use, it shall assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are entitled to neither two hours of free search time nor 100 free pages of reproduction of documents. NED shall recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records. Requesters must reasonably describe the records sought;

(2) Educational and non-commercial scientific institution requesters—NED shall provide documents to educational and non-commercial scientific institution requesters for the cost of reproduction alone, excluding charges for the first 100 pages of duplication. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought;

(3) Requesters who are representatives of the news media—NED shall provide documents to requesters who are representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in subsection (c)(10) above, and the request must not be made for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters must reasonably describe the records sought;

(4) All other requesters—NED shall charge requesters who do not fit into any of the above categories those fees that recover the full reasonable direct costs of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Requesters must reasonably describe the records sought.

(g) *Assessment and collection of fees.* (1) NED shall assess interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. The fact that the fee has been received by NED, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(2) Charges for unsuccessful searches—If NED estimates that search charges are likely to exceed $25.00, it shall notify the requester of the estimated amount of fees unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. Such notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet the requester's needs at a lower cost. Dispatch of such a notice of request shall suspend the running of the period for response by NED until a reply is received from the requester.

(3) Aggregating requests—Except for requests that are for a commercial use, NED shall not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When NED reasonably believes that a requester or a group of requesters acting in concert are attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, NED shall aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have been made. Before aggregating requests from more than one requester, NED must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case shall NED aggregate multiple requests on unrelated subjects from one requester.

(4) Advance payments—NED shall not require payment for fees before work has commenced or continued on a request unless:

(i) NED estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00. In this event, NED shall notify the requester of the likely cost and may require an advance payment of an amount up to the full amount of estimated charges; or

(ii) A requester has previously failed to pay a fee charged within 30 days of the date of billing.

In this event, NED shall require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before NED begins to process a new request or a pending request from that requester.

(iii) When NED acts under paragraphs (g)(4)(i) or (ii) above, the administrative time limits prescribed in subsection (a)(6) of the FOIA will begin only after NED has received fee payments described above.

(5) Form of payment—Remittances shall be in the form of a personal check or bank draft drawn on any bank in the United States, a postal money order, or cash. Remittances shall be made payable to the order of: National Endowment for Democracy. NED will assume no responsibility for cash lost in the mail.

(h) *Fee waiver or reduction*. NED shall furnish documents without charge or at a charge reduced below the fees established by these regulations if disclosure of the information is in the public interest because the disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. In making a determination under this subsection, NED shall consider these factors in the following order:

(1) Whether the subject of the request for documents concerns the operations or activities of the government. For purposes of determining whether this factor is met:

(i) Records generated by a non-government entity are less likely to respond to a request for documents concerning the operations or activities of the government;

(ii) Records that are sought for their intrinsic informational content apart from their informative value with respect to specific activities or operations of government are less likely to meet this factor.

(2) Whether the information requested is likely to contribute to an understanding of government operations or activities. For purposes of determining whether the request meets this factor:

(i) NED will consider the extent to which the information requested already exists in the public domain;

(ii) NED will consider the extent to which the value of the information relates to an understanding of government operations or activities as opposed to the extent to which the information relates to other subjects.

(3) Whether the information requested will contribute to public understanding of government operations

or activities. For purposes of determining whether the request meets this factor:

(i) NED will consider whether the disclosure will contribute to a public understanding as opposed to a primarily personal understanding of the requester;

(ii) NED will consider the identity of the requester to determine whether such requester is in a position to contribute to public understanding through disclosure of the information. Requesters shall describe their qualifications to satisfy this consideration;

(iii) NED will consider the expertise of the requester and the extent to which the expertise will enable the requester to extract, synthesize and convey the information to the public. Requesters shall describe their qualifications to satisfy this consideration;

(4) Whether the contribution to public understanding will be significant. In determining whether this factor has been met:

(i) NED will consider whether the public's understanding of the subject matter in question is likely to be enhanced by the disclosure of information by a significant extent;

(ii) NED will compare the likely level of public understanding of the subject matter of the request before and after disclosure.

(5) After NED is satisfied that factors (h)(1) through (4) have been met, it will consider whether the requested disclosure is primarily in the commercial interest of the requester.

(i) For purposes of this subsection, *commercial interest* is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. Under this subsection, a ''commercial interest'' shall not be an interest served by a request for records supporting the news dissemination function of the requester. All requesters who seek a fee waiver under section (h) of these regulations must disclose any and all commercial interests that would be furthered by the requested disclosure. NED shall use this information, information in its possession, reasonable inferences drawn from the requester's identity, and the circumstances surrounding the request to determine whether the requester has any commercial interest that would be furthered by the disclosure. If information that NED obtains from a source other than the requester or reasonable inferences or other circumstances are used in making a determination under this paragraph (h)(5), NED shall inform the requester of the information, inferences or circumstances that were used in its initial determination. The requester may, prior to filing an appeal of the initial determination with the President of NED or his designee under paragraph (a)(2) of this section, provide further information to rebut such reasonable inferences, or to clarify the circumstances of the request to the person responsible for the initial determination. Such action by the requester must occur within 20 days of the initial determination by NED. Within 10 days of receipt of such further information, clarification, or rebuttal, NED shall respond to the additional information, reverse or affirm its original position and state the reasons for the reversal or affirmation. Receipt of an affirmation by the requester shall constitute an initial denial of a request for purposes of the appeal process described in paragraphs (a) and (b) of this section.

(ii) NED shall consider the magnitude of the requester's commercial interest. In making a determination under this factor, NED shall consider the role that the disclosed information plays with respect to the requester's commercial interests and the extent to which the disclosed information serves the range of commercial interests of the requester.

(iii) NED shall weigh the magnitude of the identified commercial interest of the requester against the public interest in disclosure in order to determine whether the disclosure is primarily in the commercial interest of the requester. If the magnitude of the public interest in disclosure is greater than the magnitude of the requester's commercial interest, NED shall grant a full or partial fee waiver.

(6) In determining whether to grant a full or partial fee waiver, NED shall, to the extent possible, identify the portion of the information sought by the requester that satisfies the standard governing fee waivers set forth in FOIA, as amended, 5 U.S.C.

552(a)(4)(A)(iii), and in paragraphs (h)(1) through (6) of this section, and grant a fee waiver with respect to those documents. Fees for reproduction of documents that do not satisfy these standards shall be assessed as provided in paragraphs (c) through (g) of this section.

(i) Except as provided in paragraph (h)(5)(i) of this section, a requester may appeal a determination of the fees to be charged or waived under these regulations as he or she would appeal an initial determination of documents to be disclosed under paragraphs (a) and (b) of this section.

[51 FR 40162, Nov. 5, 1986, as amended at 52 FR 37766, Oct. 9, 1987. Redesignated and amended at 64 FR 54540, Oct. 7, 1999]

§66.6 Exemptions.

NED reserves the right to withhold records and information that are exempt from disclosure under FOIA. *See* 5 U.S.C. 552(b).

§66.7 Limitation of exemptions.

FOIA does not authorize withholding of information or limit the availability of NED records to the public except as specifically stated in this part. Nor is authority granted to withhold information from Congress.

§66.8 Reports.

On or before March 1 of each calendar year, NED shall submit a reporting covering the preceding calendar year to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress. The report shall include those items specified at 5 U.S.C. 552(d).

PART 67—ORGANIZATION OF THE NATIONAL ENDOWMENT FOR DEMOCRACY

Sec.

67.1 Introduction.
67.2 Board of Directors.
67.3 Management.
67.4 Description of functions and procedures.

AUTHORITY: 22 U.S.C. 4411 *et seq.;* Title II, Sec. 210, Pub. L. 99–93, 99 Stat. 431 (22 U.S.C. 4415); Pub. L. 105–277, 112 Stat. 2681 *et seq.*

SOURCE: 51 FR 40164, Nov. 5, 1986, unless otherwise noted. Redesignated at 64 FR 54541, Oct. 7, 1999.

§67.1 Introduction.

(a) The National Endowment for Democracy (hereinafter ''NED'') was created in 1983 to stregthen democratic values and institutions around the world through nongovernmental efforts. Incorporated in the District of Columbia and governed by a bipartisan Board of Directors, NED is tax-exempt, nonprofit, private corporation as defined in section 501(c)(3) of the Internal Revenue Code. Through its worldwide grant program, NED seeks to enlist the energies and talents of private citizens and groups to work with partners abroad who wish to build for themselves a democratic future.

(b) Since its establishment in 1983, NED has received an annual appropriation approved by the United States Congress as part of the United States Information Agency budget. Appropriations for NED are authorized in the National Endowment for Democracy Act (the ''Act''), 22 U.S.C. 4411 *et seq.*

(c) The activities supported by NED are guided by the six purposes set forth in NED's Articles of Incorporation and the National Endowment for Democracy Act. These six purposes are:

(1) To encourage free and democratic institutions throughout the world through private-sector initiatives, including activities which promote the individual rights and freedoms (including internationally recognized human rights) which are essential to the functioning of democratic institutions;

(2) To facilitate exchanges between U.S. private sector groups (especially the two major American political parties, labor and business) and democratic groups abroad;

(3) To promote U.S. nongovernmental participation (especially through the two major American political parties, labor, and business) in democratic training programs and democratic institution-building abroad;

(4) To strengthen democratic electoral processes abroad through timely measures in cooperation with indigenous democratic forces;

(5) To support the participation of the two major American political parties, labor, business, and other U.S. private-sector groups in fostering cooperation with those abroad dedicated to the cultural values, institutions, and organizations of democratic pluralism; and

(6) To encourage the establishment and growth of democratic development in a manner consistent both with the broad concerns of United States national interests and with the specific requirements of the democratic groups in other countries which are aided by NED-supported programs.

§ 67.2 Board of Directors.

(a) NED is governed by a bipartisan board of Directors of not fewer than thirteen and not more than twenty-five members reflecting the diversity of American society. The officers of the corporation are Chairman and Vice Chairman of the Board, who shall be members of the Board, a President, Secretary and Treasurer, and such other officers as the Board of Directors may from time to time appoint. Meetings of the Board of Directors are held at times determined by the Board, but in no event fewer than four times each year. A current list of members of the Board of Directors and a schedule of upcoming meetings is available from NED's office at 1101 15th Street, NW; Suite 700, Washington, DC 20005–5000.

(b) All major policy and funding decisions are made by the Board of Directors. The primary statement of NED's operating philosophy, general principles and priorities is contained in the National Endowment for Democracy's *Statement of Principles and Objectives*, adopted by the Board of Directors in December 1984. Copies of this statement as well as other general information concerning the organization are available from NED on request.

(c) As a grantmaking organization, NED does not carry out programs directly. All grants made by the corporation shall be by a two-thirds vote of those voting at a meeting at which a quorum is present. Notwithstanding the foregoing, the Board may from time to time adopt, upon a two-thirds vote of those voting at a meeting at which a quorum is present, procedures to address emergency funding requests between meetings of the Board. In addition, ''[a]ny Board member who is an officer or director of an organization seeking to receive grants from the Corporation must abstain from consideration of and any vote on such grant'' (Article VI, Section 6). Copies of the bylaws are available from NED's offices.

[51 FR 40164, Nov. 5, 1986. Redesignated and amended at 64 FR 54541, Oct. 7, 1999]

§ 67.3 Management.

(a) NED's operations and staff are managed by a President selected by the Board of Directors. The President is the chief executive officer of the corporation and manages the business of the corporation under the policy direction of the Board of Directors. The President directs a staff whose functions are divided among the Office of the President, a Program Section and a Finance Office.

(b) The Office of the President provides policy direction and is responsible for day-to-day management of the organization, including personnel management, liaison with the Board of Directors and preparation of meetings of the Board and Board committees. The President's office also provides information concerning NED's activities to the press and public. The Program Section, under the direction of the Director of Program, is responsible for the review and preparation of proposals submitted to the Endowment and for the monitoring and evaluation of all programs funded by NED.

(c) The Finance Office, under the direction of the Comptroller, is responsible, with the President and the Board of Directors, for financial management of NED's affairs, including both administrative financial management and grant management. The Director of Program and the Comptroller report to the NED President.

§ 67.4 Description of functions and procedures.

(a) In accordance with the *Statement of Principles and Objectives*, NED is currently developing and funding programs in five substantive areas:

(1) *Pluralism.* NED encourages the development of strong, independent private-sector organizations, especially trade unions and business associations. It also supports cooperatives, civic and women's organizations, and youth groups, among other organizations. Programs in the areas of labor and business are carried out, respectively, through the Free Trade Union Institute and the Center for International Private Enterprise.

(2) *Democratic governance and political processes.* NED seeks to promote strong, stable political parties committed to the democratic process. It also supports programs in election administration and law, as well as programs that promote dialogue among different sectors of society and advance democratic solutions to national problems.

(3) *Education, culture and communications.* NED funds programs that nourish a strong democratic civic culture, including support for publications and other communications media and training programs for journalists; the production and dissemination of books and other materials to strengthen popular understanding and intellectual advocacy of democracy; and programs of democratic education.

(4) *Research.* A modest portion of NED's resources is reserved for research, including studies of particular regions or countries where NED has a special interest, and evaluations of previous or existing efforts to promote democracy.

(5) *International cooperation.* NED seeks to encourage regional and international cooperation in promoting democracy, including programs that strengthen cohesion among democracies and enhance coordination among democratic forces.

(b) As a grantmaking organization, NED has certain responsibilities that govern its relationship with all potential and actual grantees. Briefly, these are:

(1) *Setting program priorities* within the framework of the purposes outlined in NED's articles of incorporation and contained in the legislation, and guided by the general policy Statement of the Board of Directors;

(2) *Reviewing and vetting proposals,* guided by the general guidelines and selection criteria adopted by the NED Board;

(3) *Coordinating among all grantees* to avoid duplication and to assure maximum program effectiveness;

(4) *Negotiating a grant agreement* which ensures a high standard of accountability on the part of each grantee;

(5) *Financial and programmatic monitoring* following the approval and negotiation of a grant, and ongoing and/or follow-up evaluation of programs prior to any subsequent funding of either a particular grantee or a specific program. Grantees will also be expected to monitor projects, to provide regular reports to NED on the progress of programs, and to inform NED promptly of any significant problems that could affect the successful implementation of the project. NED grantees will also conduct their own evaluations of programs.

(6) As a recipient of congressionally appropriated funds, NED has a special responsibility to:

(i) Operate openly,

(ii) Provide relevant information on programs and operations to the public, and

(iii) Ensure that funds are spent wisely, efficiently, and in accordance with all relevant regulations.

(c) Institutes representing business, labor, and the major political parties carry out programs which are central to NED's purposes. As a result of their unique relationship to NED, institute programs are an integral part of NED's priorities and the institutes themselves are ''core'' grantees. As such, the institutes, while subject to all the normal procedures governing NED's relationships with grantees, will be treated differently in the following respects:

(1) The institutes will have the mandate to carry out programs funded by NED in their respective sectors of business, labor and political parties.

(2) As an integral part of the process of budgeting and setting program priorities, the NED Board will target a certain amount of its annual resources for institute programs in their respective fields of activity.

(3) Unlike its practice for the majority of its grantees, NED will fund significant administrative costs for each of the core grantees.

(4) Institute staff will assume responsibility for program development and preparation of proposals for the Board in each field of activity for which it has a special mandate.

(5) NED will expect its core grantees to perform their monitoring/evaluation function described in programmatic monitoring under *Financial and programmatic monitoring* above in a manner that will minimize the need to devote NED resources for these purposes. (Individual copies of the Grants Policy are available from the NED office.)

(6) As stated above, in awarding grants the Board is guided by established grant selection critieria. In addition to evaluating how a program fits within NED's overall priorities, the Board considers factors such as the urgency of a program, its relevance to specific needs and conditions in a particular country, and the democratic commitment and experience of the applicant. NED is especially interested in proposals that originate with indigenous democratic groups. It is also interested in nonpartisan programs seeking to strengthen democratic values among all sectors of the democratic political spectrum.

(d) *Selection criteria*. In determining the relative merit of a particular proposal NED considers whether the grant application:

(1) Proposes a program that will make a concrete contribution to assisting foreign individuals or groups who are working for democratic ends and who need NED's assistance.

(2) Proposes a program, project or activity which is consistent with current NED program priorities and contributes to overall program balance and effectiveness.

(3) Proposes an activity that meets an especially urgent need.

(4) Does not overlap with what others are doing well.

(5) Proposes a program that will encourage an intellectual climate which is favorable to the growth of democratic institutions.

(6) Proposes a program that is not only culturally or intellectually appealing, but will affect the education and the awareness of minorities and/or the less privileged members of a society.

(7) Originates from an organization within a particular country representing the group whose needs are to be addressed.

(8) Appears to be well thought out, avoiding imprudent activities and possibilities for negative repercussions.

(9) Takes into consideration not only what objectively could be significant to a certain society, but how the cultural traditions and values of that society will react to the project.

(10) Incorporates an analysis of the problem of democracy in the area in question and the method by which the proposed program will have a constructive impact on the problem.

(11) Proposes a program that will enhance our understanding of what really helps in aiding democracy.

(12) Creatively enlists supports for foreign democratic organizations.

(13) Encourages democratic solutions and peaceful resolution of conflict in situations otherwise fraught with violence.

(14) Proposes a program, project or activity that is clearly relevant to NED program objectives and not better funded by other government or private organizations. (Proposing organizations will be be referred to other funding organizations where substantial overlap exists.)

(15) Proposes a program or strategy that is appropriate to the circumstances in the country concerned.

(16) Proposes a program that can be expected to have a multiplier effect, hence having an impact broader than that of the specific project itself; or establishes a model that could be readily replicated in other countries or institutions.

(17) Proposes appropriate, qualified staff who have a demonstrated ability to administer programs capably so as to accomplish stated goals and objectives.

(18) Proposes an appropriate ratio of administrative to program funds.

(19) Is responsive to NED suggestions with regard to program revisions.

(20) Proposes a realistic budget that is consistent with NED perceptions of

project value and is performed within a stated and realistic time frame; and

(21) Proposes a program that has, as one of its principal aspects, a major impact on the role of women and/or minorities.

(e) The following guidelines also apply to all projects funded by NED.

(1) The proposing organization must be able to show that it is a responsible, credible organization or group that has a serious and demonstrable commitment to democratic values. (Various factors may be considered in this regard: recognized democratic orientation; established professional reputation; proven ability to perform; existence of organization charter, board of directors, regular audits, etc.);

(2) The proposing organization must be willing to comply with all provisions of the National Endowment for Democracy Act as well as all provisions of current and subsequent agreements between the USIA and NED;

(3) The proposing organization must agree not to use grant funds for the purpose of educating, training, or informing United States audiences of any U.S. political party's policy or practice, or candidate for office. (This condition does not exclude making grants or expenditures for the purpose of educating, training or informing audiences of other countries on the institutions and values of democracy that may incidentally educate, train, or inform American participants);

(4) The proposing organization must agree that no NED funds will be used for lobbying or propaganda that is directed at influencing public policy decisions of the government of the United States or of any state or locality thereof;

(5) The proposing organization must agree that there shall be no expenditure of NED funds for the purpose of supporting physical violence by individuals, groups or governments;

(6) The proposing organization may not employ any person engaged in intelligence activity on behalf of the United States government or any other government;

(7) NED will not normally reimburse grantees for expenses incurred prior to the signing of a grant agreement with NED;

(8) Each grant made by NED will be an independent action implying no future commitment on NED's part to a project or program;

(9) NED may, from time to time, fund feasibility studies. Applications for grants in this category should include, but not be limited to, the following: Scope, method and objective of the study; Calendar; Proposed administration of the study; and Detailed budget. The funding of a feasibility study by NED does not imply support for any project growing out of the study. It does, however, imply interest by NED in the area under study and a willingness to entertain a project proposal growing out of the study; and

(10) The proposing organization may not use NED funds to finance the campaigns of candidates for public office.

(f) All proposals received by NED are reviewed by the staff in order to determine their congruence with NED's purposes as stated in the organization's Articles of Incorporation and the NED Act.

(g) Grant applications must contain the following information:

(1) A one-page summary of the proposed program;

(2) Organizational background and biographical information on staff and directors in the U.S. and abroad;

(3) A complete project description, including a statement of objectives, a project calendar, and a description of anticipated results;

(4) A statement describing how the project relates to NED's purposes;

(5) A description of the methods to be used to evaluate the project in relation to its objectives;

(6) A detailed budget, including an explanation of any counterpart support anticipated by the applicant, whether monetary or in-kind, domestic or foreign; and

(7) The names and addresses of all other funding organizations to which the proposal has been submitted or will be submitted.

(h) After an award determination has been made by the Board, NED enters into a grant agreement with the recipient. That agreement is made in accordance with NED policy, the terms of NED's grant agreement with USIA, and the terms of the Act, and the terms of

NED's standard grant agreement as they apply to the specific project in question. The NED Board of Directors approved a revised Statement of General Procedures and Guidelines on September 12, 1986. The statement, outlined above, is available from the NED office.

(i) NED Staff welcomes preliminary letters of inquiry prior to submission of a formal proposal. Letters of inquiry and formal proposals should be submitted to: Director of Program, National Endowment for Democracy 1101 15th Street, NW, Suite 700, Washington, DC 20005–5000.

[51 FR 40164, Nov. 5, 1986. Redesignated and amended at 64 FR 54541, Oct. 7, 1999]

SUBCHAPTER H—PROTECTION AND WELFARE OF AMERICANS, THEIR PROPERTY AND ESTATES

PART 71—PROTECTION AND WELFARE OF CITIZENS AND THEIR PROPERTY

Subpart A—General Activities

Sec.
71.1 Protection of Americans abroad.
71.2 Requests for naval force in foreign port.
71.3 American claimants to foreign estates and inheritances.
71.4 Real property of deceased American citizens.
71.5 Storage or safekeeping of private property.
71.6 Services for distressed Americans.
71.7 Reports on catastrophes abroad.
71.8 Assistance to American Red Cross.
71.9 Presentation of Americans at foreign courts.

Subpart B—Emergency Medical/Dietary Assistance for U.S. Nationals Incarcerated Abroad

71.10 Emergency medical assistance.
71.11 Short-term full diet program.
71.12 Dietary supplements.

AUTHORITY: Sec. 4, 63 Stat. 111, as amended (22 U.S.C. 2658, 2670); Pub. L. 95–45 (91 Stat. 221).

SOURCE: 22 FR 10841, Dec. 27, 1957, unless otherwise noted.

Subpart A—General Activities

§ 71.1 Protection of Americans abroad.

Officers of the Foreign Service shall perform such duties in connection with the protection of American nationals abroad as may be imposed upon them by rules and regulations prescribed by the Secretary of State.

§ 71.2 Requests for naval force in foreign port.

Diplomatic representatives and consular officers shall not request the presence of a naval force in a foreign port unless a public emergency so necessitates. The request may be addressed to the officers in command of the naval force, in which event responsibility of action rests with them, or it may be addressed to the Department of State. In either case, the request should contain detailed reasons for its submission.

§ 71.3 American claimants to foreign estates and inheritances.

Where treaty provisions, local laws, or established usage permit, a consular officer should protect the interests of American citizens claiming foreign estates and inheritances.

§ 71.4 Real property of deceased American citizens.

In the absence of special provisions by treaty the devolution and transfer of real property are covered by the law of the place where the property is situated. When real property is left by the decedent within the country where death occurs, or where the decedent was domiciled at the time of death, the consular officer, or diplomatic officer, if there be no consular officer, should if feasible informally observe the proceedings and report to the diplomatic mission or the Department any apparent irregularity or unnecessary delay in settling the estate.

§ 71.5 Storage or safekeeping of private property.

Except in a public emergency, no officer of the Foreign Service shall accept private property for storage or safekeeping in the office or for transmission to some other destination, unless it is property belonging to the estate of a deceased American citizen, or property over which the officer has jurisdiction as a result of a catastrophe at sea. In public emergencies, officers may accept private property for storage and safekeeping or for transmission to another destination, provided the owner signs a statement to the effect that the property is being accepted for deposit at his request, at his own risk, and with full knowledge that neither the Government of the United States nor any of its officers assumes responsibility therefor.

§ 71.6 Services for distressed Americans.

Officers of the Foreign Service shall extend every possible aid and assistance within their power to distressed American citizens within their districts, but they shall not expend the funds nor pledge the credit of the Government of the United States for this purpose, except in the case of American seamen, or except as authorized by the Department of State.

§ 71.7 Reports on catastrophes abroad.

Whenever a great catastrophe occurs abroad, either on land or on sea, the officer within whose district the catastrophe takes place or into whose district the survivors are brought shall report immediately by telegraph the names of any American citizens who have been killed or injured and the names of American citizens known to be safe.

§ 71.8 Assistance to American Red Cross.

Officers and employees of the Foreign Service may cooperate fully with the American Red Cross within their respective districts and subject to the limitations prescribed in § 102.806 (22 CFR, 1947 Supp.). They shall, however, avoid taking an active part in the solicitation of memberships or the collection of funds.

§ 71.9 Presentation of Americans at foreign courts.

The chief of the mission concerned may exercise his discretion in the matter of procuring the presentation of American citizens at the court of the country to which he is accredited.

Subpart B—Emergency Medical/Dietary Assistance for U.S. Nationals Incarcerated Abroad

SOURCE: 42 FR 60141, Nov. 25, 1977, unless otherwise noted.

§ 71.10 Emergency medical assistance.

(a) *Eligibility criteria.* A U.S. national incarcerated abroad is considered eligible to receive funded medical treatment under the following general criteria:

(1) Adequate treatment cannot or will not be provided by prison authorities or the host government;

(2) All reasonable attempts to obtain private resources (prisoner's family, friends, etc.) have failed, or such resources do not exist;

(3) There are medical indications that the emergency medical assistance is necessary to prevent, or attempt to prevent, the death of the prisoners, or failure to provide the serviced will cause permanent disablement.

(b) *Services covered.* Funds, once approved, may be expended for:

(1) Medical examination, when required;

(2) Emergency treatment;

(3) Non-elective surgery;

(4) Medications and related medical supplies and equipment required on a routine basis to sustain life;

(5) Preventive or protective medications and medical supplies and equipment (vaccinations, inoculations, etc.) required to combat epidemic conditions (general or intramural);

(6) Childbirth attendance, including necessary medical care of newborn children; and

(7) Within the consular district, transportation for the U.S. national and attendant(s) designated by incarcerating officials between the place of incarceration and the place(s) of treatment.

(c) *Consular responsibility.* As soon as the consular officer is aware that a U.S. national prisoner in the consular district faces a medical crisis, the officer should take the following actions, setting forth the order or priority based on an evaluation of the facts received:

(1) Make every effort to contact the ill or injured prisoner as soon as possible;

(2) Take steps to obtain a professional medical diagnosis and prognosis of the ill or injured prisoner;

(3) Determine as accurately as possible the estimated costs of recommended treatment or surgery;

(4) Obtain the names and addreses of family or friends who might serve as a source of private funds for medical services, and attempt to obtain the necessary funds;

(5) Request the prisoner to execute a promissory note, since funds expended by the Department to cover medical services normally are on a reimbursable basis; and

(6) Submit the above information, along with recommendations and evaluations, to the Department for approval and authorization.

(d) *Emergency expenditure authorization*. When a medical emergency prohibits the delay inherent in contacting the Department and receiving authority to expend funds, the consular officer can expend up to an amount to be established by the Department without prior Departmental approval if:

(1) Symptoms determine eligibility for emergency medical treatment; or

(2) An immediate medical examination is warranted in order to verify the alleged abuse of a U.S. national prisoner by arresting or confining authorities; or

(3) Immediate emergency medical treatment or surgery is necessary to prevent death or permanent disablement, and there is insufficient time to explore private funds or obtain Department approval; and

(4) A promissory note already has been executed by the prisoner, or if the circumstances warrant, by the consular officer without recourse.

§71.11 Short-term full diet program.

(a) *Eligibility criteria*. A prisoner is considered eligible for the short-term full diet program under the following general criteria:

(1) The prisoner is to be or has been held in excess of one day in a holding jail or other facility;

(2) Incarcerating officials do not provide the prisoner food, and food is not available from any other sources, including private funding from family or friends; and

(3) If the funds exceed an amount to be established by the Department, the prisoner signs a promissory note for funds expended, since the assistance is on a normally reimbursable basis.

(b) *Consular responsibility*. As soon as the consular officer is aware that a U.S. national is incarcerated in a facility wherein food is not routinely provided, the consular officer should:

(1) Contact the prisoner in accordance with existing procedures;

(2) Determine the normal cost of basic diet and best method of effecting payment;

(3) Attempt to secure funds from private sources such as family or friends;

(4) Because funds expended by the Department to cover the short-term full diet program normally are on a reimbursable basis, have the prisoner execute a promissory note; and

(5) Contact the Department, providing the above information, for approval and authorization.

(c) *Emergency expenditure authorization*. Since an immediate need for a short-term full diet program often prohibits the delay inherent in contacting the Department and receiving authority to expend funds, the consular officer can expend up to an amount to be established by the Department without prior Departmental approval if the prisoner's case meets the criteria established in paragraph (a) of this section. Expenditures above the predetermined limit must receive the prior approval of the Department.

§71.12 Dietary supplements.

(a) *Eligibility criteria*. A prisoner is considered eligible for the dietary supplement program under the following general criteria:

(1) An evaluation by a priviate physician, prison doctor, or other host country medical authority reveals that the prison diet does not meet the minimum requriements to sustain adequate health; or

(2) If the evaluation in paragraph (a)(1) of this section is not available, an evaluation by either a regional medical officer or Departmental medical officer reveals that the prison diet does not provide the minimum requirements to sustain adequate health.

(b) *Consular responsibility*. (1) When the consular officer is aware that the U.S. prisoner's diet does not provide the minimum requirements to sustain adequate health, the consular officer shall obtain the necessary dietary supplements and distribute them to the prisoner on a regular basis.

(2) As soon as the consular officer believes that dietary supplements are being misused, the consular officer

shall suspend provision of the dietary supplements and report the incident in full to the Department.

PART 72—DEATHS AND ESTATES

REPORTING DEATHS OF UNITED STATES NATIONALS

Sec.
72.1 Definitions.
72.2 Consular responsibility.
72.3 Exceptions.
72.4 Notifications of death.
72.5 Final report of death.
72.6 Report of presumptive death.

DISPOSITION OF REMAINS

72.7 Consular responsibility.

PERSONAL ESTATES OF DECEASED UNITED STATES CITIZENS AND NATIONALS.

72.8 Regulatory responsibility of consular officer.
72.9 Responsibility if legal representative is present.
72.10 Responsibility if a will intended to operate locally exists.
72.11 Responsibility if a will intended to operate in the United States exists.
72.12 Bank deposits in foreign countries.
72.13 Effects to be taken into physical possession.
72.14 Nominal possession; property not normally taken into physical possession.
72.15 Action when possession is impractical.
72.16 Procedure for inventorying and appraising effects.
72.17 Final statement of account.
72.18 Payment of debts owed by decedent.
72.19 Consular officer is ordinarily not to act as administrator of estate.
72.20 Prohibition against performing legal services or employing counsel.
72.21 Consular officer not to assume financial responsibility for the estate.
72.22 Release of personal estate to legal representative.
72.23 Affidavit of next of kin.
72.24 Conflicting claims.
72.25 Transfer of personal estate to Department of State.
72.26 Vesting of personal estate in United States.
72.27 Export of cultural property; handling other property when export, possession, or import may be illegal.
72.28 Claims for lost, stolen, or destroyed personal estate.

REAL PROPERTY OVERSEAS BELONGING TO A DECEASED UNITED STATES CITIZEN OR NATIONAL.

72.29 Real property overseas belonging to deceased United States citizen or national.
72.30 Provisions in a will or advanced directive regarding disposition of remains.

FEES

72.31 Fees for consular death and estates services.

AUTHORITY: 22 U.S.C. 2715, 2715b, 2715c, 4196, 4197, 4198, 4199.

SOURCE: 72 FR 8889, Feb. 28, 2007, unless otherwise noted.

REPORTING DEATHS OF UNITED STATES NATIONALS

§ 72.1 Definitions.

For purposes of this part:

(a) *Consular officer* includes any United States citizen employee of the Department of State who is designated by the Department of State to perform consular services relating to the deaths and estates abroad of United States nationals.

(b) *Legal representative* means—

(1) An executor designated by will intended to operate in the country where the death occurred or in the country where the deceased was residing at the time of death to take possession and dispose of the decedent's personal estate;

(2) An administrator appointed by a court of law in intestate proceedings in the country where the death occurred or in the country where the deceased was residing at the time of death to take possession and dispose of the decedent's personal estate;

(3) The next of kin, if authorized in the country where the death occurred or in the country where the deceased was residing at the time of death to take possession and dispose of the decedent's personal estate; or

(4) An authorized agent of the individuals described in paragraphs (b)(1), (b)(2) and (b)(3) of this section.

(c) *Department* means the United States Department of State

§ 72.2 Consular responsibility.

When a consular officer learns that a United States citizen or non-citizen national has died in the officer's consular district, the officer must—

(a) Report the death to the Department; and

(b) The officer must also try to notify, or assist the Secretary of State in

notifying, the next of kin (or legal guardian) and the legal representative, if different from the next of kin, as soon as possible. See § 72.3 for exceptions to this paragraph.

§ 72.3 Exceptions.

If a consular office learns that a United States citizen or non-citizen national employee or dependent of an employee of a member of the United States Armed Forces, or a United States citizen or non-citizen national employee of another department or agency or a dependent of such an employee, or a Peace Corps volunteer as defined in 22 U.S.C. 1504(a) or dependent of a Peace Corps volunteer has died while in the officer's consular district while the employee or volunteer is on assignment abroad, the officer should notify the Department. The consular officer should not attempt to notify the next of kin (or legal guardian) and legal representative of the death, but rather should assist, as needed, the appropriate military, other department of agency or Peace Corps authorities in making notifications of death with respect to such individual.

§ 72.4 Notifications of death.

The consular officer should make best efforts to notify the next of kin (or legal guardian), if any, and the legal representative (if any, and if different from the next of kin), of the death of a United States citizen or non-citizen national by telephone as soon as possible, and then should follow up with a written notification of death.

§ 72.5 Final report of death.

(a) *Preparation.* Except in the case of the death of an active duty member of the United States Armed Forces, when there is a local death certificate or finding of death by a competent local authority, the consular officer should prepare a consular report of death (''CROD'') on the form prescribed by the Department. The CROD will list the cause of death that is specified on the local death certificate or finding of death. The consular officer must prepare an original Report of Death, which will be filed with the Vital Records Section of Passport Services at the Department of State. The consular officer will provide a certified copy of the Report of Death to the next of kin or other person with a valid need for the Report within six months of the time of death. The next of kin or other person with a valid need for the Report may obtain additional certified copies after six months by contacting the Department of State, Vital Records, Passport Services, 1111 19th St., NW., Rm. 510, Washington, DC 20036.

(b) *Provision to Department.* The consular officer must sent the original of the CROD to the Department, with one additional copy for each agency concerned, if the deceased was:

(1) A recipient of continuing payments other than salary from the Federal Government; or

(2) An officer or employee of the Federal Government (other than a member of the United States Armed Services); or

(3) A Selective Service registrant of inductable age.

(c) *Provision to next of kin/legal representative.* The consular officer must provide a copy of the CROD to the next of kin (or legal guardian) or to each of the next of kin, in the event there is more than one (e.g. more than one surviving child) and to any known legal representative who is not the next of kin.

(d) *Transmission of form to other consular districts.* If the consular officer knows that a part of the personal estate of the deceased is in a consular district other than that in which the death occurred, the officer should send a copy of the CROD to the consular officer in the other district.

(e) The Department may revoke a CROD if it determines in its sole discretion that the CROD was issued in error.

§ 72.6 Report of presumptive death.

(a) *Local finding.* When there is a local finding of presumptive death by a competent local authority, a consular officer should prepare a consular report of presumptive death on the form prescribed by the Department.

(b) *No local finding.* (1) A United States citizen or non-citizen national may disappear or be missing in circumstances where it appears likely that the individual has died, but there

is no local authority able or willing to issue a death certificate or a judicial finding of death. This may include, for example, death in a plane crash where there are no identifiable remains, death in a plane crash beyond the territory of any country, death in an avalanche, disappearance/death at sea, or other sudden disaster where the body is not immediately (or perhaps ever) recoverable.

(2) *Authorization of issuance.* The Department may authorize the issuance of a consular report of presumptive death in such circumstances. A consular report of presumptive death may not be issued without the Department's authorization.

(3) *Considerations in determining whether the Department will authorize issuance of a Report of Presumptive Death.* The Department's decision whether to issue a Report of Presumptive Death is discretionary, and will be based on the totality of circumstances in each particular case. Although no one factor is conclusive or determinative, the Department will consider the factors cited below, among other relevant considerations, when deciding whether to authorize issuance in a particular case:

(i) Whether the death is believed to have occurred within a geographic area where no sovereign government exercises jurisdiction;

(ii) Whether the government exercising jurisdiction over the place where the death is believed to have occurred lacks laws or procedures for making findings of presumptive death;

(iii) Whether the government exercising jurisdiction over the place where the death is believed to have occurred requires a waiting period exceeding five years before findings of presumptive death may be made;

(iv) Whether the person who is believed to have died was seen to be in imminent peril by credible witnesses;

(v) Whether the person who is believed to have died is reliably known to have been in a place which experienced a natural disaster, or catastrophic event, that was capable of causing death;

(vi) Whether the person believed to have died was listed on the certified manifest of, and was confirmed to have boarded, an aircraft, or vessel, which was destroyed and, despite diligent search by competent authorities, some or all of the remains were not recovered or could not be identified;

(vii) Whether there is evidence of fraud, deception, or malicious intent.

(c) Consular reports of presumptive death should be processed and issued in accordance with § 72.5.

(d) The Department may revoke a report of presumptive death if it determines in its sole discretion that the report was issued in error.

DISPOSITION OF REMAINS

§ 72.7 Consular responsibility.

(a) A consular officer has no authority to create Department or personal financial obligations in connection with the disposition of the remains of a United States citizen or non-citizen national who dies abroad. Responsibility for the disposition of the remains and all related costs (including but not limited to costs of embalming or cremation, burial expenses, cost of a burial plot or receptacle for ashes, markers, and grave upkeep), rests with the legal representative of the deceased. In the absence of a legal representative (including when the next of kin is not a legal representative), the consular officer should ask the next of kin to provide funds and instructions for disposition of remains. If the consular officer cannot locate a legal representative or next of kin, the consular officer may ask friends or other interested parties to provide the funds and instructions.

(b) Arrangements for the disposition of remains must be consistent with the law and regulations of the host country and any relevant United States laws and regulations. Local law may, for example, require an autopsy, forbid cremation, require burial within a certain period of time, or specify who has the legal authority to make arrangements for the disposition of remains.

(c) If funds are not available for the disposition of the remains within the period provided by local law for the interment or preservation of dead bodies, the remains must be disposed of by the local authorities in accordance with local law or regulations.

PERSONAL ESTATES OF DECEASED UNITED STATES CITIZENS AND NATIONALS

§ 72.8 Regulatory responsibility of consular officer.

(a) A consular officer should act as provisional conservator of the personal estate of a United States citizen or non-citizen national who dies abroad in accordance with, and subject to, the provisions of §§ 72.9 through 72.27. The consular officer may act as provisional conservator only with respect to the portion of the personal estate located within the consular officer's district.

(b) A consular officer may act as provisional conservator only to the extent that doing so is:

(1) Authorized by treaty provisions;

(2) Not prohibited by the laws or authorities of the country where the personal estate is located; or

(3) Permitted by established usage in that country.

§ 72.9 Responsibility if legal representative is present.

(a) A consular officer should not act as provisional conservator if the consular officer knows that a legal representative is present in the foreign country.

(b) If the consular officer learns that a legal representative is present after the consular officer has taken possession and/or disposed of the personal estate but prior to transmission of the proceeds and effects to the Secretary of State pursuant to § 72.25, the consular officer should follow the procedures specified in § 72.22.

§ 72.10 Responsibility if a will intended to operate locally exists.

(a) If a will that is intended to operate in the foreign country is discovered and the legal representative named in the will qualifies promptly and takes charge of the personal estate in the foreign country, the consular officer should assume no responsibility for the estate, and should not take possession, inventory and dispose of the personal property and effects or in any way serve as agent for the legal representative.

(b) If the legal representative does not qualify promptly and if the laws of the country where the personal estate is located permit, however, the consular officer should take appropriate protective measures such as—

(1) Requesting local authorities to provide protection for the property under local procedures; and/or

(2) Placing the consular officer's seal on the personal property of the decedent, such seal to be broken or removed only at the request of the legal representative.

(c) If prolonged delays are encountered by the local or domiciliary legal representative in qualifying and/or making arrangements to take charge of the personal estate, the consular officer should consult the Department concerning whether the will should be offered for probate.

§ 72.11 Responsibility if a will intended to operate in the United States exists.

The consular officer immediately should forward any will that is intended to operate in the United States and that is among the effects taken into possession to the person or persons designated as executor(s). When the executor(s) cannot be located, the consular officer should send the will to the appropriate court in the State of the decedent's domicile. Until the consular officer knows that a legal representative is present in the foreign country and has qualified or made arrangements to take charge of the personal estate, the consular officer should act as provisional conservator in accordance with § 72.8.

§ 72.12 Bank deposits in foreign countries.

(a) A consular officer is not authorized to withdraw or otherwise dispose of bank accounts and other assets deposited in financial institutions left by a deceased United States citizen or non-citizen national in a foreign country. Such deposits or other assets are not considered part of the personal estate of a decedent.

(b) The consular officer should report the existence of bank accounts and other assets deposited in financial institutions of which the officer becomes aware to the legal representative, if any. The consular officer should inform

the legal representative of the procedures required by local law and the financial institution to withdraw such deposits, and should provide a list of local attorneys in the event counsel is necessary to assist in withdrawing the funds.

(c) A consular officer must not under any circumstances withdraw funds left by a deceased United States citizen or non-citizen national in a bank or financial institution in a foreign country without express approval and specific instructions from the Department.

§ 72.13 Effects to be taken into physical possession.

(a) A consular officer normally should take physical possession of articles such as the following:

(1) Convertibles assets, such as currency, unused transportation tickets, negotiable evidence of debts due and payable in the consular district, and any other instruments that are negotiable by the consular officer;

(2) Luggage;

(3) Wearing apparel;

(4) Jewelry, heirlooms, and articles generally by sentimental value (such as family photographs);

(5) Non-negotiable instruments, which include any document or instrument not negotiable by the consular officer because it requires either the signatures of the decedent or action by, or endorsement of, the decedent's legal representative. Nonnegotiable instruments include, but are not limited to, transportation tickets not redeemable by the consular officer, traveler's checks, promissory notes, stocks, bonds or similar instruments, bank books, and books showing deposits in building and loan associations, and

(6) Personal documents and papers.

(b) All articles taken into physical possession by a consular officer should be kept in a locked storage area on post premises. If access to storage facilities on the post premises cannot be adequately restricted, the consular officer may explore the possibility of renting a safe deposit box if there are funds available in the estate or from other sources (such as the next of kin).

§ 72.14 Nominal possession; property not normally taken into physical possession.

(a) When a consular officer take articles of a decedent's personal property from a foreign official or other persons for the explicit purpose of immediate release to the legal representative such acton is not a taking of physical possession by the officer. Before releasing the property, the consular officer must require the legal representative to provide a release on the form prescribed by the Department discharging the consular officer of any responsibility for the articles transferred.

(b) A consular officer is not normally expected to take physical possession of items of personal property such as:

(1) Items of personal property found in residences and places of storage such as furniture, household effects and furnishings, works of art, and book and wine collections, unless such items are of such nature and quantity that they can readily be taken into physical possession with the rest of the personal effects;

(2) Motor vehicles, airplanes or watercraft;

(3) Toiletries, such as toothpaste or razors;

(4) Perishable items.

(c) The consular officer should in his or her discretion take appropriate steps permitted under the laws of the country where the personal property is located to safeguard property in the personal estate that is not taken into the officer's physical possession including such actions as:

(1) Placing the consular officer's seal on the premises or on the property (whichever is appropriate);

(2) Placing such property in safe storage such as a bonded warehouse, if the personal estate contains sufficient funds to cover the costs of such safekeeping; and/or

(3) If property that normally would be sealed by the consular officer is not immediately accessible, requesting local authorities to seal the premises or the property or otherwise ensure that the property remains intact until consular seals can be placed thereon, the property can be placed in safe storage, or the legal representative can assume responsibility for the property.

(d) the consular officer may decide in his or her discretion to discard toiletries and perishable items.

§ 72.15 Action when possession is impractical.

(a) A consular officer should not take physical possession of the personal estate of a deceased United States citizen or non-citizen national in his or her consular district when the consular officer determines in his or her discretion that it would be impractical to do so.

(b) In such cases, the consular officer must take action that he or she determines in his or her discretion would be appropriate to protect t the personal estate such as:

(1) Requesting the persons, officials or organizations having custody of the personal estate to ship the property to the consular officer, if the personal estate contains sufficient funds to cover the costs of such shipment; or

(2) Requesting local authorities to safeguard the property until a legal representative can take physical possession.

§ 72.16 Procedure for inventorying and appraising effects.

(a) After taking physical possession of the personal estate of a deceased United States citizen or non-citizen national, the consular officer should promptly inventory the personal effects.

(b) If the personal estate taken into physical possession includes apparently valuable items, the consular officer may, in his or her discretion, seek a professional appraisal for such items, but only to the extent that there are funds available in the estate or from other sources (such as the next of kin) to cover the cost of appraisal.

(c) The consular officer must also prepare a list of articles not taken into physical possession, with an indication of any measures taken by the consular office to safeguard such items for submission with the inventory of effects.

§ 72.17 Final statement of account.

The consular officer may have to account directly to the parties in interest and to the courts of law in estate matters. Consequently, the officer must keep an account of receipts and expenditures for the personal estate of the deceased, and must prepare a final statement of account when turning over the estate to the legal representative, a claimant, or the Department.

§ 72.18 Payment of debts owed by decedent.

The consular officer may pay debts of the decedent which the consular officer believes in his or her discretion are legitimately owed in the country in which the death occurred, or in the country in which the decedent was residing at the time of death, including expenses incident to the disposition of the remains and the personal effects, out of the convertible assets of the personal estate taken into possession by the consular officer.

§ 72.19 Consular officer is ordinarily not to act as administrator of estate.

(a) A consular officer is not authorized to accept appointment from any foreign state or from a court in the United States and/or to act as administrator or to assist (except as provided in §§ 72.8 to 72.30) in administration of the personal estate of a United States citizen or non-citizen national who has died, or was residing at the time of death, in his or her consular district, unless the Department has expressly authorized the appointment. The Department will authorize such an appointment only in exceptional circumstances and will require the consular officer to execute bond consistent with 22 U.S.C. 4198 and 4199.

(b) The Department will not authorize a consular officer to serve as an administrator unless:

(1) Exercise of such responsibilities is:

(i) Authorized by treaty provisions or permitted by the laws or authorities of the country where the United States citizen or national died or was domiciled at the time of death; or

(ii) Permitted by established usage in that country; and

(2) The decedent does not have a legal representative in the consular district.

§ 72.20 Prohibition against performing legal services or employing counsel.

A consular officer may not act as an attorney or agent for the estate of a deceased United States citizen or noncitizen national overseas or employ counsel at the expense of the United States Government in taking possession and disposing of the personal estate of a United States citizen or noncitizen national who dies abroad, unless specifically authorized in writing by the Department. If the legal representative or other interested person wishes to obtain legal counsel, the consular officer may furnish a list of attorneys.

§ 72.21 Consular officer may not assume financial responsibility for the estate.

A consular officer is not authorized to assume any financial responsibility or to incur any expense on behalf of the United States Government in collecting and disposing of the personal estate of a United States citizen or national who dies abroad. A consular officer may incur expenses on behalf of the estate only to the extent that there are funds available in the estate or from other sources (such as the next of kin).

§ 72.22 Release of personal estate to legal representative.

(a) If a person or entity claiming to be a legal representative comes forward at any time prior to transmission of the decedent's personal estate to the Secretary of State under 22 CFR 72.25, the consular officer may release the personal estate in his or her custody to the legal representative provided that:

(1) The legal representative presents satisfactory evidence of the legal representative's right to receive the estate;

(2) The legal representative pays any fees prescribed for consular services provided in connection with the disposition of remains or protection of the estate (see 22 CFR 22.1);

(3) The legal representative executes a release in the form prescribed by the Department; and

(4) The Department approves the release of the personal estate.

(b) Satisfactory evidence of the right to receive the estate may include:

(1) In the case of an executor, a certified copy of letters testamentary or other evidence of legal capacity to act as executor;

(2) In the case of an administrator, a certified copy of letters of administration or other evidence of legal capacity to act as administrator;

(3) In the case of the agent of an executor or administrator, a power of attorney or other document evidencing agency (in addition to evidence of the executor's or administrator's legal capacity to act).

§ 72.23 Affidavit of next of kin.

If the United States citizen or noncitizen national who has died abroad did not leave a will that applies locally, and the personal estate in the consular district consists only of clothing and other personal effects that the consular officer concludes in his or her discretion is worth less than $2000 and/or cash of a value equal to or less than $2000, the consular officer may decide in his or her discretion to accept an affidavit from the decedent's next of kin as satisfactory evidence of the next of kin's right to take possession of the personal estate. The Department must approve any release based on an affidavit of next of kin where the consular officer concludes that the personal estate effects are worth more than $2000 and/or the cash involved is of a value more than $2000 and generally will consider approving such releases only in cases where state law prohibits the appointment of executors or administrators for estates that are valued at less than a specified amount and the law of the foreign country where the personal property is located would not prohibit such a release.

§ 72.24 Conflicting claims.

Neither the consular officer nor the Department of State has the authority or responsibility to mediate or determine the validity or order of contending claims to the personal estate of a deceased United States citizen or non-citizen national. If rival claimants, executors or administrators demand the personal estate in the consular officer's possession, the officer should not release the estate to any

claimant until a legally binding agreement in writing has been reached or until the dispute is settled by a court of competent jurisdiction, and/or the Department has approved the release.

§ 72.25 Transfer of personal estate to Department of State.

(a) If no claimant with a legal right to the personal estate comes forward, or if conflicting claims are not resolved, within one year of the date of death, the consular officer should sell or dispose of the personal estate (except for financial instruments, jewelry, heirlooms, and other articles of obvious sentimental value) in the same manner as United States Government-owned foreign excess property under Title IV of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 511 *et seq.*). If, however, a reasonable amount of additional time is likely to permit final settlement of the estate, the consular officer may in his or her discretion postpone the sale for that period of additional time.

(b) The consular officer should send to the custody of the Department the proceeds of any sale, together with all financial instruments (including bonds, shares of stock and notes of indebtedness), jewelry, heirlooms and other articles of obvious sentimental value, to be held in trust for the legal claimant(s).

(c) After receipt of a personal estate, the Department may seek payment of all outstanding debts to the estate as they become due, may receive any balances due on such estate, may endorse all checks, bills of exchange, promissory notes, and other instruments of indebtedness payable to the estate for the benefit thereof, and may take such other action as is reasonably necessary for the conservation of the estate.

§ 72.26 Vesting of personal estate in United States.

(a) If no claimant with a legal right to the personal estate comes forward within the period of five fiscal years beginning on October 1 after the consular officer took possession of the personal estate, title to the personal estate shall be conveyed to the United States, the property in the estate shall be under the custody of the Department, and the Department may dispose of the estate under as if it were surplus United States Government-owned property under title II of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 4811 *et seq.* or by such means as may be appropriate as determined by Department in its discretion in light of the nature and value of the property involved. The expenses of sales shall be paid from the estate, and any lawful claim received thereafter shall be payable to the extent of the value of the net proceeds of the estate as a refund from the appropriate Treasury appropriations account.

(b) The net cash estate shall be transferred to the miscellaneous receipts account of the Treasury of the United States.

§ 72.27 Export of cultural property; handling other property when export, possession, or import may be illegal.

(a) A consular officer should not ship, or assist in the shipping, of any archeological, ethnological, or cultural property, as defined in 19 U.S.C. 2601, that the consular officer is aware is part of the personal estate of a United States citizen or non-citizen national to the United States in order to avoid conflict with laws prohibiting or conditioning such export.

(b) A consular officer may refuse to ship, or assist in the shipping, of any property that is part of the personal estate of a United States citizen or non-citizen national if the consular officer has reason to believe that possession or shipment of the property would be illegal.

§ 72.28 Claims for lost, stolen, or destroyed personal estate.

(a) The legal representative of the estate of a decreased United States citizen or national may submit a claim to the Secretary of State for any personal property of the estate with respect to which a consular officer acted as provisional conservator, and that was lost, stolen, or destroyed while in the custody of officers or employees of the Department of State. Any such claim should be submitted to the Office of Legal Adviser, Department of State, in the manner prescribed by 28 CFR part

14 and will be processed in the same manner as claims made pursuant to 22 U.S.C. 2669–1 and 2669 (f).

(b) Any compensation paid to the estate shall be in lieu of the personal liability of officers or employees of the Department to the estate.

(c) The Department nonetheless may hold an officer or employee of the Department liability to the Department to the extent of any compensation provided to the estate. The liability of the officer or employee shall be determined pursuant to the Department's procedures for determining accountability for United States government property.

REAL PROPERTY OVERSEAS BELONGING TO A DECREASED UNITED STATES CITIZEN OR NATIONAL

§ 72.29 Real property overseas belonging to deceased United States citizen or national.

(a) If a consular officer becomes aware that the estate of a deceased United States citizen or national includes an interest in real property located within the consular officer's district that will not pass to any person or entity under the applicable local laws of intestate succession or testamentary disposition, and if local law provides that title may be conveyed to the Government of the United States, the consular officer should notify the Department.

(b) If the Department decides that it wishes to retain the property for its use, the Department will instruct the consular officer to take steps necessary to provide for title to the property to be conveyed to the Government of the United States.

(c) If title to the real estate is conveyed to the Government of the Unites States and the property is of use to the Department of State, the Department may treat such property as if it were an unconditional gift accepted on behalf of the Department of State under section 25 of the State Department Basic Authorities Act (22 U.S.C. 2697) and section 9(a)(3) of the Foreign Service Buildings Act of 1926 (22 U.S.C. 300(a)(3)).

(d) If the Department of State does not wish to retain such real property the Department may treat it as foreign excess property under title IV of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 511 *et seq.*).

§ 72.30 Provisions in a will or advanced directive regarding disposition of remains.

United States state law regarding advance directives, deaths and estates include provisions regarding a person's right to direct disposition of remains. Host country law may or may not accept such directions, particularly if the surviving spouse/next-of-kin disagree with the wishes of the testator/affiant.

FEES

§ 72.31 Fees for consular death and estates services.

(a) Fees for consular death and estates services are prescribed in the Schedule of Fees, 22 CFR 22.1.

(b) The personal estates of all officers and employees of the United States who die abroad while on official duty, including military and civilian personnel of the Department of Defense and the United States Coast Guard are exempt from the assessment of any fees proscribed by the Schedule of Fees.

SUBCHAPTER I—SHIPPING AND SEAMEN

PART 89—PROHIBITIONS ON LONGSHORE WORK BY U.S. NATIONALS

AUTHORITY: 8 U.S.C. 1288, Public Law 101–649, 104 Stat. 4878.

§ 89.1 Prohibitions on Longshore work by U.S. nationals; listing by country.

The Secretary of State has determined that, in the following countries, longshore work by crewmembers aboard United States vessels is prohibited by law, regulation, or in practice, with respect to the particular activities noted:

Albania

(a) Cargo loading and discharge.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Algeria

(a) All longshore activities.
(b) Exception: Opening and closing of hatches.

Angola

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches,
(2) Rigging of ship's gear, and
(3) Loading and discharge of cargo on board the ship if local labor is paid as if had done the work.

Antigua

(a) All longshore activities.
(b) Exceptions: activities on board ship.

Argentina

(a) All longshore activities.
(b) Exceptions: activities on board ship.

Australia (including Norfolk and Christmas Islands)

(a) All longshore activities.
(b) Exceptions:
(1) When shore labor cannot be obtained at rates prescribed by collective bargaining agreements,
(2) Operation of cargo-related equipment and opening and closing of hatches in small ports where there is insufficient shore labor, and
(3) Rigging of ship's gear.

Bahamas

(a) Longshore activities on the pier.

Bangladesh

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment integral to the vessel when there is a shortage of port workers able to operate the equipment and with the permission of the port authority, and
(2) Opening and closing of hatches.

Barbados

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Loading and discharge of cargo of less than 10 tons.

Belgium

(a) All longshore activities.
(b) Exception: Rigging of ship's gear.

Belize

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Benin

(a) All longshore activities.
(b) Exceptions:

(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Bermuda

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Brazil

(a) Cargo handling,
(b) Operation of cargo-related equipment,
(c) Watchmen,
(d) Handling of mooring lines on the pier, and
(e) Other longshore activities on the pier.
(f) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Brunei

(a) All longshore activities.
(b) Exceptions: Longshore activities on board ship.

Bulgaria

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches,
(2) Mooring and line handling on board ship, and
(3) Loading and discharge of supplies for the crew's own needs, spare parts for small repairs and other non-commercial longshore activities.

Burma

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Cameroon

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Canada

(a) All longshore activities.
(b) Exceptions:
(1) Operation of specialized self-loading/unloading log carriers on the Pacific Coast,
(2) Operation of self-loading/unloading equipment and line handling by the crews of bulk vessels calling at private terminals,
(3) Opening and closing of hatches,
(4) Cleaning of holds and tanks,
(5) Loading of ship's stores,
(6) Operation of onboard rented equipment,
(7) Ballasting and deballasting, and
(8) Rigging of ship's gear.
(c) Exceptions in connection with bulk cargo at Great Lakes ports only:
(1) Handling of mooring lines on the pier when the vessel is made fast or let go,
(2) Moving the vessel to place it under shoreside loading and unloading equipment,
(3) Moving the vessel in position to unload the vessel onto specific cargo piles, hoppers or conveyor belt systems, and
(4) Operation of cargo related equipment integral to the vessel.

Cape Verde

(a) All longshore activities.

Chile

(a) Longshore activities on shore.
(b) Transfer of cargo to or from ship.

China

(a) Longshore activities on shore.

Colombia

(a) All longshore activities.
(b) Exceptions: When local workers are unable or unavailable to provide longshore services.

Comoros

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment, and
(2) Opening and closing of hatches.

Congo, Democratic Republic of

(a) All longshore activities.

(b) Exception: Operation of cargo-related equipment, when authorized by the Port Authority.

Cook Islands

(a) Longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Costa Rica

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches and
(3) Rigging of ship's gear.

Cote d'Ivoire

(a) All longshore activities.

Croatia

(a) All longshore activities.

Cyprus

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Djibouti

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Dominica

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Dominican Republic

(a) Local longshore workers get paid if crewmembers operate loading and unloading equipment.

Ecuador

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear,

Egypt

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment integral to the ship except to load and discharge cargo,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Handling of mooring lines on the ship.

El Salvador

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment belonging to the vessel,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Special operations requiring special expertise, provided that local port workers are paid.

Eritrea

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Longshore activities for LASH vessels.

Fiji

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Operation of computerized off-loading equipment when local expertise is not available.

Finland

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and

(2) Rigging of ship's gear.

France (including the French Antilles, French Guiana, French Polynesia, Mayotte, New Caledonia, Reunion, St. Pierre and Miquelon and Wallis and Fortuna)

(a) All longshore activities.
(b) Exceptions:
(1) Loading and discharge of the ship's own material and provisions if done by the ship's own equipment or by the owner of the merchandise using his own personnel,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear,
(4) Operation of cargo-related equipment to shift cargo internally,
(5) Handling operations connected with shipbuilding and refitting, and
(6) Offloading fish by the crew or personnel for the shipowner.

Gabon

(a) All longshore activities.
(b) Exception: All longshore activities if local workers are paid as if they had done the work.

Gambia

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear,

Georgia

(a) All longshore activities.
(b) Exception: All longshore activities if local workers are paid as if they had done the work.

Germany

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Ghana

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Greece

(a) Operation of shore-based equipment to load/unload a vessel.

Grenada

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Guatemala

(a) All longshore activities.
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Guinea

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment aboard ship,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Other activities with the prior approval of the port authority.

Guyana

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment aboard ship except to load or discharge cargo,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Haiti

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Honduras

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,

(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Hong Kong

(a) Operation of equipment on the pier.

Iceland

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches,
(2) Rigging of ship's gear, and
(3) Longshore activities in smaller harbors where there are no local port workers.

India

(a) All longshore activities.
(b) Exception: Operation of shipboard equipment that local port workers cannot operate.

Indonesia

(a) All longshore activities.
(b) Exceptions:
(1) With the permission of the port administrator, when no local port workers with requisite skills are available, and
(2) In the event of an emergency.

Ireland

(a) All longshore activities on pier or on land at port.

Israel

(a) All longshore activities.
(b) Exceptions, other than for loading or discharging cargoes to and from the pier:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Italy

(a) All longshore activities.
(b) Exceptions: Cargo loading, discharge, and transfer upon presentation of the following information:
(1) Documentation listing the vessel's mechanical apparatus for cargo handling,
(2) A list of crewmembers who will perform the longshore activities,
(3) An insurance policy guaranteeing recovery for damages to persons or property in relation to the longshore activities.

Jamaica

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of unusual hatches,
(2) Rigging of unusual ship's gear, and
(3) Longshore activities on foreign government vessels or ships engaged on a community development or humanitarian project.

Japan

(a) All longshore activities.

Jordan

(a) All longshore activities.

Kazakhstan

(a) All longshore activities.

Kenya

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches,
(2) Rigging of ship's gear,
(3) In an emergency declared by the port authority, and
(4) Direct transfer of cargo from one ship to another.

Korea

(a) All longshore activities.
(b) Exceptions, when done in relation to ship safety, ship operation, or supervisory work to ensure that stevedoring is done correctly:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Kuwait

(a) Longshore activities on shore.

Latvia

(a) All longshore activities.
(b) Exceptions: activities on board the vessel.

Lebanon

(a) Longshore activities on shore.

Liberia

(a) Longshore activities on shore.

Lithuania

(a) All longshore activities.

Macau

(a) Longshore activities on the pier.

Madagascar

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Malaysia

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Loading and discharge of hazardous materials.

Maldive Islands

(a) All longshore activities on shore.

Malta

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Mauritania

(a) Loading and discharge of cargo.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Mauritius

(a) All longshore activities.
(b) Exceptions, other than for normal cargo handling activities:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Mexico

(a) All longshore activities.
(b) Exception: Preparation of cargo handling equipment to be operated by local port workers.

Morocco

(a) Loading and discharge of merchandise,
(b) Rigging of ship from dockside, and
(c) Other longshore activities not onboard vessel.
(d) Exceptions:
(1) Operation of onboard cargo related equipment, and
(2) Rigging of ship's gear onboard the ship, in coordination with local port workers.

Mozambique

(a) Loading and discharge of cargo.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Namibia

(a) Longshore activities on shore.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Nauru

(a) All longshore activities.
(b) Exceptions, with the authorization of the Harbor Master,
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Netherlands

(a) All longshore activities.
(b) Exception: Regular crew activities on board ship, including operation of cargo-related equipment, opening and closing of hatches, and rigging of ship's gear.

Netherlands Antilles

(a) All longshore activities.
(b) Exceptions:
(1) Operation of ship's gear,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

New Zealand

(a) All longshore activities that take longer than 28 days of arriving in territorial waters.

Nicaragua

(a) All longshore activities.
(b) Exception: Opening and closing of hatches and rigging of ship's gear if local workers are paid as if they had done the work.

Nigeria

(a) All longshore activities.
(b) Exceptions:
(1) Operation of ship's gear,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Instructing local employees on equipment.

Oman

(a) All longshore activities.
(b) Exceptions:
(1) Assisting in the operation of cargo related equipment if required,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Pakistan

(a) Longshore activities on shore, and
(b) Handling of mooring lines.
(c) Exception: Operation of equipment which pier workers are not capable of operating.

Panama

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Papua New Guinea

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Peru

(a) All longshore activities.
(b) Exceptions:
(1) Operation of sophisticated cargo-related equipment on container vessels,
(2) First opening and last closing of hatches and holds, and
(3) Cleaning of holds.

Philippines

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, if not related to cargo handling,
(2) Rigging of ship's gear, if not related to cargo handling,
(3) Longshore activities for hazardous or polluting cargoes, and
(4) Longshore activities on government vessels.

Poland

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Portugal (including Azores and Madeira)

(a) All longshore activities.
(b) Exceptions:
(1) Military operations,
(2) Operations in an emergency, when under the supervision of the maritime authorities,
(3) Security or inspection operations,
(4) Loading and discharge of supplies for the vessel and its crew,
(5) Loading and discharge of fuel and petroleum products at special terminals,
(6) Loading and discharge of chemical products if required for safety reasons,
(7) Placing of trailers and similar material in parking areas when done before loading or after discharge,
(8) Cleaning of the vessel,
(9) Loading, discharge, and disposal of merchandise in other boats, and
(10) Opening and closing hatches.

Qatar

(a) All longshore activities.

Romania

(a) All longshore activities.
(b) Exceptions:
(1) Operation of specialized shipboard equipment, and
(2) Loading and discharge of cargo requiring special operations.

Russia

(a) All longshore activities performed with local port equipment.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

St. Christopher and Nevis

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

St. Lucia

(a) Loading, discharge and handling of general cargo.
(b) Exceptions: activities on board the ship.

St. Vincent and the Grenadines

(a) All longshore activities.
(b) Exceptions: activities on board the ship.

Saudi Arabia

(a) All longshore activities on shore.

Senegal

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches,
(2) Rigging of ship's gear, and
(3) Cargo handling when necessary to ensure the safety or stability of the vessel.

Seychelles

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Sierra Leone

(a) All longshore activities.

Singapore

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ships gear.

Slovenia

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Solomon Islands

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

South Africa

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Spain

(a) All longshore activities.

Sri Lanka

(a) Longshore activities on shore, and
(b) Operation of cargo related equipment to load and discharge cargo.

Sweden

(a) All longshore activities.

Sudan

(a) All longshore activities.

Syria

(a) All longshore activities on shore.

Taiwan

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches operated automatically, and
(2) Raising and lowering of ship's gear.

Tanzania

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Thailand

(a) Longshore activities on shore.

Togo

(a) Loading and discharge of cargo.
(b) Exceptions:
(1) Operation of cargo-related equipment on board the ship,
(2) Opening and closing of hatches, and
(3) Rigging of ships gear.

Tonga

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Trinidad and Tobago

(a) All longshore activities on shore.

Tunisia

(a) All longshore activities.
(b) Exception: Operation of specialized equipment that local port workers cannot operate.

Turkey

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Tuvalu

(a) Longshore activities on shore.

United Arab Emirates

(a) All longshore activities on shore.

Uruguay

(a) All longshore activities.
(b) Exceptions:
(1) Operation of on-board cranes requiring expert operation or at the master's request,
(2) Opening and closing of hatches, and
(3) Rigging of ship's gear.

Vanuatu

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Venezuela

(a) Longshore activities on shore, at the discretion of the companies leasing and operating port facilities.

Vietnam

(a) All longshore activities.
(b) Exceptions:
(1) Operation of cargo-related equipment,
(2) Opening and closing of hatches,
(3) Rigging of ship's gear, and
(4) Loading and discharge of cargo with on-board equipment when the port of call does not have the necessary equipment.

Western Samoa

(a) All longshore activities.
(b) Exceptions:
(1) Opening and closing of hatches, and
(2) Rigging of ship's gear.

Yemen

(a) Longshore activities on shore.

[68 FR 69601, Dec. 15, 2003]

SUBCHAPTER J—LEGAL AND RELATED SERVICES

PART 91—IMPORT CONTROLS

Sec.
91.1 Answering inquiries regarding tariff acts and custom regulations.
91.2 Furnishing samples to collectors of customs or appraising officers.
91.3 Assistance to Customs and Tariff Commission representatives.
91.4 Alcoholic liquors on vessels of not over 500 tons.

AUTHORITY: Sec. 4, 63 Stat. 111, as amended; 22 U.S.C. 2658.

SOURCE: 22 FR 10858, Dec. 27, 1957, unless otherwise noted.

§ 91.1 Answering inquiries regarding tariff acts and customs regulations.

In replying to inquiries received from exporters, travelers, or other interested parties, concerning tariff acts or customs regulations, consular officers shall refrain from giving, or appearing to give, decisions pertaining to matters upon which hey are not competent to pass.

§ 91.2 Furnishing samples to collectors of customs or appraising officers.

Upon the receipt of a request therefor from a collector of customs or appraising officer of the Government of the United States, a consular officer shall procure and forward samples of merchandise being imported or offered for importation into the United States from his particular district.

§ 91.3 Assistance to Customs and Tariff Commission representatives.

Consular officers shall render all proper assistance to Customs and Tariff Commission representatives abroad to aid them in the performance of their official duties.

§ 91.4 Alcoholic liquors on vessels of not over 500 tons.

(a) Upon request of interested shippers or masters of vessels at ports in the consular district other than the place where the consular office is situated, consular officers shall designate one or more reputable individuals residing in each such port, as authorized persons to witness the signatures of the masters of vessels of not over 500 net tons when affixed to declarations covering shipments of alcoholic liquors destined to the United States, and to issue certificates therefor as contemplated by section 7 of the Anti-Smuggling Act of 1935 (49 Stat. 520; 19 U.S.C. 1707). Any person so designated by a consular officer to issue such certificates shall state in each of his certificates that he has no interest in the shipment described therein. Having delivered the original document to the master, he shall forward the duplicate to the consular office for retention.

(b) Consular officers shall, with respect to declarations of masters of vessels of not over 500 net tons in instances in which the port of shipment is the same place as, or conveniently near to, the location of the consular office, supply their certifications directly as contemplated by the said section of the Anti-Smuggling Act. They shall retain, over the interval prescribed in the applicable records retirement schedule, a copy of each document so certified by them. They shall similarly retain the copies of the certifications supplied by authorized persons in outlying ports of the consular district, as set forth in the preceding subsection.

(c) This section, read together with § 4.13, title 19, of the Code of Federal Regulations, comprises the joint regulations contemplated for issuance by the Secretary of State and the Secretary of the Treasury under section 7 of the Anti-Smuggling Act of 1935.

[32 FR 12588, Aug. 30, 1967]

PART 92—NOTARIAL AND RELATED SERVICES

INTRODUCTION

Sec.
92.1 Definitions.
92.2 Description of overseas notarial functions of the Department of State, record of acts.
92.3 Consular districts.
92.4 Authority of notarizing officers of the Department of State under the Federal law.

92.5 Acceptability of notarial acts under State or territorial law.
92.6 Authority of notarizing officers under international practice.
92.7 Responsibility of notarizing officers of the Department of State.

GENERAL NOTARIAL PROCEDURES

92.8 Compliance with request for notarial services.
92.9 Refusals of requests for notarial services.
92.10 Specific waiver in notarial certificate.
92.11 Preparation of legal documents.
92.12 Necessity for certification of notarial acts.
92.13 Form of notarial certificate.
92.14 Venue on notarial certificates.
92.15 Signing notarial certificate.
92.16 Sealing the notarial certificate.
92.17 Fastening of pages.

SPECIFIC NOTARIAL ACTS

92.18 Oaths and affirmations defined.
92.19 Administering an oath.
92.20 Administering an affirmation.
92.21 Notarial certificate to oath or affirmation.
92.22 ''Affidavit'' defined.
92.23 Taking an affidavit.
92.24 Usual form of affidavit.
92.25 Title of affidavit.
92.26 Venue on affidavit.
92.27 Affiant's allegations in affidavit.
92.28 Signature of affiant on affidavit.
92.29 Oath or affirmation to affidavit.
92.30 ''Acknowledgment'' defined.
92.31 Taking an acknowledgment.
92.32 Notarial certificate to acknowledgment.
92.33 Execution of certificate of acknowledgment.
92.34 Fastening certificate to instrument.
92.35 Errors in certificate of acknowledgment.
92.36 ''Authentication'' defined.
92.37 Authentication procedure.
92.38 Forms of certificate of authentication.
92.39 Authenticating foreign public documents (Federal procedures).
92.40 Authentication of foreign extradition papers.
92.41 Limitations to be observed in authenticating documents.
92.42 Certification of copies of foreign records relating to land titles.
92.43 Fees for notarial services and authentications.

DEPOSITIONS AND LETTERS ROGATORY

92.49 ''Deposition'' defined.
92.50 Use of depositions in court actions.
92.51 Methods of taking depositions in foreign countries.
92.52 ''Deposition on notice'' defined.
92.53 ''Commission to take depositions'' defined.
92.54 ''Letters rogatory'' defined.
92.55 Consular authority and responsibility for taking depositions.
92.56 Summary of procedure for taking depositions.
92.57 Oral examination of witnesses.
92.58 Examination on basis of written interrogatories.
92.59 Recording of objections.
92.60 Examination procedures.
92.61 Transcription and signing of record of examination.
92.62 Captioning and certifying depositions.
92.63 Arrangement of papers.
92.64 Filing depositions.
92.65 Depositions to prove genuineness of foreign documents.
92.66 Depositions taken before foreign officials or other persons in a foreign country.
92.67 Taking of depositions in United States pursuant to foreign letters rogatory.
92.68 Foreign Service fees and incidental costs in the taking of evidence.
92.69 Charges payable to foreign officials, witnesses, foreign counsel, and interpreters.
92.70 Special fees for depositions in connection with foreign documents.
92.71 Fees for letters rogatory executed by officials in the United States.

MISCELLANEOUS NOTARIAL SERVICES

92.72 Services in connection with patents and patent applications.
92.73 Services in connection with trademark registrations.
92.74 Services in connection with United States securities or interests therein.
92.75 Services in connection with income tax returns.

COPYING, RECORDING, TRANSLATING AND PROCURING DOCUMENTS

92.76 Copying documents.
92.77 Recording documents.
92.78 Translating documents.
92.79 Procuring copies of foreign public documents.
92.80 Obtaining American vital statistics records.

QUASI-LEGAL SERVICES

92.81 Performance of legal services.
92.82 Recommending attorneys or notaries.
92.84 ''Legal process'' defined.
92.85 Service of legal process usually prohibited.
92.86 Consular responsibility for serving subpoenas.
92.87 Consular responsibility for serving orders to show cause.
92.88 Consular procedure.
92.89 Fees for service of legal process.

92.90 Delivering documents pertaining to the revocation of naturalization.
92.91 Service of documents at request of Congressional committees.
92.92 Service of legal process under provisions of State law.
92.93 Notarial services or authentications connected with service of process by other persons.
92.94 Replying to inquiries regarding service of process or other documents.
92.95 Transportation of witnesses to the United States.

AUTHORITY: 22 U.S.C. 2658, unless otherwise noted.

SOURCE: 22 FR 10858, Dec. 27, 1957, unless otherwise noted.

INTRODUCTION

§ 92.1 Definitions.

(a) In the United States the term *notary* or *notary public* means a public officer qualified and bonded under the laws of a particular jurisdiction for the performance of notarial acts, usually in connection with the execution of some document.

(b) The term *notarial act* means an act recognized by law or usage as pertaining to the office of a notary public.

(c) The term *notarial certificate* may be defined as the signed and sealed statement to which a ''notarial act'' is almost invariably reduced. The ''notarial certificate'' attests to the performance of the act by the notary, and may be an independent document or as in general American notarial practice, may be placed on or attached to the notarized document.

(d) For purposes of this part, except §§ 92.36 through 92.42 relating to the authentication of documents, the term *notarizing officer* includes consular officers, officers of the Foreign Service who are secretaries of embassy or legation under Section 24 of the Act of August 18, 1856, 11 Stat. 61, as amended (22 U.S.C. 4221), and such U.S. citizen Department of State employees as the Deputy Assistant Secretary of State for Overseas Citizens Services may designate for the purpose of performing notarial acts overseas pursuant to section 127(b) of the Foreign Relations Authorization Act, Fiscal Years 1994–1995, Pub. L. 103–236, April 30, 1994 (''designated employees''). The authority of designated employees to perform notarial services shall not include the authority to perform authentications, to notarize patent applications, or take testimony in a criminal action or proceeding pursuant to a commission issued by a court in the United States, but shall otherwise encompass all notarial acts, including but not limited to administering or taking oaths, affirmations, affidavits or depositions.

The notarial authority of a designated employee shall expire upon termination of the employee's assignment to such duty and may also be terminated at any time by the Deputy Assistant Secretary for Overseas Citizen Services.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51721, Oct. 3, 1995]

§ 92.2 Description of overseas notarial functions of the Department of State, record of acts.

The overseas notarial function of notarizing officers of the Department of State is similar to the function of a notary public in the United States. See § 22.5(b) of this chapter concerning the giving of receipts for fees collected and the maintenance of a register serving the same purposes as the record which notaries are usually expected or required to keep of their official acts.

[60 FR 51721, Oct. 3, 1995]

§ 92.3 Consular districts.

Where consular districts have been established, the geographic limits of the district determine the area in which notarial acts can be performed by the notarizing officer. See § 92.41 (b) regarding authentication of the seals and signatures of foreign officials outside the consular district.

[27 FR 12616, Dec. 20, 1962, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.4 Authority of notarizing officers of the Department of State under Federal law.

(a) All notarizing officers are required, when application is made to them within the geographic limits of their consular district, to administer to and take from any person any oath, affirmation, affidavit, or deposition, and to perform any notarial act which

any notary public is required or authorized by law to perform within the United States. The term ''notarial act'' as used herein shall not include the performance of extraordinary acts, such as marriages, that have not been traditionally regarded as notarial, notwithstanding that notary publics may be authorized to perform such acts in some of the states of the United States. If a request is made to perform an act that the notarizing officer believes is not properly regarded as notarial within the meaning of this regulation, the officer shall not perform the act unless expressly authorized by the Department upon its determination that the act is a notarial act within the meaning of 22 U.S.C. 4215 and 4221. The language ''within the limits of the consulate'' is construed to mean within the geographic limits of a consular district. With respect to notarial acts performed by notarizing officers away from their office, see §92.7. Notarial acts shall be performed only if their performance is authorized by treaty provisions or is permitted by the laws or authorities of the country wherein the notarizing officer is stationed.

(b) These acts may be performed for any person regardless of nationality so long as the document in connection with which the notarial service is required is for use within the jurisdiction of the Federal Government of the United States or within the jurisdiction of one of the States or Territories of the United States. (However, see also §92.6.) Within the Federal jurisdiction of the United States, these acts, when certified under the hand and seal of office of the notarizing officer are valid and of like force and effect as if performed by any duly authorized and competent person within the United States. Documents bearing the seal and signature of a secretary of embassy or legation, consular officer (including consul general, vice consul or consular agent) are admissible in evidence within the Federal jurisdiction without proof of any such seal or signature being genuine or of the official character of the notarizing officer.

(c) Every notarizing officer may perform notarial acts for use in countries occupied by the United States or under its administrative jurisdiction, provided the officer has reason to believe that the notarial act will be recognized in the country where it is intended to be used. These acts may be performed for United States citizens and for nationals of the occupied or administered countries, who reside outside such countries, except in areas where another government is protecting the interests of the occupied or administered country.

(d) Chiefs of mission, that is, ambassadors and ministers, have no authority under Federal law to perform notarial acts except in connection with the authentication of extradition papers (see §92.40).

(e) Consular agents have authority to perform notarial services but acting consular agents do not.

[22 FR 10858, Dec. 27, 1957, as amended at 27 FR 12616, Dec. 20, 1962; 60 FR 51721, Oct. 3, 1995]

§92.5 Acceptability of notarial acts under State or territorial law.

The acceptability with the jurisdiction of a State or Territory of the United States of a certificate of a notarial act performed by a notarizing officer depends upon the laws of the State or Territory.

[60 FR 51721, Oct. 3, 1995]

§92.6 Authority of notarizing officers under international practice.

Although such services are not mandatory, notarizing officers may, as a courtesy, perform notarial acts for use in countries with which the United States has formal diplomatic and consular relations. Generally the applicant for such service will be a United States citizen or a national of the country in which the notarized document will be used. The notarizing officer's compliance with a request for a notarial service of this type should be based on the reasonableness of the request and the absence of any apparent irregularity. When a notarizing officer finds it advisable to do so, the officer may question the applicant to such extent as may be necessary to be assured of the reasonableness of the request and the absence of irregularity.

(a) That his notarial certificate may reasonably be expected to satisfy the legal requirements of the country in

which the notarized document will be used;

(b) That the notarial service is legally necessary and cannot be obtained otherwise than through a United States notarizing officer without loss or serious inconvenience to the applicant; and

(c) That the notarial certifcate will be used solely for a well-defined purpose, as represented by the applicant for the service. (See also § 92.4(c) regarding notarial services for use in countries occupied by the United States or under its administrative jurisdiction.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51721, Oct. 3, 1995]

§ 92.7 Responsibility of notarizing officers of the Department of State.

(a) As a rule notarial acts should be performed at the consular office. Where required by the circumstances of a particular case and subject to the reasonableness of the request notarial acts may be performed elsewhere within the limits of the consulate subject to the assessment of the applicable fees under subheading ''Services Rendered Outside of Office'' of the Tariff of Fees (§ 22.1(a) of this chapter), as well as to payment by the interested party of the officer's expenses in going to the place where the service is performed and returning to his office (§ 22.1(b) of this chapter).

(b) As indicated in §§ 92.4, 92.5, and 92.6, the authority of secretaries of embassy or legation as well as consular officers to perform notarial acts is generally recognized. However, the function is essentially consular, and notarial powers are in practice exercised by diplomatic officers only in the absence of a consular officer or U.S. citizen State Department employee designated to perform notarial functions as provided in § 92.1(d). Performance of notarial acts by an officer assigned in dual diplomatic and consular capacity shall be performed in his/her consular capacity, except in special circumstances.

[27 FR 12616, Dec. 20, 1962, as amended at 60 FR 51721, Oct. 3, 1995]

GENERAL NOTARIAL PROCEDURES

§ 92.8 Compliance with request for notarial services.

A notarizing officer should comply with all proper requests for the performance of notarial services within the limitations prescribed in this part. (See particularly §§ 92.3 to 92.7). Moreover, as a representative of the United States Government, the notarizing officer, when acting in a notarial capacity, should take great care to prevent the use of his official seal in furthering any unlawful or clearly improper purpose. (See § 92.9 regarding refusal to perform notarial services in certain cases.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51721, Oct. 3, 1995]

§ 92.9 Refusals of requests for notarial services.

(a) A notarizing officer should refuse requests for notarial services, the performance of which is not authorized by treaty provisions or permitted by the laws or authorities of the country in which he is stationed. (See § 92.4(a).) Also, a notarizing officer should refuse to perform notarial acts for use in transactions which may from time to time be prohibited by law or by regulations of the United States Government such, for example, as regulations based on the ''Trading With the Enemy Act of 1917,'' as amended.

(b) A notarizing officer is also authorized to refuse to perform a notarial act if he had reasonable grounds for believing that the document in connection with which his notarial act is requested will be used for a purpose patently unlawful, improper or inimical to the best interests of the United States. Requests for notarial services should be refused only after the most careful deliberation.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.10 Specific waiver in notarial certificate.

If the notarizing officer has reason to believe that material statements in a document presented for notarization are false, and if no basis exists for refusing the notarial service in accordance with § 92.9, he may consider the advisability of informing the applicant

that he will perform the service only with a specific waiver of responsibility included in the notarial certificate. Furthermore, a notarizing officer may, in his discretion, add to the specific waiver in the notarial certificate a statement of verifiable facts known to him, which will reveal the falsity of material in the document. However, normally a notarizing officer shall exercise great caution not to limit the general privilege of a United States citizen while abroad to execute under oath any statement he sees fit to make, including mistaken, unnecessary, and even frivolous statements: *Provided,* That substantial and compelling reasons do not exist which impel restraining action on the part of the notarizing officer. On the other hand, experience has shown the desirability of including, as standard practice, a specific waiver of responsibility in all authentications (§92.38) executed in connection with divorce proceedings.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.11 Preparation of legal documents.

(a) *By attorneys.* When a document has been prepared by an attorney for signature, a notarizing officer should not question the form of document unless it is obviously incorrect.

(b) *By notarizing officers.* A notarizing officer should not usually prepare for private persons legal documents for signature and notarization. (However, see the provisions in §92.24 regarding the preparation of affidavits.) When asked to perform such a service, the notarizing officer should explain that the preparation of legal forms is normally the task of an attorney, that the forms used and the purposes for which they are used vary widely from jurisdiction to jurisdiction and that he could not guarantee the legal effectiveness of any document which he might prepare. The person desiring the preparation of a legal document should be referred to such publications as Jones Legal Forms and The Lawyers Directory with the suggestion that he select or adapt the form which appears best suited to his needs. The notarizing officer may, in his discretion, arrange to have a member of his office staff type the document. If the document is typed in the Foreign Service office, the fee for copying shall be collected as prescribed under the caption ''Copying and Recording'' of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter).

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.12 Necessity for certification of notarial acts.

A notarizing officer must execute a written certificate attesting to the performance of a notarial act. This certificate may be inserted on or appended to the notarized document (see §92.17 regarding the fastening of sheets). The certificate evidences the performance of the notarial act. Failure to execute this certificate renders the notarial act legally ineffective. Each notarial act should be evidenced by a separate certificate; two or more distinct notarial acts should not be attested to by one certificate.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51721, Oct. 3, 1995]

§92.13 Form of notarial certificate.

The form of a notarial certificate depends on the nature of the notarial act it attests. (See §§92.18 to 92.48 for discussions of the various forms of notarial certificates.) Rules pertaining to venue, and signing and sealing, are common to all notarial certificates.

§92.14 Venue on notarial certificates.

(a) The term *venue* means the place where the certificate is executed. The venue must be shown on all notarial certificates to establish the qualifications and sphere of authority of the notarizing officer to perform the notarial act. The items characteristic of a typical venue, in the order of their appearance in the certificate, are as follows:

(1) Name of the country (or dominion, Territory, colony, island, as appropriate);

(2) Name of province or major administrative region (if none, this may be omitted);

(3) Name of local community (city, town, or village);

(4) Name of the Foreign Service post.

(b) When a notarial act is performed, and the notarial certificate executed, at a locality in a consular district other than the locality in which the Foreign Service office is situated, the venue should mention only the name of the country (or dominion, territory, colony, island, as appropriate), and the name of the consular district.

(c) The venue used at a Foreign Service post which has not been officially designated as an embassy, legation, consulate general, consulate, or consular agency should bear the notation ''American Consular Service'' in place of the post name.

§ 92.15 Signing notarial certificate.

The notarizing officer should sign a notarial certificate on the lower right-hand side. The name and full official title of the notarizing officer should by typed, stamped with a rubber stamp, or printed in ink on two separate lines immediately below his signature. When the notarizing officer is assigned to a Foreign Service post in both a diplomatic and consular capacity, he should use his consular title in the notarial certificate. (See § 92.7.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.16 Sealing the notarial certificate.

The notarizing officer should seal a notarial certificate with the impression seal of the post on the lower left-hand side of the certificate. A notarial certificate executed at a Foreign Service post which has not been officially designated as an embassy, legation, consulate general, consulate, or consular agency should be sealed with an impression seal bearing the legend ''American Consular Service'' and the name of the locality.

§ 92.17 Fastening of pages.

When the instrument or document to which a notarial act relates consists of more than one sheet, or when the notarial certificate will be attached and not written on the document itself, the notarizing officer should bring all the sheets comprising the document together under his official seal.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

SPECIFIC NOTARIAL ACTS

§ 92.18 Oaths and affirmations defined.

(a) *Oath.* An oath is an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. In a broad sense the word ''oath'' includes all forms of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truly, and in this sense it includes ''affirmation''.

(b) *Affirmation.* An affirmation is a solemn and formal declaration or asseveration in the nature of an oath that a statement, or series of statements, is true. When an oath is required or authorized by law, an affirmation in lieu thereof may be taken by any person having conscientious scruples against taking an oath. As a general rule, an affirmation has the same legal force and effect as an oath.

§ 92.19 Administering an oath.

The usual formula for administering an oath is as follows: The officer administering the oath requests the person taking the oath to raise his right hand while the officer repeats the following words: ''You do solemnly swear that the statements set forth in this paper which you have here signed before me are true. So help you God.'' Whereupon the person taking the oath answers, ''I do.''

§ 92.20 Administering an affirmation.

In administering an affirmation the procedure followed is generally the same as in the case of an oath, but the formula is varied by the use of the following words: ''You do solemnly, sincerely, and truly affirm and declare that . . ., and this you do under the pains and penalties of perjury.''

§ 92.21 Notarial certificate to oath or affirmation.

The written statement attesting to the administration of an oath or affirmation is known as a jurat. The jurat must be signed and sealed by the notarizing officer (see §§ 92.15 and 92.16 on signing and sealing notarial certificates).

§ 92.22 "Affidavit" defined.

An affidavit is a written declaration under oath made before some person who has authority to administer oaths, without notice to any adverse party that may exist. One test of the sufficiency of an affidavit is whether it is so clear and certain that it will sustain an indictment for perjury, if found to be false. An affidavit differs from a deposition in that it is taken ex parte and without notice, while a deposition is taken after notice has been furnished to the opposite party, who is given an opportunity to cross-examine the witness.

§ 92.23 Taking an affidavit.

The notarizing officer taking an affidavit should:

(a) Satisfy himself, as far as possible, that his notarial act will be acceptable under the laws of the jurisdiction where the affidavit is to be used (see § 92.5);

(b) Require the personal appearance of the affiant at the time the affidavit is taken;

(c) Require satisfactory identification of the affiant; and

(d) Administer the oath to the affiant before the affiant signs the affidavit.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.24 Usual form of affidavit.

Affidavits are usually drawn by competent attorneys or are set out in established forms. The form and substantive requirements of an affidavit depend principally upon the purpose for which it is made and the statutes of the jurisdiction where it is intended to be used. When a notarizing officer finds it necessary in the discharge of his official duties to prepare an affidavit, or when he assists a private person in preparing an affidavit (see § 92.11(b)), he should, where possible, consult the pertinent statutory provisions.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.25 Title of affidavit.

Generally an affidavit taken for use in a pending cause must be entitled in that cause so that it will show to what proceedings it is intended to apply, and may support an indictment for perjury in case it proves to be false. If there is no suit pending at the time the affidavit is taken or if the affidavit is not to be used in any cause in court, no title need be given.

§ 92.26 Venue on affidavit.

The venue must always be given and should precede the body of the affidavit. (See § 92.14 regarding venue on notarial certificates generally.)

§ 92.27 Affiant's allegations in affidavit.

(a) *Substance of allegations.* Although a notarizing officer is generally not responsible for the correctness of the form of an affidavit or the manner in which the allegations therein are set forth (see § 92.11(a) regarding the preparation of legal documents by attorneys; § 92.11(b) regarding the preparation of legal documents by notarizing officers; and § 92.24 regarding the form of an affidavit), he may, in appropriate instances, draw the affiant's attention to the following generally accepted criteria as regards the substance of the allegations:

(1) Material facts within the personal knowledge of the affiant should be alleged directly and positively. Facts are not to be inferred where the affiant has it in his power to state them positively and fully.

(2) If the matters stated in the affiant's affidavit rest upon information derived from others rather than on facts within his personal knowledge, he should aver that such matters are true to the best of his knowledge and belief.

(3) If the allegations made on information and belief are material, the sources of information and grounds of belief should be set out and a good reason given why a positive statement could not be made.

(4) If the conclusions of the affiant are drawn from the contents of documents, such contents should be set out or exhibited, so that the authority to whom the affidavit is presented may determine whether the affiant's deductions are well founded.

(b) *Veracity of allegations.* Notarizing officers are not required to examine into the truth of the affiant's allegations or to pass upon any contentious

questions involved. In many instances the matters referred to in an affidavit will be of a technical or special nature beyond the officer's general knowledge or experience. However, he may, in certain circumstances, refuse to take an affidavit. (See § 92.9 regarding the types of situations in which an officer might properly refuse to perform a notarial service; also see § 92.10 regarding the waiver and other statements which may be included in a notarial certificate where evidence exists of falsity in the affiant's declaration.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.28 Signature of affiant on affidavit.

The signature of the affiant is indispensable. The affiant should always sign the affidavit in the presence of the notarizing officer.

§ 92.29 Oath or affirmation to affidavit.

Affidavits made before notarizing officers must be sworn to or affirmed (see § 92.23(d)).

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.30 Acknowledgment defined.

An acknowledgment is a proceeding by which a person who has executed an instrument goes before a competent officer or court and declares it to be his act and deed to entitle it to be recorded or to be received in evidence without further proof of execution. An acknowledgment is almost never made under oath and should not be confused with an oath (see § 92.18(a) for definition of oath). Moreover, an acknowledgment is not the same as an attestation, the latter being the act of witnessing the execution of an instrument and then signing it as a witness. Instruments requiring acknowledgment generally are those relating to land, such as deeds, mortgages, leases, contracts for the sale of land, and so on.

§ 92.31 Taking an acknowledgment.

(a) *Officers' assurance of acceptability of notarial act*. A notarizing officer taking an acknowledgment should, if possible, ascertain the requirements of the jurisdiction in which the acknowledged document is to be used and execute the certificate in accordance with those requirements. Not all States or Territories will accept certificates of acknowledgment executed by notarizing officers other than consuls. Therefore, notarizing officers and consular agents who are called upon to perform this notarial act should consult the applicable State or territorial law to ascertain whether certificates of acknowledgment will be acceptable. (See § 92.5 regarding acceptability of consular notarial acts under state or territorial law.) Furthermore, public policy generally forbids that the act of taking and certifying an acknowledgment be performed by a person financially or beneficially interested in the transaction to which the acknowledged document relates. Notarizing officers should keep this point in mind, especially in connection with acknowledgments by members of their families.

(b) *Personal appearance of grantor(s)*. A notarizing officer taking an acknowledgment should always require the personal appearance of the grantor(s), *i.e.*, the person or persons who have signed the instrument to be acknowledged. Since the officer states in his certificate that the parties did personally appear before him, failure to observe this requirement invalidates the notarial act and makes the officer liable to the charge of negligence and of having executed a false certificate. A notarizing officer should never take an acknowledgment by telephone.

(c) *Satisfactory identification of grantor(s)*. The notarizing officer must be certain of the identity of the parties making an acknowledgment. If he is not personally acquainted with the parties, he should require from each some evidence of identity, such as a passport, police identity card, or the like. The laws of some States and Territories require that the identity of an acknowledger be proved by the oath of one or more ''credible witnesses'', and that a statement regarding the proving of identity in this manner be included in the certificate of acknowledgment. (See § 92.32(b) regarding forms of certificates of acknowledgment generally.) Mere introduction of a person not known to the notarizing officer, without further proof of identity, is

not considered adequate identification for acknowledgment purposes.

(d) *Explanation of contents of instrument.* The notarizing officer must assure himself that the person acknowledging an instrument understands the nature of the instrument. If the person does not understand it, the officer is legally and morally bound to explain the instrument in such a way as to make the person who has signed it realize the character and effect of his act. This duty is particularly important where the signer of a document has little or no knowledge of the language in which the document is written.

(e) *Acknowledgments of married women.* Some of the States still require that a married woman who has executed an instrument of conveyance jointly with her husband be examined separately by the notarizing officer at the time the acknowledgments of the couple are taken. Notarizing officers should consult the applicable statutory provisions before taking the acknowledgments of a husband and wife to a document which they have both executed.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51722 and 51723, Oct. 3, 1995]

§ 92.32 Notarial certificate to acknowledgment.

(a) *Title.* The notarial certificate evidencing the taking of an acknowledgment is commonly known as a ''certificate of acknowledgment'' or sometimes simply as an ''acknowledgment.''

(b) *Form.* The form of a certificate of acknowledgment varies widely depending on the laws of the jurisdiction where the acknowledged document is intended to be used, the purpose for which the document is intended, and the legal position of the persons who have executed it. Instruments to be acknowledged are frequently prepared on printed forms, the entire contract or deed being on one sheet together with the certificate of acknowledgment. Often the document, including the certificate of acknowledgment, is drawn up in advance by an attorney. In these cases, the notarizing officer may use the certificate which is already on the document, making whatever modifications are manifestly required to show that the certificate was executed by a notarizing officer. However, if he finds it necessary to prepare the certificate of acknowledgment, the officer should consult the appropriate reference work for guidance as to the proper form. When no prescribed form can be found, the officer should use the language in Form FS–88. Certificate of Acknowledgment of Execution of an Instrument, inserting the certificate immediately at the close of the deed on the last page if space permits, or, if a separate sheet is necessary, using the printed Form FS–88 itself.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.33 Execution of certificate of acknowledgment.

(a) *When certificate should be executed.* A notarizing officer should execute a certificate of acknowledgment immediately after the parties to the instrument have made their acknowledgment. Allowing several days or weeks to elapse between the time the acknowledgment is made and the certificate executed is undesirable, even though the officer may remember the acknowledgment act.

(b) *Venue.* The venue must be shown as prescribed in § 92.14.

(c) *Date.* The date in the certificate must be the date the acknowledgment was made. This is not necessarily the same as the date the instrument was executed. In fact, there is no reason why an instrument may not be acknowledged a year or more after the date of its execution, or at different times and places by various grantors.

(d) *Names of parties.* The name or names of the person or persons making the acknowledgment should appear in the certificate in the same form as they are set out in the acknowledged document, and in the same form as their signature on the instrument.

(e) *Additional statements.* When executing a certificate of acknowledgment on Form FS–88, the notarizing officer may include any necessary additional statements in the blank space below the body of the certificate.

(f) *Signing and sealing certificate.* The certificate of acknowledgment shall be signed and sealed as prescribed in §§ 92.15 and 92.16.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.34 Fastening certificate to instrument.

The proper place for the certificate of acknowledgment is after the signature of the parties to the instrument. If the instrument is a printed form, the certificate will almost invariably be a part of the form. When Form FS–88 is used or when the certificate must be prepared on a sheet separate from the instrument, it should be fastened to the instrument as the last sheet. The method of fastening notarial certificates is prescribed in § 92.17.

§ 92.35 Errors in certificate of acknowledgment.

A notarizing officer having taken an acknowledgment of an instrument and made a certificate of that fact cannot afterwards amend or change his certificate for the purpose of correcting a mistake. This can be done only by the parties reacknowledging the instrument. However, typographical errors may be corrected by striking out the erroneous characters and inserting the correct ones above. Such changes should be initiated by the parties who executed the instrument and by the notarizing officer.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.36 Authentication defined.

An authentication is a certification of the genuineness of the official character, *i.e.*, signature and seal, or position of a foreign official. It is an act done with the intention of causing a document which has been executed or issued in one jurisdiction to be recognized in another jurisdiction. Documents which may require authentication include legal instruments notarized by foreign notaries or other officials, and copies of public records, such as birth, death, and marriage certificates, issued by foreign record keepers.

§ 92.37 Authentication procedure.

(a) The consular officer must compare the foreign official's seal and signature on the document he is asked to authenticate with a specimen of the same official's seal and signature on file either in the Foreign Service office or in a foreign public office to which he has access. If no specimen is available to the consular officer, he should require that each signature and seal be authenticated by some higher official or officials of the foreign government until there appears on the document a seal and signature which he can compare with a specimen available to him. However, this procedure of having a document authenticated by a series of foreign officials should be followed only where unusual circumstances, or the laws or regulations of the foreign country require it.

(b) Where the State law requires the consular officer's certificate of authentication to show that the foreign official is empowered to perform a particular act, such as administering an oath or taking an acknowledgment, the consular officer must verify the fact that the foreign official is so empowered.

(c) When the consular officer has satisfactorily identified the foreign seal and signature (and, where required, has verified the authority of the foreign official to perform a particular act), he may then execute a certificate of authentication, either placing this certificate on the document itself if space is available, or appending it to the document on a separate sheet (see § 92.17 on the fastening of notarial certificates).

§ 92.38 Forms of certificate of authentication.

The form of a certificate of authentication depends on the statutory requirements of the jurisdiction where the authenticated document will be used (see § 92.39 regarding the provisions of Federal law). Before authenticating a document for use in a State or Territory of the United States, a consular officer should consult the pertinent law digest to ascertain what specific requirements must be met, or he should be guided by any special information he may receive from the attorney or other person requesting the document with regard to the applicable statutory requirements. (See § 92.41(e) regarding material which should not be in the certificate of authentication.) If no provisions relating to authentications can be found in a particular State

or Territorial law digest, and in the absence of any special information from the attorney or other person requesting the document, the officer should prepare the certificate of authentication in the form which seems best suited to the needs of the case. When in his opinion the circumstances seem to warrant, and always in connection with certificates of marriage or divorce decrees, a consular officer should include in the body of his certificate of authentication a qualifying statement reading as follows: ''For the contents of the annexed document I assume no responsibility.''

§92.39 Authenticating foreign public documents (Federal procedures).

(a) A copy of a foreign public document intended to be used as evidence within the jurisdiction of the Federal Government of the United States must be authenticated in accordance with the provisions of section 1 of the act of June 25, 1948, as amended (sec. 1, 62 Stat. 948, sec. 92(b), 63 Stat. 103; 28 U.S.C. 1741). This provision of Federal law provides that a copy of any foreign document of record, or on file in a public office of a foreign country or political subdivision thereof, if certified, by the lawful custodian thereof, may be admitted in evidence when authenticated by a certificate of a United States consular officer resident in the foreign country, under the seal of his office.

(b) The consular officer's certificate should indicate that the copy has been certified by the lawful custodian.

(c) In the absence of a consular officer of the United States as an officer resident in the State of the Vatican City, a copy of any document of record or on file in a public office of said State of the Vatican City, certified by the lawful custodian of such document may be authenticated by a consular officer of the United States resident in Rome, Italy (22 U.S.C. 1204).

§92.40 Authentication of foreign extradition papers.

Foreign extradition papers are authenticated by chiefs of mission.

§92.41 Limitations to be observed in authenticating documents.

(a) *Unknown seals and signatures.* A consular officer should not authenticate a seal and signature not known to him. See §92.37(a) regarding the necessity for making a comparison with a specimen seal and signature.

(b) *Foreign officials outside consular district.* A consular officer should not authenticate the seals and signatures of foreign officials outside his consular district.

(c) *Officials in the United States.* Consular officers are not competent to authenticate the seals and signatures of notaries public or other officials in the United States. However, diplomatic and consular officers stationed at a United States diplomatic mission may certify to the seal of the Department of State (not the signature of the Secretary of State) if this is requested or required in particular cases by the national authorities of the foreign country.

(d) *Photostat copies.* Consular officers should not authenticate facsimiles of signatures and seals on photographic reproductions of documents. They may, however, authenticate original signatures and seals on such photographic reproductions.

(e) *Matters outside consular officer's knowledge.* A consular officer should not include in his certificate of authentication statements which are not within his power or knowledge to make. Since consular officers are not expected to be familiar with the provisions of foreign law, except in a general sense, they are especially cautioned not to certify that a document has been executed or certified in accordance with foreign law, nor to certify that a document is a valid document in a foreign country.

(f) *United States officials in foreign countries.* An authentication by a United States consular officer is performed primarily to cause the official characters and positions of foreign officials to be known and recognized in the United States. Consular officers should not, therefore, undertake to authenticate the seals and signatures of other United States officials who may be residing in their consular districts.

(g) *Officers of the Foreign Service in other countries.* An officer of the Foreign Service stationed in one country is not expected to authenticate the signature or seal of an officer of the Foreign Service stationed in another country. When it is necessary for the seal and signature of an officer of the Foreign Service to be authenticated, such authentication will be done in the Department of State. An official of a foreign government requesting the authentication of the seal and signature of an officer of the United States Foreign Service who is, or was, stationed in another country should be informed that the document to be authenticated will have to be sent to the Department for this purpose. Any document bearing the seal and signature of an officer of the Foreign Service which is received at a Foreign Service post from a person in the United States with the request that it be further authenticated should be referred to the Department of State.

§ 92.42 Certification of copies of foreign records relating to land titles.

In certifying documents of the kind described in title 28, section 1742, of the United States Code, diplomatic and consular officers of the United States will conform to the Federal procedures for authenticating foreign public documents (§ 92.39), unless otherwise instructed in a specific case.

§ 92.43 Fees for notarial services and authentications.

The fees for administering an oath or affirmation and making a certificate thereof, for the taking of an acknowledgment of the execution of a document and executing a certificate thereof, for certifying to the correctness of a copy of or an extract from a document, official or private, for authenticating a foreign document, or for the noting of a bill of exchange, certifying to protest, etc., are as prescribed under the caption Documentary services in the Schedule of Fees (§ 22.1 of this chapter), unless the service is performed under a ''no fee'' item of the same caption of the Schedule. If an oath or affirmation is administered concurrently to several persons and only one consular certificate (jurat) is executed, only one fee is collectible. If more than one person joins in making an acknowledgment but only one certificate is executed, only one fee shall be charged.

[22 FR 10858, Dec. 27, 1957, as amended at 63 FR 6480, Feb. 9, 1998]

DEPOSITIONS AND LETTERS ROGATORY

§ 92.49 "Deposition" defined.

A deposition is the testimony of a witness taken in writing under oath or affirmation, before some designated or appointed person or officer, in answer to interrogatories, oral or written. (For the distinction between a deposition and an affidavit see § 92.22.)

§ 92.50 Use of depositions in court actions.

Generally depositions may be taken and used in all civil actions or suits. In criminal cases in the United States, a deposition cannot be used, unless a statute has been enacted which permits a defendant in a criminal case to have a deposition taken in his own behalf, or unless the defendant consents to the taking of a deposition by the State for use by the prosecution. (For exception in connection with the proving of foreign documents for use in criminal actions, see § 92.65.)

§ 92.51 Methods of taking depositions in foreign countries.

Rule 28(b) of the Rules of Civil Procedure for the District Courts of the United States provides that depositions may be taken in foreign countries by any of the following four methods:

(a) Pursuant to any applicable treaty or convention, or

(b) Pursuant to a letter of request (whether or not captioned a letter rogatory), or

(c) On notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States. Notarizing officials as defined by 22 CFR 92.1 are so authorized by the law of the United States, or

(d) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony.

[60 FR 51722, Oct. 3, 1995]

§ 92.52 "Deposition on notice" defined.

A *deposition on notice* is a deposition taken before a competent official after reasonable notice has been given in writing by the party or attorney proposing to take such deposition to the opposing party or attorney of record. Notarizing officers, as defined by 22 CFR 92.1, are competent officials for taking depositions on notice in foreign countries (see § 92.51). This method of taking a deposition does not necessarily involve the issuance of a commission or other court order.

[60 FR 51722, Oct. 3, 1995]

§ 92.53 "Commission to take depositions" defined.

A *commission to take depositions* is a written authority issued by a court of justice, or by a quasi-judicial body, or a body acting in such capacity, giving power to take the testimony of witnesses who cannot appear personally to be examined in the court or before the body issuing the commission. In Federal practice, a commission to take depositions is issued only when necessary or convenient, on application and notice. The commission indicates the action or hearing in which the depositions are intended to be used, and the person or persons required to take the depositions, usually by name or descriptive title (see § 92.55 for manner of designating notarizing officers). Normally a commission is accompanied by detailed instructions for its execution.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.54 "Letters rogatory" defined.

In its broader sense in international practice, the term *letters rogatory* denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act. Examples are requests for the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment. In United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining evidence. Requests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity. The legal sufficiency of documents executed in foreign countries for use in judicial proceedings in the United States, and the validity of the execution, are matters for determination by the competent judicial authorities of the American jurisdiction where the proceedings are held, subject to the applicable laws of that jurisdiction. See § 92.66 for procedures in the use of letters rogatory requesting the taking of depositions in foreign jurisdictions.

§ 92.55 Consular authority and responsibility for taking depositions.

(a) *Requests to take depositions or designations to execute commissions to take depositions.* Any United States notarizing officer may be requested to take a deposition on notice, or designated to execute a commission to take depositions. A commission or notice should, if possible, identify the officer who is to take depositions by his official title only in the following manner: ''Any notarizing officer of the United States of America at (name of locality)''. The notarizing officer responsible for the performance of notarial acts at a post should act on a request to take a deposition on notice, or should execute the commission, when the documents are drawn in this manner, provided local law does not preclude such action. However, when the officer (or officers) is designated by name as well as by title, only the officer (or officers) so designated may take the depositions. In either instance, the officer must be a disinterested party. Rule 28(c) of the Rules of Civil Procedure for the district courts of the United States prohibits the taking of a deposition before a person who is a relative, employee, attorney or counsel of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.

(b) *Authority in Federal law.* The authority for the taking of depositions, charging the appropriate fees, and imposing the penalty for giving false evidence is generally set forth in 22 U.S.C. 4215 and 4221. The taking of depositions for federal courts of the United States is further governed by the Federal Rules of Civil Procedure. For the provisions of law which govern particularly the taking of depositions to prove the

genuineness of foreign documents which it is desired to introduce in evidence in any criminal action or proceeding is a United States federal court, see 18 U.S.C. 3491 through 3496.

(c) *Procedure where laws of the foreign country do not permit the taking of depositions.* In countries where the right to take depositions is not secured by treaty, notarizing officers may take depositions only if the laws or authorities of the national government will permit them to do so. Notarizing officers in countries where the taking of depositions is not permitted who receive notices or commissions for taking depositions should return the documents to the parties from whom they are received explaining why they are returning them, and indicating what other method or methods may be available for obtaining the depositions, whether by letters rogatory or otherwise.

[60 FR 51722, Oct. 3, 1995]

§ 92.56 Summary of procedure for taking depositions.

In taking a deposition on notice or executing a commission to take depositions, a notarizing officer should conform to any statutory enactments on the subject in the jurisdiction in which the depositions will be used. He should also comply with any special instructions which accompany the request for a deposition on notice or a commission. Unless otherwise directed by statutory enactments or special instructions, the officer should proceed as follows in taking depositions:

(a) Request the witnesses, whose testimony is needed, to appear before him; or, at the request of any party to the action or proceeding, request designated persons to supply him or the requesting party with needed records or documents in their possession, or copies thereof;

(b) When necessary, act as interpreter or translater, or see that arrangements are made for some qualified person to act in this capacity;

(c) Before the testimony is taken, administer oaths (or affirmations in lieu thereof) to the interpreter or translator (if there is one), to the stenographer taking down the testimony, and to each witness;

(d) Have the witnesses examined in accordance with the procedure described in §§ 92.57 to 92.60;

(e) Either record, or have recorded in his presence and under his direction, the testimony of the witnesses;

(f) Take the testimony, or have it taken, stenographically in question-and-answer form and transcribed (see § 92.58) unless the parties to the action agree otherwise (rules 30(c) and 31(b), Rules of Civil Procedure for the District Courts of the United States);

(g) Be actually present throughout the examination of the witnesses, but recess the examination for reasonable periods of time and for sufficient reasons;

(h) Mark or cause to be marked, by identifying exhibit numbers or letters, all documents identified by a witness or counsel and submitted for the record.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.57 Oral examination of witnesses.

When a witness is examined on the basis of oral interrogatories, the counsel for the party requesting the deposition has the right to conduct a direct examination of the witness without interruption except in the form of objection by opposing counsel. The opposing counsel has the same right on cross-examination. Cross-examination may be followed by redirect and recross-examinations until the interrogation is complete. The notarizing officer taking the deposition should endeavor to restrain counsel from indulging in lengthy colloquies, digressions, or asides, and from attempts to intimidate or mislead the witness. The notarizing officer has no authority to sustain or overrule objections but should have them recorded as provided in § 92.59. Instead of taking part in the oral examination of a witness, the parties notified of the taking of a deposition may transmit written interrogatories to the notarizing officer. The notarizing officer should then question the witness on the basis of the written interrogatories and should record the answers verbatim. (Rules 30 (c) and 31

(b), Rules of Civil Procedure for the District Courts of the United States.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.58 Examination on basis of written interrogatories.

Written interrogatories are usually divided into three parts:

(a) The direct interrogatories or interrogatories in chief;

(b) The cross-interrogatories; and

(c) The redirect interrogatories.

Recross-interrogatories sometimes follow redirect interrogatories. The notarizing officer should not furnish the witness with a copy of the interrogatories in advance of the questioning, nor should he allow the witness to examine the interrogatories in advance of the questioning. Although it may be necessary for the officer, when communicating with the witness for the purpose of asking him to appear to testify, to indicate in general terms the nature of the evidence which is being sought, this information should not be given in such detail as to permit the witness to formulate his answers to the interrogatories prior to his appearance before the notarizing officer. The officer taking the deposition should put the interrogatories to the witness separately and in order. The written interrogatories should not be repeated in the record (unless special instructions to that effect are given), but an appropriate reference should be made thereto. These references should, of course, be followed by the witness' answers. All of the written interrogatories must be put to the witness, even though at some point during the examination the witness disclaims further knowledge of the subject. When counsel for all of the parties attend an examination conducted on written interrogatories, the notarizing officer may, all counsel having consented thereto, permit oral examination of the witness following the close of the examination upon written interrogatories. The oral examination should be conducted in the same manner and order as if not preceded by an examination upon written interrogatories.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995; 61 FR 14375, Apr. 1, 1996]

§ 92.59 Recording of objections.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings must be noted in the deposition. Evidence objected to will be taken subject to the objections. (Rules 30 (c) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

§ 92.60 Examination procedures.

(a) *Explaining interrogatory to witness.* If the witness does not understand what an interrogatory means, the notarizing officer should explain it to him, if possible, but only so as to get an answer strictly responsive to the interrogatory.

(b) *Refreshing memory by reference to written records.* A witness may be permitted to refresh his memory by referring to notes, papers or other documents. The notarizing officer should have such occurrence noted in the record of the testimony together with a statement of his opinion as to whether the witness was using the notes, papers or other documents to refresh his memory or for the sake of testifying to matters not then of his personal knowledge.

(c) *Conferring with counsel.* When the witness confers with counsel before answering any interrogatory, the notarizing officer should have that fact noted in the record of the testimony.

(d) *Examining witness as to personal knowledge.* The notarizing officer may at any time during the examination of a witness propound such inquiries as may be necessary to satisfy himself whether the witness is testifying from his personal knowledge of the subject matter of the examination.

(e) *Witness not to leave officer's presence.* The notarizing officer should request the witness not to leave his presence during the examination, except during the recesses for meals, rest, etc., authorized in § 92.56 (g). Failure of the witness to comply with this request must be noted in the record.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.61 Transcription and signing of record of examination.

After the examination of a witness is completed, the stenographic record of the examination must be fully transcribed and the transcription attached securely to any document or documents to which the testimony in the record pertains. (See § 92.63 regarding the arrangement of papers.) The transcribed deposition must then be submitted to the witness for examination and read to or by him, unless such examination and reading are waived by the witness and by the parties to the action. Any changes in form or substance desired by the witness should be entered upon the deposition by the notarizing officer with a statement of the reasons given by the witness for making the changes. The witness should then sign the transcript of his deposition and should initial in the margin each correction made at his request. However, the signature and initials of the witness may be omitted if the parties to the action by stipulation waive the signing or if the witness is ill, refuses to sign, or cannot be found. If the deposition is not signed by the witness, the notarizing officer should sign it and should state on the record the reason for his action, *i.e.*, the waiver of the parties, the illness or absence of the witness, or the refusal of the witness to sign, giving the reasons for such refusal. The deposition may then be used as though signed by the witness except when, on the motion to suppress, the court holds that the reasons given for the refusal to sign require the rejection of the deposition in whole or in part. (Rules 30 (e) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.62 Captioning and certifying depositions.

The notarizing officer should prepare a caption for every deposition; should certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness; and should sign and seal the certification in the manner prescribed in §§ 92.15 and 92.16. (Rules 30 (f) (1) and 31 (b), Rules of Civil Procedures for the District Courts of the United States.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.63 Arrangement of papers.

Unless special instructions to the contrary are received, the various papers comprising the completed record of the depositions should usually be arranged in the following order from bottom to top:

(a) Commission to take depositions (or notice of taking depositions), with interrogatories, exhibits, and other supporting documents fastened thereto.

(b) Statement of fees charged, if one is prepared on a separate sheet.

(c) Record of the responses of the various witnesses, including any exhibits the witnesses may submit.

(d) Closing certificate.

All of these papers should be fastened together with ribbon, the ends of which should be secured beneath the notarizing officer's seal affixed to the closing certificate.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.64 Filing depositions.

(a) *Preparation and transmission of envelope.* The notice or commission, the interrogatories, the record of the witnesses' answers, the exhibits, and all other documents and papers pertaining to the depositions should be fastened together (see § 92.63 regarding the arrangement of papers) and should be enclosed in an envelope sealed with the wax engraving seal of the post. The envelope should be endorsed with the title of the action and should be marked and addressed. The sealed envelope should then be transmitted to the court in which the action is pending.

(b) *Furnishing copies.* The original completed depositions should not be sent to any of the parties to the action or to their counsel. However, the notarizing officer may furnish a copy of a deposition to the deponent or to any party to the action upon the payment of the copying fee and if certification is desired under official seal that the copy is a true copy, the certification

fee prescribed in the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.65 Depositions to prove genuineness of foreign documents.

(a) *Authority to execute commission.* Under the provisions of section 1 of the act of June 25, 1948, as amended (sec. 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492), a diplomatic or consular officer may be commissioned by an United States court to take the testimony of a witness in a foreign country either on oral or written interrogatories, or partly on oral and partly on written interrogatories, for the purpose of determining the genuineness of any foreign document (any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States) which it is desired to introduce in evidence in any criminal action or proceeding in any United States court under the provisions of section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 945; 28 U.S.C. 1732). Such testimony may also be taken to determine whether the foreign document was made in the regular course of business and whether it was the regular course of business to make such document. The term ''business'' includes business, profession, occupation, and calling of every kind. (Sec. 1, 62 Stat. 945, 28 U.S.C. 1732.)

(b) *Disqualification to execute commission.* Any diplomatic or consular officer to whom a commission is addressed to take testimony, who is interested in the outcome of the criminal action or proceeding in which the foreign documents in question are intended to be used or who has participated in the prosecution of such action or proceeding, whether by investigations, preparation of evidence, or otherwise, may be disqualified on his own motion or on that of the United States or any other party to such criminal action or proceeding made to the court from which the commission issued at any time prior to the execution thereof. If, after notice and hearing, the court grants the motion, it will instruct the diplomatic or consular officer thus disqualified to send the commission to any other diplomatic or consular officer of the United States named by the court, and such other officer should execute the commission according to its terms and will for all purposes be deemed the officer to whom the commission is addressed. (Section 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492.)

(c) *Execution and return of commission.* (1) Commissions issued in criminal cases under the authority of the act of June 25, 1948, as amended, to take testimony in connection with foreign documents should be executed and returned by officers of the Foreign Service in accordance with section 1 of that act, as amended (sec. 1, 62 Stat. 835; 18 U.S.C. 3493, 3494), and in accordance with any special instructions which may accompany the commission. For details not covered by such section or by special instructions, officers of the Foreign Service should be guided by such instructions as may be issued by the Department of State in connection with the taking of depositions generally. (See §§ 92.55 to 92.64.)

(2) Section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 835; 18 U.S.C. 3493) provides that every person whose testimony is taken should be cautioned and sworn to testify the whole truth and should be carefully examined. The testimony should be reduced to writing or typewriting by the consular officer, or by some person under his personal supervision, or by the witness himself in the presence of the consular officer, and by no other person. After it has been reduced to writing or typewriting, the testimony must be signed by the witness. Every foreign document with respect to which testimony is taken must be annexed to such testimony and must be signed by each witness who appears for the purpose of establishing the genuineness of such document.

(3) When counsel for all of the parties attend the examination of any witness whose testimony will be taken on written interrogatories, they may consent that oral interrogatories, in addition to those accompanying the commission, be put to the witness. The consular officer taking the testimony

should require an interpreter to be present when his services are needed or are requested by any party or his attorney. (Section 1, 62 Stat. 835, 18 U.S.C. 3493.)

(4) Section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 835; 18 U.S.C. 3494) provides that the consular officer, who executes any commission authorized under the same section, as amended (sec. 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492) and who is satisfied, upon all the testimony taken, that a foreign document is genuine, should certify such document to be genuine under the seal of his office. This certification must include a statement that the officer is not subject to disqualification under the provisions of section 1 of the act of June 25, 1948, as amended (sec. 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492). For purposes of assessment of fees, the issuance of this certificate shall be regarded as a part of the consular service of executing the commission, and no separate fee shall be charged for the certificate.

(5) The consular officer should then forward such foreign documents, together with the record of all testimony taken and the commission which has been executed, to the Department of State for transmission to the clerk of the court from which the commission issued. (Section 1, 62 Stat. 835; 18 U.S.C. 3494.) (See § 92.64 regarding the filing of depositions generally.)

(Sec. 303, 60 Stat. 1002, 62 Stat. 836; 22 U.S.C. 843, 18 U.S.C. 3496, E.O. 10307; 16 FR 11907, 3 CFR 1949–1953 Comp., page 387)

§ 92.66 Depositions taken before foreign officials or other persons in a foreign country.

(a) *Customary practice.* Under Federal law (Rule 28(b), Rules of Civil Procedure for the District Courts of the United States) and under the laws of some of the States, a commission to take depositions can be issued to a foreign official or to a private person in a foreign country. However, this method is rarely used; commissions are generally issued to U.S. notarizing officers. In those countries where U.S. notarizing officers are not permitted to take testimony (see § 92.55(c)) and where depositions must be taken before a foreign authority, letters rogatory are usually issued to a foreign court.

(b) *Transmission of letters rogatory to foreign officials.* Letters rogatory may often be sent direct from court to court. However, some foreign governments require that these requests for judicial aid be submitted through the diplomatic channel (*i.e.*, that they be submitted to the Ministry for Foreign Affairs by the American diplomatic representative). A usual requirement is that the letters rogatory as well as the interrogatories and other papers included with them be accompanied by a complete translation into the language (or into one of the languages) of the country of execution. Another requirement is that provision be made for the payment of fees and expenses. Inquiries from interested parties or their attorneys, or from American courts, as to customary procedural requirements in given countries, may be addressed direct to the respective American embassies and legations in foreign capitals, or to the Department of State, Washington, DC 20520.

(c) *Return of letters rogatory executed by foreign officials.* (1) Letters rogatory executed by foreign officials are returned through the same channel by which they were initially transmitted. When such documents are returned to a United States diplomatic mission, the responsible officer should endorse thereon a certificate stating the date and place of their receipt. This certificate should be appended to the documents as a separate sheet. The officer should then enclose the documents in an envelope sealed with the wax engraving seal of the post and bearing an endorsement indicating the title of the action to which the letters rogatory pertain. The name and address of the American judicial body from which the letters rogatory issued should also be placed on the envelope.

(2) If the executed letters rogatory are returned to the diplomatic mission from the Foreign Office in an envelope bearing the seals of the foreign judicial authority who took the testimony, that sealed envelope should not be opened at the mission. The responsible officer should place a certificate on the envelope showing the date it was received at his office and indicating that

it is being forwarded in the same condition as received from the foreign authorities. He should then place that sealed envelope in a second envelope, sealed with the wax engraving seal of the post, and bearing the title of the action and the name and address of the American judicial body from which the letters rogatory issued.

(3) Charges should be made for executing either of the certificates mentioned in paragraphs (c) (1) and (2) of this section, as prescribed by item 67 of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter), unless the service is classifiable in a no-fee category under the exemption for Federal agencies and corporations (item 83 of the same Tariff).

(4) The sealed letters rogatory should be transmitted by appropriate means to the court in which the action is pending. See title 28, section 1781, of the United States Code concerning the manner of making return to a court of the United States (Federal court).

(d) *Transmissions of commissions to foreign officials or other persons.* A commission to take depositions which is addressed to an official or person in a foreign country other than a United States notarizing officer may be sent directly to the person designated. However, if such a commission is sent to the United States diplomatic mission in the country where the depositions are intended to be taken, it should be forwarded to the Foreign Office for transmission to the person appointed in the commission. If sent to a United States consular office, the commission may be forwarded by that office directly to the person designated, or, if the notarial officer deems it more advisable to do so, he may send the commission to the United States diplomatic mission for transmission through the medium of the foreign office.

[22 FR 10858, Dec. 27, 1957, as amended at 32 FR 11775, Aug. 16, 1967; 60 FR 51722, Oct. 3, 1995]

§92.67 Taking of depositions in United States pursuant to foreign letters rogatory.

(a) *Authority and procedure.* The taking of depositions by authority of State courts for use in the courts of foreign countries is governed by the laws of the individual States. As respects Federal practice, the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the interntational tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. This does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person or in any manner acceptable to him (28 U.S.C. 1782).

(b) *Formulation of letters rogatory.* A letter rogatory customarily states the nature of the judicial assistance sought by the originating court, prays that this assistance be extended, incorporates an undertaking of future reciprocity in like circumstances, and makes some provision for payment of fees and costs entailed in its execution. As respects Federal practice, it is not

required that a letter rogatory emanating from a foreign court be authenticated by a diplomatic or consular officer of the United States or that it be submitted through the diplomatic channel; the seal of the originating court suffices. When testimony is desired, the letter rogatory should state whether it is intended to be taken upon oral or written interrogatories. If the party on whose behalf the testimony is intended to be taken will not be represented by counsel, written interrogatories should be attached. Except where manifestly unneeded (e.g. a Spanish-language letter rogatory intended for execution in Puerto Rico) or dispensed with by arrangement with the court, letters rogatory and interrogatories in a foreign language should be accompanied by English translations.

(c) *Addressing letters rogatory.* To avert uncertainties and minimize possibilities for refusal of courts to comply with requests contained in letters rogatory in the form in which they are presented, it is advisable that counsel for the parties in whose behalf testimony is sought ascertain in advance if possible, with the assistance of correspondent counsel in the United States or that of a consular representative or agent of his nation in the United States, the exact title of the court, Federal or State as the case may be, which will be prepared to entertain the letter rogatory. In Federal practice the following form of address is acceptable:

The U.S. District Court for the _____ (e.g. Northern, Southern) District of _____ (State) _____ (City) _____, (State)

In instances where it is not feasible to ascertain the correct form of address at the time of preparation of the letter rogatory, and it will be left for counsel in the United States, or a consul or agent in the United States of the nation of origin of the letter rogatory to effect its transmission to an appropriate court, the following form may be used: ''To the Appropriate Judicial Authority at (name of locality).''

(d) *Submitting letters rogatory to courts in the United States.* A letter rogatory may be submitted to the clerk of the court of which assistance is sought, either in person or by mail. This may be direct by international mail from the originating foreign court. Alternatively, submission to the clerk of court may be effected in person or by mail by any party to the action at law or his attorney or agent, or by a consular officer or agent in the United States of the foreign national concerned. Finally, the Department of State has been authorized (62 Stat. 949; 28 U.S.C. 1781) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution. This authorization does not preclude—

(1) The transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) The transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

[32 FR 11775, Aug. 16, 1967]

§ 92.68 Foreign Service fees and incidental costs in the taking of evidence.

The fees for the taking of evidence by officers of the Foreign Service are as prescribed by the Tariff or Fees, Foreign Service of the United States of America (§ 22.1 of this chapter), under the caption ''Services Relating to the Taking of Evidence,'' unless the service is performed for official use, which comes under the caption ''Exemption for Federal Agencies and Corporations'' of the same Tariff. See § 22.6 of this chapter concerning the requirement for advance deposit of estimated fees. When the party on whose behalf the evidence is sought or his local representative is not present to effect direct payment of such incidental costs as postage or travel of witnesses, the advance deposit required by the officer shall be in an amount estimated as sufficient to cover these in addition to the fees proper. The same rule shall apply

to charges for interpreting or for the taking and transcribing of a stenographic record when performed commercially rather than by staff members at Tariff of Fee rates.

§ 92.69 Charges payable to foreign officials, witnesses, foreign counsel, and interpreters.

(a) *Execution of letters rogatory by foreign officials.* Procedures for payment of foreign costs will be by arrangement with the foreign authorities.

(b) *Execution of commissions by foreign officials or other persons abroad.* Procedure for the payment of foreign costs will be as arranged, by the tribunal requiring the evidence, with its commissioner.

(c) *Witness fees and allowances when depositions are taken pursuant to commission from a Federal court.* A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a cut of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance (28 U.S.C. 1821, Supp. IV). Witnesses giving depositions before consular officers pursuant to a commission issued by the Federal Court are entitled to these fees and allowances, and the officer shall make payment thereof in the same manner as payment is made of other expenses involved in the execution of the commission, charging the advance deposit provided by the party at whose request the depositions are taken (see § 92.68). In any case to which the Government of the United States, or an officer or agency thereof, is a party, the United States marshal for the district will pay all fees of witnesses on the certificate of the United States Attorney or Assistant United States Attorney, and in the proceedings before a United States Commissioner, on the certificate of such commissioner (28 U.S.C. 1825).

§ 92.70 Special fees for depositions in connection with foreign documents.

(a) *Fees payable to witnesses.* Each witness whose testimony is obtained under a commission to take testimony in connection wtih foreign documents for use in criminal cases shall be entitled to receive compensation at the rate of $15 a day for each day of attendance, plus 8 cents a mile for going from his place of residence or business to the place of examination, and returning, by the shortest feasible route (18 U.S.C. 3495 and 3496, and E.O. 10307, 3 CFR, 1949–1953 Comp.). When, however it is necessary to procure the attendance of a witness on behalf of the United States or an indigent party, an officer or agent of the United States may negotiate with the witness to pay compensation at such higher rate as may be approved by the Attorney General, plus the mileage allowance stated above (5 U.S.C. 341). The expense of the compensation and mileage of each witness will be borne by the party, or parties, applying for the commission unless the commission is accompanied by an order of court (18 U.S.C. 3495(b) that all fees, compensations, and other expenses authorized by these regulations are chargeable to the United States (18 U.S.C. 3495).

(b) *Fee payable to counsel.* Each counsel who represents a party to the action or proceeding in the examination before the commissioner will receive compensation for each day of attendance at a rate of not less than $15 a day and not more than $50 a day, as agreed between him and the party whom he represents, plus such actual and necessary expenses as may be allowed by the commissioner upon verified statements filed with him. If the commission is issued on application of the United States, the compensation and expenses of counsel representing each party are chargeable to the United States under section 3495(b) of title 18 of the United States Code (18 U.S.C.

3495 and 3496, and E.O. 10307, 3 CFR, 1949–1953 Comp.).

(c) *Fees payable to interpreters and translators.* Each interpreter and translator employed by the commissioner under these regulations shall receive an allowance of $10 a day, plus 8 cents a mile for going from his place of residence or business to the place of examination and returning, by the shortest feasible route. The compensation and mileage of interpreters and translators shall be chargeable to the United States.

(d) *Time for paying fees.* Witnesses, counsel, interpreters, and translators will be paid, in accordance with the foregoing regulations, by the commissioner at the conclusion of their services. Other expenses authorized by these regulations will be paid by the commissioner as they are incurred.

(e) *Payment of fees by the United States.* When it appears that the commission was issued on application of the United States or when the commission is accompanied by an order of court that all fees, compensation, and other expenses authorized by these regulations are chargeable to the United States under section 3495(b) of title 18 of the United States Code, the commissioner shall execute the commission without charge for his service as commissioner in connection therewith. The Commissioner shall pay witnesses, counsel, interpreter, or translator, and other expenses authorized by these regulations through the disbursing officer in his area in accordance with instructions which will be issued in each case.

(f) *Payment of fees by other parties.* When fees, compensation, and other expenses authorized by this section are chargeable to any party other than the United States, the commissioner shall undertake the execution of the commission only if such party deposits with the Department of State or with the appropriate Foreign Service post, in advance, an amount to be set by the court as apparently adequate to defray all fees, compensation, and other expenses authorized by this part. If the amount of the deposit is later found to be insufficient, the depositor shall be so notified, and the commissioner shall retain the commission and other papers until a sufficient supplemental amount has been deposited. If the amount of the deposit exceeds the aggregate amount of fees, compensation, and other expenses authorized by this part, the excess shall be returned to the party, or parties, entitled thereto. The commissioner shall pay witnesses, counsel, interpreter, or translator, and other expenses authorized by this section, from the proceeds of a check which the disbursing officer for his area will be authorized to draw on the Treasurer of the United States.

§ 92.71 Fees for letters rogatory executed by officials in the United States.

Arrangements for the payment of fees should be made directly with the court in the United States by the party in the foreign country at whose request the depositions are taken, either through his legal representative in the United States or through the appropriate diplomatic or consular officer of his country in the United States. (See § 92.67 regarding the execution of letters rogatory in the United States.)

MISCELLANEOUS NOTARIAL SERVICES

§ 92.72 Services in connection with patents and patent applications.

(a) *Affidavit of applicant.* The form of the affidavit of an applicant for a United States patent depends on who is making the application, the type of invention, and the circumstances of the case. Officers of the Foreign Service are not responsible for the correctness of form of such affidavits, and should not endeavor to advise in their preparation. Persons who inquire at a Foreign Service post regarding the filing of patent applications may be referred to the pamphlet entitled ''General Information Concerning Patents,'' if copies thereof are available at the post.

(b) *Oath or affirmation of applicant*—(1) *Authority to administer oath or affirmation.* When an applicant for a patent resides in a foreign country, his oath or affirmation may be made before any diplomatic or consular officer of the United States authorized to administer oaths, or before any officer having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by certificate of

a diplomatic or consular officer of the United States (35 U.S.C. 115). See paragraph (c) of this section regarding authentication of the authority of a foreign official. A notary or other official in a foreign country who is not authorized to administer oaths is not qualified to notarize an application for a United States patent.

(2) *Form of oath or affirmation.* See §§ 92.19 and 92.20 for usual forms of oaths and affirmations.

(3) *Execution of jurat.* In executing the jurat, the officer should carefully observe the following direction with regard to ribboning and sealing: When the oath is taken before an officer in a country foreign to the United States, all the application papers, except the drawings, must be attached together and a ribbon passed one or more times through all the sheets of the application, except the drawings, and the ends of said ribbon brought together under the seal before the latter is affixed and impressed, or each sheet must be impressed with the official seal of the officer before whom the oath is taken. If the papers as filed are not properly ribboned or each sheet impressed with the seal, the case will be accepted for examination but before it is allowed, duplicate papers, prepared in compliance with the foregoing sentence, must be filed. (Rule 66, Rules of Practice of the United States Patent Office.)

(c) *Authentication of authority of foreign official*—(1) *Necessity for authentication.* When the affidavit required in connection with a patent application been sworn to or affirmed before an official in a foreign country other than a diplomatic or consular officer of the United States, an officer of the Foreign Service authenticate the authority of the official administering the oath or affirmation (35 U.S.C. 115). If the officer of the Foreign Service cannot authenticate the oath or affirmation, the document should be authenticated by a superior foreign official, or by a series of superior foreign officials if necessary. The seal and signature of the foreign official who affixes the last foreign authentication to the document should then be authenticated by the officer of the Foreign Service.

(2) *Use of permanent ink.* All papers which will become a part of a patent application filed in the United States Patent Office must be legibly written or printed in permanent ink. (Rule 52, Rules of Practice of the United States Patent Office.) Consular certificates of authentication executed in connection with patent applications should preferably be prepared on a typewriter; they should not be prepared on a hectograph machine.

(d) *Authority of a foreign executor or administrator acting for deceased inventor.* Legal representatives of deceased inventors and of those under legal incapacity may make application for patent upon compliance with the requirements and on the same terms and conditions applicable to the inventor (35 U.S.C. 117). The rules of the Patent Office require proof of the power or authority of the legal representative. See paragraph (c) of this section for procedure for authenticating the authority of a foreign official.

(e) *Assignments of patents and applications for patents.* An application for a patent, or a patent, or any interest therein, may be assigned in law by an instrument in writing. The applicant, or the patentee, or his assigns or legal representatives, may grant and convey an exclusive right under the application for patent, or under the patent, to the whole or any specified part of the United States. Any such assignment, grant, or conveyance of any application for patent, or of any patent, may be acknowledged, in a foreign country, before ''a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States'' (35 U.S.C. 261). See § 92.37 regarding authentication of the authority of a foreign official.

(f) *Fees.* The fee for administering an oath, taking an acknowledgment, or supplying an authentication, in connection with patent applications is as prescribed in item 49 of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

§ 92.73 Services in connection with trademark registrations.

(a) *Authority and responsibility.* Acknowledgments and oaths required in

connection with applications for registration of trademarks may be made, in a foreign country, before any diplomatic or consular officer of the United States or before any official authorized to administer oaths in the foreign country whose authority must be proved by a certificate of a diplomatic or consular officer of the United States (15 U.S.C. 1061). The responsibility of officers of the Foreign Service in this connection is the same as that where notarial services in connection with patent applications are involved (see § 92.72(a)). (See § 92.72(c) regarding the authentication of the authority of a foreign official who performs a notarial service in connection with a patent application.)

(b) *Fees*. The fee for administering an oath, taking an acknowledgment, or supplying an authentication, in connection with an application for registration of a trademark, or with the assignment or transfer of rights thereunder, is as prescribed in item 49 of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

§ 92.74 Services in connection with United States securities or interests therein.

(a) *Authority and responsibility*. Assignments or requests for payment of United States securities, or securities for which the Treasury Department acts as transfer agent, or powers of attorney in connection therewith where authorized by the Treasury Department, should, in a foreign country, be executed before a United States consular or diplomatic officer. However, if they are executed before a foreign official having power to administer oaths, the Treasury Department requires that the official character and jurisdiction on the foreign official be certified by a United States diplomatic or consular officer. (See §§ 92.36 to 92.41 on authentications.)

(b) *Fees*. Officers of the Foreign Service should charge no fees for notarial services they perform in connection with the execution of documents, including the certification or authentication of documents where necessary, which affect United States securities or securities for which the Treasury Department acts as transfer agent, or which may be required in the collection of interest thereon. Item 58(b) of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter) applies in cases of this nature.

§ 92.75 Services in connection with income tax returns.

(a) *Responsibility*. Officers of the Foreign Service are authorized to perform any and all notarial services which may be required in connection with the execution of Federal, state, territorial, municipal, or insular income tax returns. Officers should not give advice on the preparation of tax returns.

(b) *Fees*. No charge under the caption ''Notarial Services and Authentications'' should be made for services performed in connection with the execution of tax returns for filing with the Federal or State Governments or political subdivisions thereof. When requested, see item 58(d) of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

COPYING, RECORDING, TRANSLATING AND PROCURING DOCUMENTS

§ 92.76 Copying documents.

(a) *Consular authority*. The consular officer is authorized to have documents, or abstracts therefrom, copied at a Foreign Service post, if he deems it advisable and it is practicable to do so. This service frequently is necessary in connection with the performance of certain notarial acts, such as the certification of copies of documents.

(b) *Fees*. The charges for making copies of documents are as prescribed by the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter), under the caption ''Copying and Recording,'' unless the service is Performed for official use, which comes under the caption Exemption for Federal Agencies and Corporations of the same Tariff.

§ 92.77 Recording documents.

(a) *Consular authority*. Consular officers may, at their discretion, accept for recording in the Miscellaneous Record Book of the office concerned

unofficial documents such as deeds, leases, agreements, wills, and so on. The object of this service is primarily to afford United States citizens and interests the means of preserving, in official custody, records of their business and other transactions where other suitable facilities are not available locally for making such records. The recording of unofficial documents is not a notarial service, strictly speaking; however, the certifying of copies of documents thus recorded is a notarial service.

(b) *Recording procedure.* Generally, before accepting a document for recording the consular officer should require satisfactory proof of its genuineness. The document should be copied, word for word, in the Miscellaneous Record Book. At the close of the record a statement that it is a true copy of the original should be entered and signed by the consular officer who copies or compares the record. In the margin of the first page where the document is recorded, the consular officer should note the following data:

(1) By whom the document is presented for recording;

(2) On whose behalf the service is requested;

(3) Date and hour of presentation for recording;

(4) How the authenticity of the document was proved (where appropriate); and

(5) The name of the person by whom recorded (in his proper signature) and the name of the consular officer with whom compared (in his proper signature).

(c) *Certificate of recording.* Ordinarily, a certificate of recording need not be issued. The original document may simply be endorsed: ''Recorded at (name and location of consular office) this _____ day of _____, 19____, in (here insert appropriate reference to volume of Miscellaneous Record Book)''. Below the endorsement should appear the notation regarding the service number, the Tariff item number, and the amount of the fee collected. When a certificate of recording is requested, the consular officer may issue it, if he sees fit to do so. The certificate may be either entered on the document, if space permits, or appended to the document as a separate sheet in the manner prescribed in §92.17.

(d) *Fees.* The fee for recording unofficial documents at a Foreign Service post is as prescribed under the caption ''Copying and Recording'' of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter). For purposes of assessment of fees, the issuance of certificates of recording, when requested, shall be regarded as part of the consular service of recording unofficial documents, and no separate fee shall be charged for the certificate.

§92.78 Translating documents.

Officers of the Foreign Service are not authorized to translate documents or to certify to the correctness of translations. (However, see §92.56 with regard to interpreting and translating services which may be performed in connection with depositions.) They are authorized to administer to a translator an oath as to the correctness of a translation; to take an acknowledgment of the preparation of a translation; and to authenticate the seal and signature of a local official affixed to a translation. Separate fees should be charged for each of these services, as indicated under the caption ''Notarial Services and Authentications'' of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter).

§92.79 Procuring copies of foreign public documents.

(a) *Nature of services.* When requested to do so by United States citizens or by persons acting in behalf of United States citizens, a consular officer should endeavor to obtain from foreign officials copies of birth, death, and marriage certificates, or copies of other public records such as divorce decrees, probated wills, and so on. The interest of the party requesting the document should be clearly indicated, and there should be good reason for asking for the consular officer's assistance. Persons requesting documents for use in the preparation of family trees or in the compilation of genealogical studies should be referred to a local attorney

or to a genealogical research bureau if one is available.

(b) *Payment of expenses involved*—(1) *Official funds not to be used.* The use of official funds to pay for copies of or extracts from foreign public records obtained at the request of private persons is prohibited.

(2) *Payment of costs by Federal Government.* In instances of requests emanating from departments or agencies of the Federal Government for copies of or extracts from foreign public records, the Department will issue to Foreign Service posts concerned appropriate instructions with respect to the payment of whatever local costs may be entailed if the documents cannot be obtained gratis from the local authorities.

(3) *Payment of costs by State or municipal governments.* Should State, county, municipal or other authorities in the United States besides the Federal Government request the consular officer to obtain foreign documents, and express willingness to supply documents gratis in analogous circumstances, the consular officer may endeavor on that basis to obtain the desired foreign documents gratis. Otherwise, such authorities should be informed that they must pay the charges of the foreign officials, as well as any fees which it may be necessary for the consular officer to collect under the provisions of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

(4) *Payment of costs by private persons.* Before a consular officer endeavors to obtain a copy of a foreign public document in behalf of a private person, the person requesting the document should be required to make a deposit of funds in an amount sufficient to defray any charges which may be made by the foreign authorities, as well as the Foreign Service fee for authenticating the document, should authentication be desired.

§ 92.80 Obtaining American vital statistics records.

Individuals who inquire as to means of obtaining copies of or extracts from American birth, death, marriage, or divorce records may be advised generally to direct their inquires to the Vital Statistics Office at the place where the record is kept, which is usually in the capital city of the State or Territory. Legal directories and other published works of references at the post may be of assistance in providing exact addresses, information about fees, etc. An inquirer who is not an American citizen may write directly to the diplomatic or appropriate consular representative of his own country for any needed assistance in obtaining a desired document.

QUASI-LEGAL SERVICES

§ 92.81 Performance of legal services.

(a) *Legal services defined.* The term ''legal services'' means services of the kind usually performed by attorneys for private persons and includes such acts as the drawing up of wills, powers of attorney, or other legal instruments.

(b) *Performance usually prohibited*—(1) *General prohibition; exceptions.* Officers of the Foreign Service should not perform legal services except when instructed to do so by the Secretary of State, or in cases of sudden emergency when the interests of the United States Government, might be involved, or in cases in which no lawyer is available and refusal to perform the service would result in the imposition of extreme hardship upon a United States citizen. There is no objection, however, to permitting persons to use the legal references in the Foreign Service office giving specimen forms of wills, powers of attorney, etc.

(2) *Specific prohibitions and restrictions.* See § 72.41 of this chapter for prohibition of performance of legal services by consular officers in connection with decedents' estates. See § 92.11 restricting the preparation for private parties of legal documents for signature and notarization.

(3) *Acceptance of will for deposit prohibited.* Wills shall not be accepted for safekeeping in the office safe. If a person desires to have his last will and testament made a matter of record in a Foreign Service establishment, the officer to whom application is made shall have the will copied in the Miscellaneous Record Book (§ 92.77) and charge the prescribed fee therefor.

(c) *Refusal of requests.* In refusing requests for the performance of legal

services, an officer of the Foreign Service should cite these regulations and should state clearly his reasons for refusing to act. In appropriate cases, the officer may furnish the inquirer with a copy of the annual list of attorneys (see § 92.82) practicing in the consular district or he may refer the inquirer to the Department for a list of attorneys.

(d) *Waiver of responsibility*. When an officer of the Foreign Service accedes to a request for the performance of a legal service, he should inform the applicant that the service is performed at the latter's risk and without any responsibility on the part of the United States Government or the officer performing the service.

(e) *Fees*. No fee should be charged for any legal services which may be performed under these regulations, beyond the fees or charges for specific services enumerated in the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

§ 92.82 Recommending attorneys or notaries.

(a) *Assistance in selecting American lawyers*. When any person in the district of a Foreign Service post desires to have the name of an attorney in the United States, the officer at the post may refer him to American law directories or other published references at his disposal, but he shall refrain from recommending any particular attorney.

(b) *Assistance in selecting foreign attorneys or notaries*. Persons applying to a Foreign Service post for services of a legal or fiduciary character or for assistance in selecting an attorney or notary capable of rendering the services in view, may be furnished the names of several attorneys or notaries in the district, or referred to the lists to be found in American or foreign law directories or other published references. Alternatively, they may be referred to bar associations or, where applicable, to the organization charged by local law with the responsibility for providing legal assistance.

(c) *Agreements for referral of legal business prohibited*. Officers of the Foreign Service shall not recommend particular attorneys or notaries to persons who apply to a Foreign Service post for legal assistance, nor shall they make agreements with attorneys or notaries for the referral to them of inquiries for legal assistance.

§ 92.84 Legal process defined.

Legal process means a writ, warrant, mandate, or other process issuing from a court of justice. The term includes subpoenas, citations, and complaints.

§ 92.85 Service of legal process usually prohibited.

The service of process and legal papers is not normally a Foreign Service function. Except when directed by the Department of State, officers of the Foreign Service are prohibited from serving process or legal papers or appointing other persons to do.

[32 FR 11776, Aug. 16, 1967]

§ 92.86 Consular responsibility for serving subpoenas.

When directed by the Department of State, officers of the Foreign Service will serve a subpoena issued by a court of the United States on a national or resident of the United States who is in a foreign country unless such action is prohibited by the law of the foreign country.

[32 FR 11776, Aug. 16, 1967]

§ 92.87 Consular responsibility for serving orders to show cause.

Officers of the Foreign Service are required to serve orders to show cause issued in contempt proceedings on a person who has failed or neglected to appear in answer to a subpoena served in accordance with the provisions of § 92.86. (Section 1, 62 Stat. 949; 28 U.S.C. 1784.)

§ 92.88 Consular procedure.

With regard to the serving of subpoenas and orders to show cause referred to in §§ 92.86 and 92.87, section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 819, 28 U.S.C. 1783), provides that the subpoena shall designate the time and place for appearance before the court of the United States, and shall issue to any consular officer of the United States in the foreign country. The consular officer is required to make personal service of the subpoena

and any order to show cause, rule, judgment or decree on the request of the Federal court or its marshal, and to make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which will be determined by the court and sent with the subpoena. When the subpoena or order is forwarded to the officer, it is usually accompanied by instructions directing exactly how service should be made and how the return of service should be executed. These instructions should be followed carefully.

§ 92.89 Fees for service of legal process.

No charge should be made for serving a subpoena or order to show cause issuing out of Federal court under the procedures set forth in §§ 92.86 and 92.87. The taking of the affidavit of the officer effecting the service, or the performance of any other notarial act which may be involved in making the return, should be without charge, under the caption ''Exemption for Federal Agencies and Corporations'' of the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter).

§ 92.90 Delivering documents pertaining to the revocation of naturalization.

Officers of the Foreign Service shall deliver, or assist in delivering, to designated persons, documents relating to proceedings in the cancellation of certificates of naturalization when such documents are forwarded by duly authorized officials of the Federal courts. The responsibility for furnishing detailed instructions on the procedure to be followed in delivering such documents rests with the court or with the United States attorney concerned, and officers should follow such instructions carefully.

§ 92.91 Service of documents at request of Congressional committees.

Officers of the Foreign Service have no authority to serve upon persons in their consular districts legal process such as subpoenas or citations in connection with Congressional investigations. All requests for such service should be referred to the Department of State.

§ 92.92 Service of legal process under provisions of State law.

It may be found that a State statute purporting to regulate the service of process in foreign countries is so drawn as to mention service by an American consular officer or a person appointed by him, without mention of or provision for alternate methods of service. State laws of this description do not operate in derogation of the laws of the foreign jurisdiction wherein it may be sought to effect service of legal process, and such State laws do not serve to impose upon American consular officers duties or obligations which they are unauthorized to accept under Federal law, or require them to perform acts contrary to Federal regulations (see § 92.85).

§ 92.93 Notarial services or authentications connected with service of process by other persons.

An officer of the Foreign Service may administer an oath to a person making an affidavit to the effect that legal process has ben served. When an affidavit stating that legal process has been served is executed before a foreign notary or other official, an officer of the Foreign Service may authenticate the official character of the person administering the oath. The fee for administering an oath to a person making an affidavit or for an authentication, as the case may be, is as prescribed under the caption ''Notarial Services and Authentications'' in the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter), unless the case is of such nature as to fall under the caption, ''Exemption for Federal Agencies and Corporations'' of the same Tariff.

§ 92.94 Replying to inquiries regarding service of process or other documents.

Officers should make prompt and courteous replies to all inquiries regarding the service of legal process or documents of like nature, and should render such assistance as they properly

can to the court and to interested parties. Such assistance could include furnishing information as to the standard procedure of the locality for service of legal papers, with the name and address of the local office having a bailiff authorized to effect and make return of service; it could include furnishing a list of local attorneys capable of making necessary arrangements; or it could, where appropriate, include a suggestion that the request of the American court might be presented to the foreign judicial authorities in the form of letters rogatory (see definition, §92.54, and procedures, §92.66 (b)). If the person upon whom the process is intended to be served is known to be willing to accept service, or if it is clear that it would be in his interest at least to be informed of the matter, the consular officer may suggest to the interested parties in the United States the drawings up of papers for voluntary execution by such person, such as a waiver of service or a document which would be acceptable to the American court to signify the person's entering an appearance in the action pending therein.

§92.95 Transportation of witnesses to the United States.

Officers of the Foreign Service may at times be called upon to assist in arranging for the transportation to the United States of persons in foreign countries whose testimony is desired by the Attorney General in a case pending in a Federal court. Requests that the travel of such persons be facilitated originate in the Department of Justice, and special instructions in each case are transmitted to the appropriate Foreign Service post by the Department of State.

PART 93—SERVICE ON FOREIGN STATE

Sec.

93.1 Service through the diplomatic channel.
93.2 Notice of suit (or of default judgment).

AUTHORITY: 22 U.S.C. 2658; 28 U.S.C. 1608(a).

§93.1 Service through the diplomatic channel.

(a) The Director of the Office of Special Consular Services in the Bureau of Consular Affairs, Department of State (''The Managing Director for Overseas Citizen Service''), shall perform the duties of the Secretary of State under section 1608(a)(4) of title 28, United States Code.

(b) When the clerk of the court concerned sends documents under section 1608(a)(4), of title 28, United States Code, the Managing Director for Overseas Citizen Service shall promptly ascertain if the documents include the required copies of the notice of suit and of the summons and complaint (or default judgment), and any required translations. If not, he shall promptly advise the clerk of the missing items.

(c) Upon receiving the required copies of documents and any required translations, the Managing Director for Overseas Citizen Service shall promptly cause one copy of each such document and translation (''the documents'') to be delivered—

(1) To the Embassy of the United States in the foreign state concerned, and the Embassy shall promptly deliver them to the foreign ministry or other appropriate authority of the foreign state, or

(2) If the foreign state so requests or if otherwise appropriate, to the embassy of the foreign state in the District of Columbia, or

(3) If paragraphs (c)(1) and (2) of this section are unavailable, through an existing diplomatic channel, such as to the embassy of another country authorized to represent the interests of the foreign state concerned in the United States.

(d) The documents, when delivered under paragraph (c) of this section, shall be accompanied by a diplomatic note of transmittal, requesting that the documents be forwarded to the appropriate authority of the foreign state or political subdivision upon which service is being made. The note shall state that, under United States law, questions of jurisdiction and of state immunity must be addressed to the court and not to the Department of

State, and that it is advisable to consult with an attorney in the United States.

(e) If the documents are delivered under paragraph (c)(1) of this section, the Embassy of the United States shall promptly transmit by diplomatic pouch, to the Managing Director for Overseas Citizen Service, a certified copy of the diplomatic note of transmittal. If the documents are delivered under paragraph (c) (2) or (3) of this section, the Managing Director for Overseas Citizen Service shall prepare a certified copy of the diplomatic note of transmittal. In each case, the certification shall state the date and place the documents were delivered. The Managing Director for Overseas Citizen Service shall then promptly send the certified copy to the clerk of the court concerned.

(Sec. 1608(a), Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583 (28 U.S.C. 1608(a)); sec. 4, 63 Stat. 111, as amended (22 U.S.C. 2658))

[42 FR 6367, Feb. 2, 1977, as amended at 63 FR 16687, Apr. 6, 1998]

§ 93.2 Notice of suit (or of default judgment).

(a) A Notice of Suit prescribed in section 1608(a) of title 28, United States Code, shall be prepared in the form that appears in the Annex to this section.

(b) In preparing a Notice of Suit, a party shall in every instance supply the information specified in items 1 through 5 of the form appearing in the Annex to this section. A party shall also supply information specified in item 6, if notice of a default judgment is being served.

(c) In supplying the information specified in item 5, a party shall in simplified language summarize the nature and purpose of the proceeding (including principal allegations and claimed bases of liability), the reasons why the foreign state or political subdivision has been named as a party in the proceeding, and the nature and amount of relief sought. The purpose of item 5 is to enable foreign officials unfamiliar with American legal documents to ascertain the above information.

(d) A party may attach additional pages to the Notice of Suit to complete information under any item.

(e) A party shall attach, as part of the Notice of Suit, a copy of the Foreign State Immunities Act of 1976 (Pub. L. 94–583; 90 Stat. 2891).

ANNEX

NOTICE OF SUIT (OR OF DEFAULT JUDGMENT[1])

1. Title of legal proceeding; full name of court; case or docket number.
2. Name of foreign state (or political subdivision) concerned:
3. Identity of the other Parties:

JUDICIAL DOCUMENTS

4. Nature of documents served (e.g., Summons and Complaint; Default Judgment):
5. Nature and purpose of the proceedings; why the foreign state (or political subdivision) has been named; relief requested:
6. Date of default judgment (if any):
7. A response to a ''Summons'' and ''Complaint'' is required to be submitted to the court, not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity).
8. The failure to submit a timely response with the court can result in a Default Judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.
9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94–583; 90 Stat. 2891).

(Sec. 1608(a), Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583 (28 U.S.C. 1608(a)); sec. 4, 63 Stat. 111, as amended (22 U.S.C. 2658))

[42 FR 6367, Feb. 2, 1977]

PART 94—INTERNATIONAL CHILD ABDUCTION

Sec.
94.1 Definitions.
94.2 Designation of Central Authority.
94.3 Functions of the Central Authority.
94.4 Prohibitions.
94.5 Application.

[1] Relevant only if items 4 and 6 indicate that a default judgment has occurred.

94.6 Procedures for children abducted to the United States.
94.7 Procedures for children abducted from the United States.
94.8 Interagency coordinating group.

AUTHORITY: Hague Convention on the Civil Aspects of International Child Abduction; the federal ''International Child Abduction Remedies Act,'' Pub. L. 100–300.

SOURCE: 53 FR 23608, June 23, 1988, unless otherwise noted.

§94.1 Definitions.

For purposes of this part—

(a) *Convention* means the Hague Convention on the Civil Aspects of International Child Abduction, Appendix B to Department of State notice, 51 FR 10498, March 26, 1986.

(b) *Contracting State* means any country which is a party to the Convention.

(c) *Child* and *children* mean persons under the age of sixteen.

§94.2 Designation of Central Authority.

The Office of Children's Issues in the Bureau of Consular Affairs is designated as the U.S. Central Authority to discharge the duties which are imposed by the Convention and the International Child Abduction Remedies Act upon such authorities.

[60 FR 25843, May 15, 1995]

§94.3 Functions of the Central Authority.

The U.S. Central Authority shall cooperate with the Central Authorities of other countries party to the Convention and promote cooperation by appropriate U.S. state authorities to secure the prompt location and return of children wrongfully removed to or retained in any Contracting State, to ensure that rights of custody and access under the laws of one Contracting State are effectively respected in the other Contracting States, and to achieve the other objects of the Convention. In performing its functions, the U.S. Central Authority may receive from, or transmit to, any department, agency, or instrumentality of the federal government, or of any state or foreign government, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child.

§94.4 Prohibitions.

(a) The U.S. Central Authority is prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention. The U.S. Central Authority is not responsible for the costs of any legal representation or legal proceedings nor for any transportation expenses of the child or applicant. However, the U.S. Central Authority may not impose any fee in relation to the administrative processing of applications submitted under the Convention.

(b) The U.S. Central Authority shall not be a repository of foreign or U.S. laws.

§94.5 Application.

Any person, institution, or other body may apply to the U.S. Central Authority for assistance in locating a child, securing access to a child, or obtaining the return of a child that has been removed or retained in breach of custody rights. The application shall be made in the form prescribed by the U.S. Central Authority and shall contain such information as the U.S. Central Authority deems necessary for the purposes of locating the child and otherwise implementing the Convention. The application and any accompanying documents should be submitted in duplicate in English or with English translations. If intended for use in a foreign country, two additional copies should be provided in the language of the foreign country.

§94.6 Procedures for children abducted to the United States.

The U.S. Central Authority, or an entity acting at its direction, shall perform the following operational functions with respect to all Hague Convention applications seeking the return of children wrongfully removed to or retained in the United States or seeking access to children in the United States:

(a) Receive all applications seeking return of children wrongfully retained in the United States or seeking access to children in the United States;

(b) Confirm the child's location or, where necessary, seek to ascertain its location;

(c) Seek to ascertain the child's welfare through inquiry to the appropriate

state social service agencies and, when necessary, consult with those agencies about the possible need for provisional arrangements to protect the child or to prevent the child's removal from the jurisdiction of the state;

(d) Seek through appropriate authorities (such as state social service agencies or state attorneys general or prosecuting attorneys), where appropriate, to achieve a voluntary agreement for suitable visitation rights by the applicant or for return of the child;

(e) Assist applicants in securing information useful for choosing or obtaining legal representation, for example, by providing a directory of lawyer referral services, or pro bono listing published by legal professional organizations, or the name and address of the state attorney general or prosecuting attorney who has expressed a willingness to represent parents in this type of case and who is employed under state law to intervene on the applicant's behalf;

(f) Upon request, seek from foreign Central Authorities information relating to the social background of the child;

(g) Upon request, seek from foreign Central Authorities information regarding the laws of the country of the child's habitual residence;

(h) Upon request, seek from foreign Central Authorities a statement as to the wrongfulness of the taking of the child under the laws of the country of the child's habitual residence;

(i) Upon request, seek a report on the status of court action when no decision has been reached by the end of six weeks;

(j) Consult with appropriate agencies (such as state social service departments, the U.S. Department of Health and Human Services, state attorneys general) about possible arrangements for temporary foster care and/or return travel for the child from the United States;

(k) Monitor all cases in which assistance has been sought and maintain records on the procedures followed in each case and its disposition;

(l) Perform such additional functions as determined by the U.S. Central Authority, deemed advisable to maintain U.S. treaty compliance with the Hague Convention on the Civil Aspects of International Child Abduction.

[53 FR 23608, June 23, 1988, as amended at 60 FR 66074, Dec. 21, 1995; 73 FR 47831, Aug. 15, 2008]

§ 94.7 Procedures for children abducted from the United States.

Upon receipt of an application requesting access to a child or return of a child abducted from the United States and taken to another country party to the Convention, the U.S. Central Authority shall—

(a) Review and forward the application to the Central Authority of the country where the child is believed located or provide the applicant with the necessary form, instructions, and the name and address of the appropriate Central Authority for transmittal of the application directly by the applicant;

(b) Upon request, transmit to the foreign Central Authority requests for a report on the status of any court action when no decision has been reached by the end of six weeks;

(c) Upon request, facilitate efforts to obtain from appropriate U.S. state authorities and transmit to the foreign Central Authority information regarding the laws of the child's state of habitual residence;

(d) Upon request, facilitate efforts to obtain from appropriate U.S. state authorities and transmit to the foreign Central Authority a statement as to the wrongfulness of the taking of the child under the laws of the child's state of habitual residence;

(e) Upon request, facilitate efforts to obtain from appropriate U.S. state authorities and transmit to the foreign Central Authority information relating to the social background of the child;

(f) Upon request, be available to facilitate possible arrangements for temporary foster care and/or travel for the child from the foreign country to the United States;

(g) Monitor all cases in which assistance has been sought; and

(h) Perform such additional functions as the Assistant Secretary of State for Consular Affairs may from time to time direct.

§94.8 Interagency coordinating group.

The U.S. Central Authority shall nominate federal employees and may, from time to time, nominate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation. This group shall meet from time to time at the request of the U.S. Central Authority.

PART 95—IMPLEMENTATION OF TORTURE CONVENTION IN EXTRADITION CASES

Sec.
95.1 Definitions.
95.2 Application.
95.3 Procedures.
95.4 Review and construction.

AUTHORITY: 18 U.S.C. 3181 *et seq.;* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

§95.1 Definitions.

(a) *Convention* means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, entered into force for the United States on November 10, 1994. Definitions provided below in paragraphs (b) and (c) of this section reflect the language of the Convention and understandings set forth in the United States instrument of ratification to the Convention.

(b) *Torture* means:

(1) Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(4) This definition of torture applies only to acts directed against persons in the offender's custody or physical control.

(5) The term ''acquiescence'' as used in this definition requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(6) The term ''lawful sanctions'' as used in this definition includes judicially imposed sanctions and other enforcement actions authorized by law, provided that such sanctions or actions were not adopted in order to defeat the object and purpose of the Convention to prohibit torture.

(7) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.

(c) *Where there are substantial grounds for believing that [a fugitive] would be in danger of being subjected to torture* means if it is more likely than not that the fugitive would be tortured.

(d) *Secretary* means Secretary of State and includes, for purposes of this

rule, the Deputy Secretary of State, by delegation.

§ 95.2 Application.

(a) Article 3 of the Convention imposes on the parties certain obligations with respect to extradition. That Article provides as follows:

(1) No State party shall expel, return (''refouler'') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(b) Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. ''is more likely than not'' to be tortured in the State requesting extradition when appropriate in making this determination.

§ 95.3 Procedures.

(a) Decisions on extradition are presented to the Secretary only after a fugitive has been found extraditable by a United States judicial officer. In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.

(b) Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

§ 95.4 Review and construction.

Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105–277, notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

PART 96—ACCREDITATION OF AGENCIES AND APPROVAL OF PERSONS UNDER THE INTER-COUNTRY ADOPTION ACT OF 2000 (IAA)

Subpart A—General Provisions

Sec.
96.1 Purpose.
96.2 Definitions.
96.3 [Reserved]

Subpart B—Selection, Designation, and Duties of Accrediting Entities

96.4 Designation of accrediting entities by the Secretary.
96.5 Requirement that accrediting entity be a nonprofit or public entity.
96.6 Performance criteria for designation as an accrediting entity.
96.7 Authorities and responsibilities of an accrediting entity.
96.8 Fees charged by accrediting entities.
96.9 Agreement between the Secretary and the accrediting entity.
96.10 Suspension or cancellation of the designation of an accrediting entity by the Secretary.
96.11 [Reserved]

Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services

96.12 Authorized adoption service providers.

96.13 Circumstances in which accreditation, approval, or supervision is not required.
96.14 Providing adoption services using other providers.
96.15 Examples.
96.16 Public domestic authorities.
96.17 Effective date of accreditation and approval requirements.

Subpart D—Application Procedures for Accreditation and Approval

96.18 Scope.
96.19 Special provision for agencies and persons seeking to be accredited or approved as of the time the Convention enters into force for the United States.
96.20 First-time application procedures for accreditation and approval.
96.21 Choosing an accrediting entity.
96.22 [Reserved]

Subpart E—Evaluation of Applicants for Accreditation and Approval

96.23 Scope.
96.24 Procedures for evaluating applicants for accreditation or approval.
96.25 Access to information and documents requested by the accrediting entity.
96.26 Protection of information and documents by the accrediting entity.
96.27 Substantive criteria for evaluating applicants for accreditation or approval.
96.28 [Reserved]

Subpart F—Standards for Convention Accreditation and Approval

96.29 Scope.

LICENSING AND CORPORATE GOVERNANCE

96.30 State licensing.
96.31 Corporate structure.
96.32 Internal structure and oversight.

FINANCIAL AND RISK MANAGEMENT

96.33 Budget, audit, insurance, and risk assessment requirements.
96.34 Compensation.

ETHICAL PRACTICES AND RESPONSIBILITIES

96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention.
96.36 Prohibition on child buying.

PROFESSIONAL QUALIFICATIONS AND TRAINING FOR EMPLOYEES

96.37 Education and experience requirements for social service personnel.
96.38 Training requirements for social service personnel.

INFORMATION DISCLOSURE, FEE PRACTICES, AND QUALITY CONTROL POLICIES AND PRACTICES

96.39 Information disclosure and quality control practices.
96.40 Fee policies and procedures.

RESPONDING TO COMPLAINTS AND RECORDS AND REPORTS MANAGEMENT

96.41 Procedures for responding to complaints and improving service delivery.
96.42 Retention, preservation, and disclosure of adoption records.
96.43 Case tracking, data management, and reporting.

SERVICE PLANNING AND DELIVERY

96.44 Acting as primary provider.
96.45 Using supervised providers in the United States.
96.46 Using providers in Convention countries.

STANDARDS FOR CASES IN WHICH A CHILD IS IMMIGRATING TO THE UNITED STATES (INCOMING CASES)

96.47 Preparation of home studies in incoming cases.
96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.
96.49 Provision of medical and social information in incoming cases.
96.50 Placement and post-placement monitoring until final adoption in incoming cases.
96.51 Post-adoption services in incoming cases.
96.52 Performance of Convention communication and coordination functions in incoming cases.

STANDARDS FOR CASES IN WHICH A CHILD IS EMIGRATING FROM THE UNITED STATES (OUTGOING CASES)

96.53 Background studies on the child and consents in outgoing cases.
96.54 Placement standards in outgoing cases.
96.55 Performance of Convention communication and coordination functions in outgoing cases.
96.56 [Reserved]

Subpart G—Decisions on Applications for Accreditation or Approval

96.57 Scope.
96.58 Notification of accreditation and approval decisions.
96.59 Review of decisions to deny accreditation or approval.
96.60 Length of accreditation or approval period.
96.61 [Reserved]

Subpart H—Renewal of Accreditation or Approval

96.62 Scope.
96.63 Renewal of accreditation or approval.
96.64 [Reserved]

Subpart I—Routine Oversight by Accrediting Entities

96.65 Scope.
96.66 Oversight of accredited agencies and approved persons by the accrediting entity.
96.67 [Reserved]

Subpart J—Oversight Through Review of Complaints

96.68 Scope.
96.69 Filing of complaints against accredited agencies and approved persons.
96.70 Operation of the Complaint Registry.
96.71 Review by the accrediting entity of complaints against accredited agencies and approved persons.
96.72 Referral of complaints to the Secretary and other authorities.
96.73 [Reserved]

Subpart K—Adverse Action by the Accrediting Entity

96.74 Scope.
96.75 Adverse action against accredited agencies or approved persons not in substantial compliance.
96.76 Procedures governing adverse action by the accrediting entity.
96.77 Responsibilities of the accredited agency, approved person, and accrediting entity following adverse action by the accrediting entity.
96.78 Accrediting entity procedures to terminate adverse action.
96.79 Administrative or judicial review of adverse action by the accrediting entity.
96.80 [Reserved]

Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary

96.81 Scope.
96.82 The Secretary's response to actions by the accrediting entity.
96.83 Suspension or cancellation of accreditation or approval by the Secretary.
96.84 Reinstatement of accreditation or approval after suspension or cancellation by the Secretary.
96.85 Temporary and permanent debarment by the Secretary.
96.86 Length of debarment period and reapplication after temporary debarment.
96.87 Responsibilities of the accredited agency, approved person, and accrediting entity following suspension, cancellation, or debarment by the Secretary.
96.88 Review of suspension, cancellation, or debarment by the Secretary.
96.89 [Reserved]

Subpart M—Dissemination and Reporting of Information by Accrediting Entities

96.90 Scope.
96.91 Dissemination of information to the public about accreditation and approval status.
96.92 Dissemination of information to the public about complaints against accredited agencies and approved persons.
96.93 Reports to the Secretary about accredited agencies and approved persons and their activities.
96.94 [Reserved]

Subpart N—Procedures and Standards Relating to Temporary Accreditation

96.95 Scope.
96.96 Eligibility requirements for temporary accreditation.
96.97 Application procedures for temporary accreditation.
96.98 Length of temporary accreditation period.
96.99 Converting an application for temporary accreditation to an application for full accreditation.
96.100 Procedures for evaluating applicants for temporary accreditation.
96.101 Notification of temporary accreditation decisions.
96.102 Review of temporary accreditation decisions.
96.103 Oversight by accrediting entities.
96.104 Performance standards for temporary accreditation.
96.105 Adverse action against a temporarily accredited agency by an accrediting entity.
96.106 Review of the withdrawal of temporary accreditation by an accrediting entity.
96.107 Adverse action against a temporarily accredited agency by the Secretary.
96.108 Review of the withdrawal of temporary accreditation by the Secretary.
96.109 Effect of the withdrawal of temporary accreditation by the accrediting entity or the Secretary.
96.110 Dissemination and reporting of information about temporarily accredited agencies.
96.111 Fees charged for temporary accreditation.

AUTHORITY: The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); The

Intercountry Adoption Act of 2000, 42 U.S.C. 14901–14954.

SOURCE: 71 FR 8131, Feb. 15, 2006, unless otherwise noted.

Subpart A—General Provisions

§96.1 Purpose.

This part provides for the accreditation and approval of agencies and persons pursuant to the Intercountry Adoption Act of 2000 (Pub. L. 106–279, 42 U.S.C. 14901–14954). Subpart B of this part establishes the procedures for the selection and designation of accrediting entities to perform the accreditation and approval functions. Subparts C through H establish the general procedures and standards for accreditation and approval of agencies and persons (including renewal of accreditation or approval). Subparts I through M address the oversight of accredited or approved agencies and persons. Subpart N establishes special rules relating to small agencies that wish to seek temporary accreditation.

§96.2 Definitions.

As used in this part, the term:

Accredited agency means an agency that has been accredited by an accrediting entity, in accordance with the standards in subpart F of this part, to provide adoption services in the United States in cases subject to the Convention. It does not include a temporarily accredited agency.

Accrediting entity means an entity that has been designated by the Secretary to accredit agencies (including temporarily accredit) and/or to approve persons for purposes of providing adoption services in the United States in cases subject to the Convention.

Adoption means the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s).

Adoption record means any record, information, or item related to a specific Convention adoption of a child received or maintained by an agency, person, or public domestic authority, including, but not limited to, photographs, videos, correspondence, personal effects, medical and social information, and any other information about the child. An adoption record does not include a record generated by an agency, person, or a public domestic authority to comply with the requirement to file information with the Case Registry on adoptions not subject to the Convention pursuant to section 303(d) of the IAA (42 U.S.C. 14932(d)).

Adoption service means any one of the following six services:

(1) Identifying a child for adoption and arranging an adoption;

(2) Securing the necessary consent to termination of parental rights and to adoption;

(3) Performing a background study on a child or a home study on a prospective adoptive parent(s), and reporting on such a study;

(4) Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child;

(5) Monitoring a case after a child has been placed with prospective adoptive parent(s) until final adoption; or

(6) When necessary because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) child care or any other social service pending an alternative placement.

Agency means a private, nonprofit organization licensed to provide adoption services in at least one State. (For-profit entities and individuals that provide adoption services are considered ''persons'' as defined in this section.)

Approved home study means a review of the home environment of the child's prospective adoptive parent(s) that has been:

(1) Completed by an accredited agency or temporarily accredited agency; or

(2) Approved by an accredited agency or temporarily accredited agency.

Approved person means a person that has been approved, in accordance with the standards in subpart F of this part, by an accrediting entity to provide adoption services in the United States in cases subject to the Convention.

Best interests of the child shall have the meaning given to it by the law of the State with jurisdiction to decide

whether a particular adoption or adoption-related action is in a child's best interests.

Case Registry means the tracking system jointly established by the Secretary and DHS to comply with section 102(e) of the IAA (42 U.S.C. 14912).

Central Authority means the entity designated as such under Article 6(1) of the Convention by any Convention country or, in the case of the United States, the United States Department of State.

Central Authority function means any duty required under the Convention to be carried out, directly or indirectly, by a Central Authority.

Child welfare services means services, other than those defined as ''adoption services'' in this section, that are designed to promote and protect the well-being of a family or child. Such services include, but are not limited to, recruiting and identifying adoptive parent(s) in cases of disruption (but not assuming custody of the child), arranging or providing temporary foster care for a child in connection with a Convention adoption or providing educational, social, cultural, medical, psychological assessment, mental health, or other health-related services for a child or family in a Convention adoption case.

Competent authority means a court or governmental authority of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption.

Complaint Registry means the system created by the Secretary pursuant to § 96.70 to receive, distribute, and monitor complaints relevant to the accreditation or approval status of agencies and persons.

Convention means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993.

Convention adoption means the adoption of a child resident in a Convention country by a United States citizen, or an adoption of a child resident in the United States by an individual or individuals residing in a Convention country, when, in connection with the adoption, the child has moved or will move between the United States and the Convention country.

Convention country means a country that is a party to the Convention and with which the Convention is in force for the United States.

Country of origin means the country in which a child is a resident and from which a child is emigrating in connection with his or her adoption.

Debarment means the loss of accreditation or approval by an agency or person as a result of an order of the Secretary under which the agency or person is temporarily or permanently barred from accreditation or approval.

DHS means the Department of Homeland Security and encompasses the former Immigration and Naturalization Service (INS) or any successor entity designated by the Secretary of Homeland Security to assume the functions vested in the Attorney General by the IAA relating to the INS's responsibilities.

Disruption means the interruption of a placement for adoption during the post-placement period.

Dissolution means the termination of the adoptive parent(s)' parental rights after an adoption.

Exempted provider means a social work professional or organization that performs a home study on prospective adoptive parent(s) or a child background study (or both) in the United States in connection with a Convention adoption (including any reports or updates), but that is not currently providing and has not previously provided any other adoption service in the case.

IAA means the Intercountry Adoption Act of 2000, Public Law 106–279 (2000) (42 U.S.C. 14901–14954), as amended from time to time.

Legal custody means having legal responsibility for a child under the order of a court of law, a public domestic authority, competent authority, public foreign authority, or by operation of law.

Legal services means services, other than those defined in this section as ''adoption services,'' that relate to the provision of legal advice and information and to the drafting of legal instruments. Such services include, but are not limited to, drawing up contracts, powers of attorney, and other legal instruments; providing advice and counsel to adoptive parent(s) on completing

DHS or Central Authority forms; and providing advice and counsel to accredited agencies, temporarily accredited agencies, approved persons, or prospective adoptive parent(s) on how to comply with the Convention, the IAA, and the regulations implementing the IAA.

Person means an individual or a private, for-profit entity (including a corporation, company, association, firm, partnership, society, or joint stock company) providing adoption services. It does not include public domestic authorities or public foreign authorities.

Post-adoption means after an adoption; in cases in which an adoption occurs in a Convention country and is followed by a re-adoption in the United States, it means after the adoption in the Convention country.

Post-placement means after a grant of legal custody or guardianship of the child to the prospective adoptive parent(s), or to a custodian for the purpose of escorting the child to the identified prospective adoptive parent(s), and before an adoption.

Primary provider means the accredited agency, temporarily accredited agency, or approved person that is identified pursuant to §96.14 as responsible for ensuring that all six adoption services are provided and for supervising and being responsible for supervised providers where used.

Public domestic authority means an authority operated by a State, local, or tribal government within the United States.

Public foreign authority means an authority operated by a national or subnational government of a Convention country.

Secretary means the Secretary of State, the Assistant Secretary of State for Consular Affairs, or any other Department of State official exercising the Secretary of State's authority under the Convention, the IAA, or any regulations implementing the IAA, pursuant to a delegation of authority.

State means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands.

Supervised provider means any agency, person, or other non-governmental entity, including any foreign entity, regardless of whether it is called a facilitator, agent, attorney, or by any other name, that is providing one or more adoption services in a Convention case under the supervision and responsibility of an accredited agency, temporarily accredited agency, or approved person that is acting as the primary provider in the case.

Temporarily accredited agency means an agency that has been accredited on a temporary basis by an accrediting entity, in accordance with the standards in subpart N of this part, to provide adoption services in the United States in cases subject to the Convention. It does not include an accredited agency.

§96.3 [Reserved]

Subpart B—Selection, Designation, and Duties of Accrediting Entities

§96.4 Designation of accrediting entities by the Secretary.

(a) The Secretary, in the Secretary's discretion, will designate one or more entities that meet the criteria set forth in §96.5 to perform the accreditation (including temporary accreditation) and/or approval functions. Each accrediting entity's designation will be set forth in an agreement between the Secretary and the accrediting entity. The agreement will govern the accrediting entity's operations. The agreements will be published in the FEDERAL REGISTER.

(b) The Secretary's designation may authorize an accrediting entity to accredit (including temporarily accredit) agencies, to approve persons, or to both accredit agencies and approve persons. The designation may also limit the accrediting entity's geographic jurisdiction or impose other limits on the entity's jurisdiction.

(c) A public entity may only be designated to accredit agencies and approve persons that are located in the public entity's State.

§96.5 Requirement that accrediting entity be a nonprofit or public entity.

An accrediting entity must qualify as either:

(a) An organization described in section 501(c)(3) of the Internal Revenue

Code of 1986, as amended, that has expertise in developing and administering standards for entities providing child welfare services; or

(b) A public entity (other than a Federal entity), including, but not limited to, any State or local government or governmental unit or any political subdivision, agency, or instrumentality thereof, that is responsible for licensing adoption agencies in a State and that has expertise in developing and administering standards for entities providing child welfare services.

§ 96.6 Performance criteria for designation as an accrediting entity.

An entity that seeks to be designated as an accrediting entity must demonstrate to the Secretary:

(a) That it has a governing structure, the human and financial resources, and systems of control adequate to ensure its reliability;

(b) That it is capable of performing the accreditation or approval functions or both on a timely basis and of administering any renewal cycle authorized under § 96.60;

(c) That it can monitor the performance of agencies it has accredited or temporarily accredited and persons it has approved (including their use of any supervised providers) to ensure their continued compliance with the Convention, the IAA, and the regulations implementing the IAA;

(d) That it has the capacity to take appropriate adverse actions against agencies it has accredited or temporarily accredited and persons it has approved;

(e) That it can perform the required data collection, reporting, and other similar functions;

(f) Except in the case of a public entity, that it operates independently of any agency or person that provides adoption services, and of any membership organization that includes agencies or persons that provide adoption services;

(g) That it has the capacity to conduct its accreditation, temporary accreditation, and approval functions fairly and impartially;

(h) That it can comply with any conflict-of-interest prohibitions set by the Secretary in its agreement;

(i) That it prohibits conflicts of interest with agencies or persons or with any membership organization that includes agencies or persons that provide adoption services; and

(j) That it prohibits its employees or other individuals acting as site evaluators, including, but not limited to, volunteer site evaluators, from becoming employees or supervised providers of an agency or person for at least one year after they have evaluated such agency or person for accreditation, temporary accreditation, or approval.

§ 96.7 Authorities and responsibilities of an accrediting entity.

(a) An accrediting entity may be authorized by the Secretary to perform some or all of the following functions:

(1) Determining whether agencies are eligible for accreditation and/or temporary accreditation;

(2) Determining whether persons are eligible for approval;

(3) Overseeing accredited agencies, temporarily accredited agencies, and/or approved persons by monitoring their compliance with applicable requirements;

(4) Investigating and responding to complaints about accredited agencies, temporarily accredited agencies, and approved persons (including their use of supervised providers);

(5) Taking adverse action against an accredited agency, temporarily accredited agency, or approved person, and/or referring an accredited agency, temporarily accredited agency, or approved person for possible action by the Secretary;

(6) Determining whether accredited agencies and approved persons are eligible for renewal of their accreditation or approval on a cycle consistent with § 96.60;

(7) Collecting data from accredited agencies, temporarily accredited agencies, and approved persons, maintaining records, and reporting information to the Secretary, State courts, and other entities; and

(8) Assisting the Secretary in taking appropriate action to help an agency or person in transferring its Convention cases and adoption records.

(b) The Secretary may require the accrediting entity:

(1) To utilize the Complaint Registry as provided in subpart J of this part; and

(2) To fund a portion of the costs of operating the Complaint Registry with fees collected by the accrediting entity pursuant to the schedule of fees approved by the Secretary as provided in §96.8.

(c) An accrediting entity must perform all responsibilities in accordance with the Convention, the IAA, the regulations implementing the IAA, and its agreement with the Secretary.

§96.8 Fees charged by accrediting entities.

(a) An accrediting entity may charge fees for accreditation or approval services under this part only in accordance with a schedule of fees approved by the Secretary. Before approving a schedule of fees proposed by an accrediting entity, or subsequent proposed changes to an approved schedule, the Secretary will require the accrediting entity to demonstrate:

(1) That its proposed schedule of fees reflects appropriate consideration of the relative size and geographic location and volume of Convention cases of the agencies or persons it expects to serve;

(2) That the total fees the accrediting entity expects to collect under the schedule of fees will not exceed the full costs of accreditation or approval under this part (including, but not limited to, costs for completing the accreditation or approval process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities).

(b) The schedule of fees must:

(1) Establish separate non-refundable fees for Convention accreditation and Convention approval;

(2) Include in each fee for full Convention accreditation or approval the costs of all activities associated with the accreditation or approval cycle, including but not limited to, costs for completing the accreditation or approval process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities, except that separate fees based on actual costs incurred may be charged for the travel and maintenance of evaluators; and

(3) If the accrediting entity provides temporary accreditation services, include fees as required by §96.111 for agencies seeking temporary accreditation under subpart N of this part.

(c) An accrediting entity must make its approved schedule of fees available to the public, including prospective applicants for accreditation or approval, upon request. At the time of application, the accrediting entity must specify the fees to be charged to the applicant in a contract between the parties and must provide notice to the applicant that no portion of the fee will be refunded if the applicant fails to become accredited or approved.

(d) Nothing in this section shall be construed to provide a private right of action to challenge any fee charged by an accrediting entity pursuant to a schedule of fees approved by the Secretary.

§96.9 Agreement between the Secretary and the accrediting entity.

An accrediting entity must perform its functions pursuant to a written agreement with the Secretary that will be published in the FEDERAL REGISTER. The agreement will address:

(a) The responsibilities and duties of the accrediting entity;

(b) The method by which the costs of delivering the accreditation, temporary accreditation, or approval services may be recovered through the collection of fees from those seeking accreditation, temporary accreditation, or approval, and how the entity's schedule of fees will be approved;

(c) How the accrediting entity will address complaints about accredited agencies, temporarily accredited agencies, and approved persons (including their use of supervised providers) and complaints about the accrediting entity itself;

(d) Data collection requirements;

(e) Matters of communication and accountability between both the accrediting entity and the applicant(s) and between the accrediting entity and the Secretary; and

(f) Other matters upon which the parties have agreed.

§ 96.10 Suspension or cancellation of the designation of an accrediting entity by the Secretary.

(a) The Secretary will suspend or cancel the designation of an accrediting entity if the Secretary concludes that it is substantially out of compliance with the Convention, the IAA, the regulations implementing the IAA, other applicable laws, or the agreement with the Secretary. Complaints regarding the performance of the accrediting entity may be submitted to the Department of State, Bureau of Consular Affairs. The Secretary will consider complaints in determining whether an accrediting entity's designation should be suspended or canceled.

(b) The Secretary will notify an accrediting entity in writing of any deficiencies in the accrediting entity's performance that could lead to the suspension or cancellation of its designation, and will provide the accrediting entity with an opportunity to demonstrate that suspension or cancellation is unwarranted, in accordance with procedures established in the agreement entered into pursuant to § 96.9.

(c) An accrediting entity may be considered substantially out of compliance under circumstances that include, but are not limited to:

(1) Failing to act in a timely manner when presented with evidence that an accredited agency or approved person is substantially out of compliance with the standards in subpart F of this part or a temporarily accredited agency is substantially out of compliance with the standards in § 96.104;

(2) Accrediting or approving significant numbers of agencies or persons whose performance results in intervention of the Secretary for the purpose of suspension, cancellation, or debarment;

(3) Failing to perform its responsibilities fairly and objectively;

(4) Violating prohibitions on conflicts of interest;

(5) Failing to meet its reporting requirements;

(6) Failing to protect information or documents that it receives in the course of performing its responsibilities; and

(7) Failing to monitor frequently and carefully the compliance of accredited agencies, temporarily accredited agencies, and approved persons with the home study requirements of the Convention, section 203(b)(1)(A)(ii) of the IAA (42 U.S.C. 14923(b)(1)(A)(ii)), and § 96.47.

(d) An accrediting entity that is subject to a final action of suspension or cancellation may petition the United States District Court for the District of Columbia or the United States district court in the judicial district in which the accrediting entity is located to set aside the action as provided in section 204(d) of the IAA (42 U.S.C. 14924(d)).

§ 96.11 [Reserved]

Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services

§ 96.12 Authorized adoption service providers.

(a) Once the Convention has entered into force for the United States, except as provided in section 505(b) of the IAA (relating to transitional cases), an agency or person may not offer, provide, or facilitate the provision of any adoption service in the United States in connection with a Convention adoption unless it is:

(1) An accredited agency, a temporarily accredited agency, or an approved person;

(2) A supervised provider; or

(3) An exempted provider, if the exempted provider's home study or child background study will be reviewed and approved by an accredited agency or temporarily accredited agency pursuant to § 96.47(c) or § 96.53(b).

(b) A public domestic authority may also offer, provide, or facilitate the provision of any such adoption service.

(c) Neither conferral nor maintenance of accreditation, temporary accreditation, or approval, nor status as an exempted or supervised provider, nor status as a public domestic authority shall be construed to imply, warrant, or establish that, in any specific case, an adoption service has been provided consistently with the Convention, the IAA, or the regulations implementing the IAA. Conferral and maintenance of accreditation, temporary

accreditation, or approval under this part establishes only that the accrediting entity has concluded, in accordance with the standards and procedures of this part, that the agency or person conducts adoption services in substantial compliance with the applicable standards set forth in this part; it is not a guarantee that in any specific case the accredited agency, temporarily accredited agency, or approved person is providing adoption services consistently with the Convention, the IAA, the regulations implementing the IAA, or any other applicable law, whether Federal, State, or foreign. Neither the Secretary nor any accrediting entity shall be responsible for any acts of an accredited agency, temporarily accredited agency, approved person, exempted provider, supervised provider, or other entity providing services in connection with a Convention adoption.

§96.13 Circumstances in which accreditation, approval, or supervision is not required.

(a) *Home studies and child background studies.* Home studies and child background studies, when performed by exempted providers, may be performed without accreditation, temporary accreditation, approval, or supervision; provided, however, that an exempted provider's home study must be approved by an accredited agency or temporarily accredited agency in accordance with §96.47(c), and an exempted provider's child background study must be approved by an accredited agency or temporarily accredited agency in accordance with §96.53(b).

(b) *Child welfare services.* An agency or person does not need to be accredited, temporarily accredited, approved, or operate as a supervised provider if it is providing only child welfare services, and not providing any adoption services, in connection with a Convention adoption. If the agency or person provides both a child welfare service and any adoption service in the United States in a Convention adoption case, it must be accredited, temporarily accredited, or approved or operate as a supervised provider unless the only adoption service provided is preparation of a home study and/or a child background study.

(c) *Legal services.* An agency or person does not need to be accredited, temporarily accredited, approved, or to operate as a supervised provider if it is providing only legal services, and not providing any adoption services, in connection with a Convention adoption. If the agency or person provides both a legal service and any adoption service in the United States in a Convention adoption case, it must be accredited, temporarily accredited, or approved or operate as a supervised provider unless the only adoption service provided is preparation of a home study and/or a child background study. Nothing in this part shall be construed:

(1) To permit an attorney to provide both legal services and adoption services in an adoption case where doing so is prohibited by State law; or

(2) To require any attorney who is providing one or more adoption services as part of his or her employment by a public domestic authority to be accredited or approved or operate as a supervised provider.

(d) *Prospective adoptive parent(s) acting on own behalf.* Prospective adoptive parent(s) may act on their own behalf without being accredited, temporarily accredited, or approved unless so acting is prohibited by State law or the law of the Convention country. In the case of a child immigrating to the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State in which the prospective adoptive parent(s) reside and the laws of the Convention country from which the parent(s) seek to adopt. In the case of a child emigrating from the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State where the child resides and the laws of the Convention country in which the parent(s) reside.

§ 96.14 Providing adoption services using other providers.

(a) Accreditation, temporary accreditation, and approval under this part require that, in each Convention adoption case, an accredited agency, a temporarily accredited agency, or an approved person will be identified and act as the primary provider. If one accredited agency, temporarily accredited agency, or approved person is providing all adoption services by itself, it must act as the primary provider. If just one accredited agency, temporarily accredited agency, or approved person is involved in providing adoption services, the sole accredited agency, temporarily accredited agency, or approved person must act as the primary provider. If adoption services in the Convention case are being provided by more than one accredited agency, temporarily accredited agency, or approved person, the agency or person that has child placement responsibility, as evidenced by the following, must act as the primary provider throughout the case:

(1) Entering into placement contracts with prospective adoptive parent(s) to provide child referral and placement;

(2) Accepting custody from a birth parent or other legal custodian in a Convention country for the purpose of placement for adoption;

(3) Assuming responsibility for liaison with a Convention country's Central Authority or its designees with regard to arranging an adoption; or

(4) Receiving from or sending to a Convention country information about a child that is under consideration for adoption, unless acting as a local service provider that conveys such information to parent(s) on behalf of the primary provider.

(b) Pursuant to § 96.44, in the case of accredited agencies or approved persons, and § 96.104(g), in the case of temporarily accredited agencies, the primary provider may only use the following to provide adoption services in the United States:

(1) A supervised provider, including an accredited agency, temporarily accredited agency, or approved person;

(2) An exempted provider, if the exempted provider's home study or child background study will be reviewed and approved by an accredited agency or temporarily accredited agency pursuant to § 96.47(c) or § 96.53(b); or

(3) A public domestic authority.

(c) Pursuant to § 96.44 of subpart F, in the case of accredited agencies or approved persons, and § 96.104(g) of subpart N, in the case of temporarily accredited agencies, the primary provider may only use the following to provide adoption services in a Convention country:

(1) A Central Authority, competent authority, or a public foreign authority;

(2) A foreign supervised provider, including a provider accredited by the Convention country; or

(3) A foreign provider (agency, person, or other non-governmental entity) who

(i) Has secured or is securing the necessary consent to termination of parental rights and to adoption, if the primary provider verifies consent pursuant to § 96.46(c); or

(ii) Has prepared or is preparing a background study on a child in a case involving immigration to the United States (incoming case) or a home study on prospective adoptive parent(s) in a case involving emigration from the United States (outgoing case), and a report on the results of such a study, if the primary provider verifies the study and report pursuant to § 96.46(c).

(d) The primary provider is not required to provide supervision or to assume responsibility for:

(1) Public domestic authorities; or

(2) Central Authorities, competent authorities, and public foreign authorities.

(e) The primary provider must adhere to the standards contained in § 96.45 (Using supervised providers in the United States) when using supervised providers in the United States and the applicable standards contained in § 96.46 (Using providers in Convention countries) when using providers outside the United States.

§ 96.15 Examples.

The following examples illustrate the rules of §§ 96.12 to 96.14:

Example 1. Identifying a child for adoption and arranging an adoption. Agency X identifies children eligible for adoption in the

United States on a TV program in an effort to recruit prospective adoptive parent(s). A couple in a Convention country calls Agency X about one of the children. Agency X refers them to an agency or person in the United States who arranges intercountry adoptions. Agency X does not require accreditation, temporarily accreditation, approval or supervision because it is not both identifying and arranging the adoption. In contrast, Agency Y, located in the United States, provides information about children eligible for adoption in a Convention country on a website and then arranges for interested U.S. parents to adopt those children. Agency Y must be accredited, temporarily accredited, approved, or supervised because, in addition to identifying children eligible for adoption, it is also helping to arrange the adoption.

Example 2. Child welfare services exemption. Doctor X evaluates the medical records and a video of Child Y. The evaluation will be used in a Convention adoption as part of the placement of Child Y and is the only service that Doctor X provides in the United States with regard to Child Y's adoption. Doctor X (not employed with an accredited agency or approved person) does not need to be approved or supervised because she is not providing an adoption service as defined in §96.2.

Example 3. Home study exemption. Social Worker X, in the United States, (not employed with an accredited agency or approved person) interviews Prospective Adoptive Parent Y, obtains a criminal background study, and checks the references of Prospective Adoptive Parent Y, then composes a report and submits the report to an accredited agency for use in a Convention adoption. Social Worker X does not provide any other services to Prospective Adoptive Parent Y. Social Worker X qualifies as an exempted provider and therefore need not be approved or operate as supervised provider. In contrast, Social Worker Z, in the United States, (not employed with an accredited agency or approved person) prepares a home study report for Prospective Adoptive Parent(s) W, and in addition re-enters the house after Child V has been placed with Prospective Adoptive Parent(s) W to assess how V and W are adjusting to life as a family. This assessment is post-placement monitoring, which is an adoption service. Therefore, Social Worker Z would need to become approved before providing this assessment for this Convention adoption or else operate as a supervised provider. If an agency or person provides an adoption service in addition to a home study or child background study, the agency or person needs to become accredited, temporarily accredited, approved, or supervised before providing that adoption service.

Example 4. Child background study exemption. An employee of Agency X interviews Child Y in the United States and compiles a report concerning Child Y's social and developmental history for use in a Convention adoption. Agency X provides no other adoption services on behalf of Child Y. Agency X does not need to be accredited, temporarily accredited, approved, or supervised. Agency X is only conducting and creating a child background study, and therefore is an exempted provider. In contrast, an employee of Agency Z interviews Child W in the United States and creates a child background study for use in a Convention adoption. Agency Z subsequently identifies prospective adoptive parent(s) and arranges a new adoption when Child W's previous adoption becomes disrupted. Agency Z needs to be accredited, temporarily accredited, approved, or supervised before providing this service. If an agency or person provides an adoption service in addition to a child background study or home study, the agency or person needs to be accredited, temporarily accredited, approved, or supervised before providing the additional service.

Example 5. Home study and child welfare services exemptions. Agency X interviews Prospective Adoptive Parent Y, obtains a criminal background check, checks the references of Prospective Adoptive Parent Y, then composes a home study and submits it to an accredited agency for use in a Convention adoption in the United States. Parent Y later joins a post-adoption support group for adoptive parents sponsored by Agency X. If Agency X performs no other adoption services, Agency X does not need to be accredited, temporarily accredited, approved, or supervised. If an agency or person provides a home study or child background study as well as other services in the United States that do not require accreditation, temporary accreditation, approval, or supervision, and no other adoption services, the agency or person is an exempted provider.

Example 6. Exempted provider. Agency X interviews Prospective Adoptive Parent(s) Y, obtains a criminal background check, checks the references of Prospective Adoptive Parent(s) Y, and then composes a home study and submits the report to an accredited agency. In addition, Agency X interviews Child Z and compiles a report concerning Child Z's social and developmental history. All of Agency X's work is done in the United States. Both reports will be used in a Convention adoption. If Agency X performs no other adoption services, Agency X does not need to be accredited, temporarily accredited, approved, or supervised. If an agency or person provides a home study and child background study as well as other services that do not require accreditation, temporary accreditation, approval or supervision, and no other adoption services, the agency or person is an exempted provider.

Example 7. Legal services exemption. Attorney X (not employed with an accredited agency or approved person) provides advice and counsel to Prospective Adoptive Parent(s) Y on filling out DHS paperwork required for a Convention adoption. Among other papers, Attorney X prepares an affidavit of consent to termination of parental rights and to adoption of Child W to be signed by the birth mother in the United States. Attorney X must be approved or supervised because securing consent to termination of parental rights is an adoption service. In contrast, Attorney Z (not employed with an accredited agency or approved person) assists Adoptive Parent(s) T to complete an adoption in the State in which they reside, after they have been granted an adoption in Child V's Convention country of origin. Attorney Z is exempt from approval or supervision because she is providing legal services, but no adoption services.

Example 8. Post-placement monitoring. A court in a Convention country has granted custody of Child W to Prospective Adoptive Parent(s) Y pending the completion of W's adoption. Agency X interviews both Prospective Adoptive Parent(s) Y and Child W in their home in the United States. Agency X gathers information on the adjustment of Child W as a member of the family and inquires into the social and educational progress of Child W. Agency X must be accredited, temporarily accredited, approved, or supervised. Agency X's activities constitute post-placement monitoring, which is an adoption service. In contrast, if Person Z provided counseling for Prospective Adoptive Parent(s) Y and/or Child W, but provided no adoption services in the United States to the family, Person Z would not need to be approved or supervised. Post-placement counseling is different than post-placement monitoring because it does not relate to evaluating the adoption placement. Post-placement counseling is not an adoption service and does not trigger the accreditation/approval requirements of the IAA and this part.

Example 9. Post-adoption services. Convention Country H requires that post-adoption reports be completed and sent to its Central Authority every year until adopted children reach the age of 18. Agency X provides support groups and a newsletter for U.S. parents that have adopted children from Country H and encourages parents to complete their post-adoption reports annually. Agency X does not need to be accredited, temporarily accredited, approved, or supervised because it is providing only post-adoption services. Post-adoption services are not included in the definition of adoption services, and therefore, do not trigger accreditation/approval requirements of the IAA and this part.

Example 10. Assuming custody and providing services after a disruption. Agency X provides counseling for Prospective Adoptive Parent(s) Y and for Child W pending the completion of Child W's Convention adoption. The adoption is eventually disrupted. Agency X helps recruit and identify new prospective adoptive parent(s) for Child W, but it is Agency P that assumes custody of Child W and places him in foster care until an alternative adoptive placement can be found. Agency X is not required to be accredited, temporarily accredited, approved, or supervised because it is not providing an adoption service in the United States as defined in § 96.2. Agency P, on the other hand, is providing an adoption service and would have to be accredited, temporarily accredited, approved, or supervised.

Example 11. Making non-judicial determinations of best interest of child and appropriateness of adoptive placement of child. Agency X receives information about and a videotape of Child W from the institution where Child W lives in a Convention country. Based on the age, sex, and health problems of Child W, Agency X matches Prospective Adoptive Parent(s) Y with Child W. Prospective Adoptive Parent(s) Y receive a referral from Agency X and agree to accept the referral and proceed with the adoption of Child W. Agency X determines that Prospective Adoptive Parent(s) Y are a good placement for Child W and notifies the competent authority in W's country of origin that it has found a match for Child W and will start preparing adoption paperwork. All of Agency X's services are provided in the United States. Agency X is performing an adoption service and must be accredited, temporarily accredited, approved, or supervised.

Example 12. Securing necessary consent to termination of parental rights and to adoption. Facilitator Y is accredited by Convention Country Z. He has contacts at several orphanages in Convention Country Z and helps Agency X match children eligible for adoption with prospective adoptive parent(s) in the United States. Facilitator Y works with the institution that is the legal guardian of Child W in order to get the documents showing the institution's legal consent to the adoption of Child W. Agency X is the only U.S. agency providing adoption services in the case. Agency X must be accredited, temporarily accredited, or approved and must either treat Facilitator Y as a foreign supervised provider in accordance with § 96.46(a) and (b) or verify the consents Facilitator Y secured, in accordance with § 96.46(c).

§ 96.16 Public domestic authorities.

Public domestic authorities are not required to become accredited to be able to provide adoption services in

Convention adoption cases, but must comply with the Convention, the IAA, and other applicable law when providing services in a Convention adoption case.

§96.17 Effective date of accreditation and approval requirements.

The Secretary will publish a document in the FEDERAL REGISTER announcing the date on which the Convention will enter into force for the United States. As of that date, the regulations in subpart C of this part will govern Convention adoptions between the United States and Convention countries, and agencies or persons providing adoption services must comply with §96.12 and applicable Federal regulations. The Secretary will maintain for the public a current listing of Convention countries.

Subpart D—Application Procedures for Accreditation and Approval

§96.18 Scope.

(a) Agencies are eligible to apply for ''accreditation'' or ''temporary accreditation.'' Persons are eligible to apply for ''approval.'' Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N, the provisions of this subpart do not apply to agencies seeking temporary accreditation. Applications for full accreditation rather than temporary accreditation will be processed in accordance with §§96.20 and 96.21.

(b) An agency or person seeking to be accredited or approved as of the time the Convention enters into force for the United States, and to be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law, must follow the special provision contained in §96.19.

(c) If an agency or person is reapplying for accreditation or approval following cancellation of its accreditation or approval by an accrediting entity or refusal by an accrediting entity to renew its accreditation or approval, it must comply with the procedures in §96.78.

(d) If an agency or person that has been accredited or approved is seeking renewal, it must comply with the procedures in §96.63.

§96.19 Special provision for agencies and persons seeking to be accredited or approved as of the time the Convention enters into force for the United States.

(a) The Secretary will establish and announce, by public notice in the FEDERAL REGISTER, a transitional application deadline. An agency or person seeking to be accredited or approved as of the time the Convention enters into force for the United States must submit an application to an accrediting entity with jurisdiction to evaluate its application, with the required fee(s), by the transitional application deadline. The Secretary will subsequently establish and announce a date by which such agencies and persons must complete the accreditation or approval process in time to be accredited or approved at the time the Convention enters into force for the United States (deadline for initial accreditation or approval).

(b) The accrediting entity must use its best efforts to provide a reasonable opportunity for an agency or person that applies by the transitional application deadline to complete the accreditation or approval process by the deadline for initial accreditation or approval. Only those agencies and persons that are accredited or approved by the deadline for initial accreditation or approval will be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law.

(c) The accrediting entity may, in its discretion, permit an agency or person that fails to submit an application by the transitional application deadline to attempt to complete the accreditation or approval process in time to be included on the initial list; however, such an agency or person is not assured an opportunity to complete the accreditation or approval process in time to be included on the initial list. The accrediting entity must give priority to applicants that filed by the transitional

application deadline. If such an agency or person succeeds in completing the accreditation or approval process in time to be included on the initial list, it will be treated as an agency or person that applied by the transitional application deadline for the purposes of § 96.58 and § 96.60(b).

§ 96.20 First-time application procedures for accreditation and approval.

(a) Agencies or persons seeking accreditation or approval for the first time may submit an application at any time, with the required fee(s), to an accrediting entity with jurisdiction to evaluate the application. If an agency or person seeks to be accredited or approved by the deadline for initial accreditation or approval, an agency or person must comply with the procedures in § 96.19.

(b) The accrediting entity must establish and follow uniform application procedures and must make information about those procedures available to agencies and persons that are considering whether to apply for accreditation or approval. An accrediting entity must evaluate the applicant for accreditation or approval in a timely fashion.

§ 96.21 Choosing an accrediting entity.

(a) An agency that seeks to become accredited must apply to an accrediting entity that is designated to provide accreditation services and that has jurisdiction over its application. A person that seeks to become approved must apply to an accrediting entity that is designated to provide approval services and that has jurisdiction over its application. The agency or person may apply to only one accrediting entity at a time.

(b)(1) If the agency or person is applying for accreditation or approval pursuant to this part for the first time, it may apply to any accrediting entity with jurisdiction over its application. However, the agency or person must apply to the same accrediting entity that handled its prior application when it next applies for accreditation or approval, if the agency or person:

(i) Has been denied accreditation or approval;

(ii) Has withdrawn its application in anticipation of denial;

(iii) Has had its accreditation or approval cancelled by an accrediting entity or the Secretary;

(iv) Has been temporarily debarred by the Secretary; or

(v) Has been refused renewal of its accreditation or approval by an accrediting entity.

(2) If the prior accrediting entity is no longer providing accreditation or approval services, the agency or person may apply to any accrediting entity with jurisdiction over its application.

§ 96.22 [Reserved]

Subpart E—Evaluation of Applicants for Accreditation and Approval

§ 96.23 Scope.

The provisions in this subpart govern the evaluation of agencies and persons for accreditation or approval. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N, the provisions of this subpart do not apply to agencies seeking temporary accreditation.

§ 96.24 Procedures for evaluating applicants for accreditation or approval.

(a) The accrediting entity must designate at least two evaluators to evaluate an agency or person for accreditation or approval. The accrediting entity's evaluators must have expertise in intercountry adoption, standards evaluation, or experience with the management or oversight of child welfare organizations and must also meet any additional qualifications required by the Secretary in the agreement with the accrediting entity.

(b) To evaluate the agency's or person's eligibility for accreditation or approval, the accrediting entity must:

(1) Review the agency's or person's written application and supporting documentation;

(2) Verify the information provided by the agency or person by examining underlying documentation;

(3) Consider any complaints received by the accrediting entity pursuant to subpart J of this part; and

(4) Conduct site visit(s).

(c) The site visit(s) may include, but need not be limited to, interviews with birth parents, adoptive parent(s), prospective adoptive parent(s), and adult adoptee(s) served by the agency or person, interviews with the agency's or person's employees, and interviews with other individuals knowledgeable about the agency's or person's provision of adoption services. It may also include a review of on-site documents. The accrediting entity must, to the extent practicable, advise the agency or person in advance of the type of documents it wishes to review during the site visit. The accrediting entity must require at least one of the evaluators to participate in each site visit. The accrediting entity must determine the number of evaluators that participate in a site visit in light of factors such as:

(1) The agency's or person's size;

(2) The number of adoption cases it handles;

(3) The number of sites the accrediting entity decides to visit; and

(4) The number of individuals working at each site.

(d) Before deciding whether to accredit an agency or approve a person, the accrediting entity may, in its discretion, advise the agency or person of any deficiencies that may hinder or prevent its accreditation or approval and defer a decision to allow the agency or person to correct the deficiencies.

§ 96.25 Access to information and documents requested by the accrediting entity.

(a) The agency or person must give the accrediting entity access to information and documents, including adoption case files and proprietary information, that it requires or requests to evaluate an agency or person for accreditation or approval and to perform its oversight, enforcement, renewal, data collection, and other functions. The agency or person must also cooperate with the accrediting entity by making employees available for interviews upon request.

(b) Accrediting entity review of adoption case files pursuant to paragraph (a) shall be limited to Convention adoption case files, except that, in the case of first-time applicants for accreditation or approval, the accrediting entity may review adoption case files related to non-Convention cases for purposes of assessing the agency's or person's capacity to comply with recordkeeping and data-management standards in subpart F of this part. The accrediting entity shall permit the agency or person to redact names and other information that identifies birth parent(s), prospective adoptive parent(s), and adoptee(s) from such non-Convention adoption case files prior to their inspection by the accrediting entity.

(c) If an agency or person fails to provide requested documents or information, or to make employees available as requested, the accrediting entity may deny accreditation or approval or, in the case of an accredited agency, temporarily accredited agency, or approved person, take appropriate adverse action against the agency or person solely on that basis.

§ 96.26 Protection of information and documents by the accrediting entity.

(a) The accrediting entity must protect from unauthorized use and disclosure all documents and information about the agency or person it receives including, but not limited to, documents and proprietary information about the agency's or person's finances, management, and professional practices received in connection with the performance of its accreditation or approval, oversight, enforcement, renewal, data collection, or other functions under its agreement with the Secretary and this part.

(b) The documents and information received may not be disclosed to the public and may be used only for the purpose of performing the accrediting entity's accreditation or approval functions and related tasks under its agreement with Secretary and this part, or to provide information to the Secretary, the Complaint Registry, or an appropriate Federal, State, or local authority, including, but not limited to, a

public domestic authority or local law enforcement authority unless:

(1) Otherwise authorized by the agency or person in writing;

(2) Otherwise required under Federal or State laws; or

(3) Required pursuant to subpart M of this part.

(c) Unless the names and other information that identifies the birth parent(s), prospective adoptive parent(s), and adoptee(s) are requested by the accrediting entity for an articulated reason, the agency or person may withhold from the accrediting entity such information and substitute individually assigned codes in the documents it provides. The accrediting entity must have appropriate safeguards to protect from unauthorized use and disclosure of any information in its files that identifies birth parent(s), prospective adoptive parent(s), and adoptee(s). The accrediting entity must ensure that its officers, employees, contractors, and evaluators who have access to information or documents provided by the agency or person have signed a non-disclosure agreement reflecting the requirements of § 96.26(a) and (b). The accrediting entity must maintain an accurate record of the agency's or person's application, the supporting documentation, and the basis for its decision.

§ 96.27 Substantive criteria for evaluating applicants for accreditation or approval.

(a) The accrediting entity may not grant an agency accreditation or a person approval, or permit an agency's or person's accreditation or approval to be maintained, unless the agency or person demonstrates to the satisfaction of the accrediting entity that it is in substantial compliance with the standards in subpart F of this part.

(b) When the agency or person makes its initial application for accreditation or approval under the standards contained in subpart F of this part, the accrediting entity may measure the capacity of the agency or person to achieve substantial compliance with these standards where relevant evidence of its actual performance is not yet available. Once the agency or person has been accredited or approved pursuant to this part, the accrediting entity must, for the purposes of monitoring, renewal, enforcement, and reapplication after adverse action, consider the agency's or person's actual performance in deciding whether the agency or person is in substantial compliance with the standards contained in subpart F of this part, unless the accrediting entity determines that it is still necessary to measure capacity because adequate evidence of actual performance is not available.

(c) The standards contained in subpart F of this part apply during all the stages of accreditation and approval, including, but not limited to, when the accrediting entity is evaluating an applicant for accreditation or approval, when it is determining whether to renew an agency's or person's accreditation or approval, when it is monitoring the performance of an accredited agency or approved person, and when it is taking adverse action against an accredited agency or approved person. Except as provided in § 96.25 and paragraphs (e) and (f) of this section, the accrediting entity may only use the standards contained in subpart F of this part when determining whether an agency or person may be granted or permitted to maintain Convention accreditation or approval.

(d) The Secretary will ensure that each accrediting entity performs its accreditation and approval functions using only a method approved by the Secretary that is substantially the same as the method approved for use by each other accrediting entity. Each such method will include: an assigned value for each standard (or element of a standard); a method of rating an agency's or person's compliance with each applicable standard; and a method of evaluating whether an agency's or person's overall compliance with all applicable standards establishes that the agency or person is in substantial compliance with the standards and can be accredited, temporarily accredited, or approved. The Secretary will ensure that the value assigned to each standard reflects the relative importance of that standard to compliance with the Convention and the IAA and is consistent with the value assigned to the

standard by other accrediting entities. The accrediting entity must advise applicants of the value assigned to each standard (or elements of each standard) at the time it provides applicants with the application materials.

(e) If an agency or person has previously been denied accreditation or approval, has withdrawn its application in anticipation of denial, has had its temporary accreditation withdrawn, or is reapplying for accreditation or approval after cancellation, refusal to renew, or temporary debarment, the accrediting entity may take the reasons underlying such actions into account when evaluating the agency or person for accreditation or approval, and may deny accreditation or approval on the basis of the previous action.

(f) If an agency or person that has an ownership or control interest in the applicant, as that term is defined in section 1124 of the Social Security Act (42 U.S.C. 1320a–3), has been debarred pursuant to §96.85, the accrediting entity may take into account the reasons underlying the debarment when evaluating the agency or person for accreditation or approval, and may deny accreditation or approval or refuse to renew accreditation or approval on the basis of the debarment.

(g) The standards contained in subpart F of this part do not eliminate the need for an agency or person to comply fully with the laws of the jurisdictions in which it operates. An agency or person must provide adoption services in Convention cases consistent with the laws of any State in which it operates and with the Convention and the IAA. Persons that are approved to provide adoption services may only provide such services in States that do not prohibit persons from providing adoption services. Nothing in the application of subparts E and F should be construed to require a State to allow persons to provide adoption services if State law does not permit them to do so.

§96.28 [Reserved]

Subpart F—Standards for Convention Accreditation and Approval

§96.29 Scope.

The provisions in this subpart provide the standards for accrediting agencies and approving persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to agencies seeking temporary accreditation.

LICENSING AND CORPORATE GOVERNANCE

§96.30 State licensing.

(a) The agency or person is properly licensed or otherwise authorized by State law to provide adoption services in at least one State.

(b) The agency or person follows applicable State licensing and regulatory requirements in all jurisdictions in which it provides adoption services.

(c) If it provides adoption services in a State in which it is not itself licensed or authorized to provide such services, the agency or person does so only:

(1) Through agencies or persons that are licensed or authorized by State law to provide adoption services in that State and that are exempted providers or acting as supervised providers; or

(2) Through public domestic authorities.

(d) In the case of a person, the individual or for-profit entity is not prohibited by State law from providing adoption services in any State where it is providing adoption services, and does not provide adoption services in Convention countries that prohibit individuals or for-profit entities from providing adoption services.

§96.31 Corporate structure.

(a) The agency qualifies for nonprofit tax treatment under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or for nonprofit status under the laws of any State.

(b) The person is an individual or is a for-profit entity organized as a corporation, company, association, firm, partnership, society, or joint stock

company, or other legal entity under the laws of any State.

§ 96.32 Internal structure and oversight.

(a) The agency or person has (or, in the case of an individual, is) a chief executive officer or equivalent official who is qualified by education, adoption service experience, and management credentials to ensure effective use of resources and coordinated delivery of the services provided by the agency or person, and has authority and responsibility for management and oversight of the staff and any supervised providers in carrying out the adoption-related functions of the organization.

(b) The agency or person has a board of directors or a similar governing body that establishes and approves its mission, policies, budget, and programs; provides leadership to secure the resources needed to support its programs; includes one or more individuals with experience in adoption, including but not limited to, adoptees, birth parents, prospective adoptive parent(s), and adoptive parents; and appoints and oversees the performance of its chief executive officer or equivalent official. This standard does not apply where the person is an individual practitioner.

(c) The agency or person keeps permanent records of the meetings and deliberations of its governing body and of its major decisions affecting the delivery of adoption services.

(d) The agency or person has in place procedures and standards, pursuant to § 96.45 and § 96.46, for the selection, monitoring, and oversight of supervised providers.

(e) The agency or person discloses to the accrediting entity the following information:

(1) Any other names by which the agency or person is or has been known, under either its current or any former form of organization, and the addresses and phone numbers used when such names were used;

(2) The name, address, and phone number of each current director, manager, and employee of the agency or person, and, for any such individual who previously served as a director, manager, or employee of another provider of adoption services, the name, address, and phone number of such other provider; and

(3) The name, address, and phone number of any entity it uses or intends to use as a supervised provider.

FINANCIAL AND RISK MANAGEMENT

§ 96.33 Budget, audit, insurance, and risk assessment requirements.

(a) The agency or person operates under a budget approved by its governing body, if applicable, for management of its funds. The budget discloses all remuneration (including perquisites) paid to the agency's or person's board of directors, managers, employees, and supervised providers.

(b) The agency's or person's finances are subject to annual internal review and oversight and are subject to independent audits every four years. The agency or person submits copies of internal financial review reports for inspection by the accrediting entity each year.

(c) The agency or person submits copies of each audit, as well as any accompanying management letter or qualified opinion letter, for inspection by the accrediting entity.

(d) The agency or person meets the financial reporting requirements of Federal and State laws and regulations.

(e) The agency's or person's balance sheets show that it operates on a sound financial basis and maintains on average sufficient cash reserves, assets, or other financial resources to meet its operating expenses for two months, taking into account its projected volume of cases and its size, scope, and financial commitments. The agency or person has a plan to transfer its Convention cases if it ceases to provide or is no longer permitted to provide adoption services in Convention cases. The plan includes provisions for an organized closure and reimbursement to clients of funds paid for services not yet rendered.

(f) If it accepts charitable donations, the agency or person has safeguards in place to ensure that such donations do not influence child placement decisions in any way.

(g) The agency or person assesses the risks it assumes, including by reviewing information on the availability of insurance coverage for Convention-related activities. The agency or person uses the assessment to meet the requirements in paragraph (h) of this section and as the basis for determining the type and amount of professional, general, directors' and officers', errors and omissions, and other liability insurance to carry.

(h) The agency or person maintains professional liability insurance in amounts reasonably related to its exposure to risk, but in no case in an amount less than $1,000,000 in the aggregate.

(i) The agency's or person's chief executive officer, chief financial officer, and other officers or employees with direct responsibility for financial transactions or financial management of the agency or person are bonded.

§ 96.34 Compensation.

(a) The agency or person does not compensate any individual who provides intercountry adoption services with an incentive fee or contingent fee for each child located or placed for adoption.

(b) The agency or person compensates its directors, officers, employees, and supervised providers who provide intercountry adoption services only for services actually rendered and only on a fee-for-service, hourly wage, or salary basis rather than a contingent fee basis.

(c) The agency or person does not make any payments, promise payment, or give other consideration to any individual directly or indirectly involved in provision of adoption services in a particular case, except for salaries or fees for services actually rendered and reimbursement for costs incurred. This does not prohibit an agency or person from providing in-kind or other donations not intended to influence or affect a particular adoption.

(d) The fees, wages, or salaries paid to the directors, officers, employees, and supervised providers of the agency or person are not unreasonably high in relation to the services actually rendered, taking into account the country in which the adoption services are provided and norms for compensation within the intercountry adoption community in that country, to the extent that such norms are known to the accrediting entity; the location, number, and qualifications of staff; workload requirements; budget; and size of the agency or person.

(e) Any other compensation paid to the agency's or person's directors or members of its governing body is not unreasonably high in relation to the services rendered, taking into account the same factors listed in paragraph (d) of this section and its for-profit or nonprofit status.

(f) The agency or person identifies all vendors to whom clients are referred for non-adoption services and discloses to the accrediting entity any corporate or financial arrangements and any family relationships with such vendors.

ETHICAL PRACTICES AND RESPONSIBILITIES

§ 96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention.

(a) The agency or person provides adoption services ethically and in accordance with the Convention's principles of:

(1) Ensuring that intercountry adoptions take place in the best interests of children; and

(2) Preventing the abduction, exploitation, sale, or trafficking of children.

(b) In order to permit the accrediting entity to evaluate the suitability of an agency or person for accreditation or approval, the agency or person discloses to the accrediting entity the following information related to the agency or person, under its current or any former name:

(1) Any instances in which the agency or person has lost the right to provide adoption services in any State or country, including the basis for such action(s);

(2) Any instances in which the agency or person was debarred or otherwise denied the authority to provide adoption services in any State or country, including the basis and disposition of such action(s);

(3) Any licensing suspensions for cause or other negative sanctions by oversight bodies against the agency or

person, including the basis and disposition of such action(s);

(4) For the prior ten-year period, any disciplinary action(s) against the agency or person by a licensing or accrediting body, including the basis and disposition of such action(s);

(5) For the prior ten-year period, any written complaint(s) related to the provision of adoption-related services, including the basis and disposition of such complaints, against the agency or person filed with any State or Federal or foreign regulatory body and of which the agency or person was notified;

(6) For the prior ten-year period, any known past or pending investigation(s) (by Federal authorities or by public domestic authorities), criminal charge(s), child abuse charge(s), or lawsuit(s) against the agency or person, related to the provision of child welfare or adoption-related services, and the basis and disposition of such action(s).

(7) Any instances where the agency or person has been found guilty of any crime under Federal, State, or foreign law or has been found to have committed any civil or administrative violation involving financial irregularities under Federal, State, or foreign law;

(8) For the prior five-year period, any instances where the agency or person has filed for bankruptcy; and

(9) Descriptions of any businesses or activities that are inconsistent with the principles of the Convention and that have been or are currently carried out by the agency or person, affiliate organizations, or by any organization in which the agency or person has an ownership or controlling interest.

(c) In order to permit the accrediting entity to evaluate the suitability of an agency or person for accreditation or approval, the agency or person (for its current or any former names) discloses to the accrediting entity the following information about its individual directors, officers, and employees:

(1) For the prior ten-year period, any conduct by any such individual related to the provision of adoption-related services that was subject to external disciplinary proceeding(s);

(2) Any convictions or current investigations of any such individual who is in a senior management position for acts involving financial irregularities;

(3) The results of a State criminal background check and a child abuse clearance for any such individual in the United States in a senior management position or who works directly with parent(s) and/or children (unless such checks have been included in the State licensing process); and

(4) A completed FBI Form FD–258 for each such individual in the United States in a senior management position or who works directly with parent(s) and/or children, which the agency or person must keep on file in case future allegations warrant submission of the form for a Federal criminal background check of any such individual.

(5) Descriptions of any businesses or activities that are inconsistent with the principles of the Convention and that are known to have been or are currently carried out by current individual directors, officers, or employees of the agency or person.

(d) In order to permit the accrediting entity to evaluate the suitability of a person who is an individual practitioner for approval, the individual:

(1) Provides the results of a State criminal background check and a child abuse clearance to the accrediting entity;

(2) Completes and retains a FBI Form FD–258 on file in case future allegations warrant submission of the form for a Federal criminal background check;

(3) If a lawyer, for every jurisdiction in which he or she has ever been admitted to the Bar, provides a certificate of good standing or an explanation of why he or she is not in good standing, accompanied by any relevant documentation and immediately reports to the accrediting entity any disciplinary action considered by a State bar association, regardless of whether the action relates to intercountry adoption; and

(4) If a social worker, for every jurisdiction in which he or she has been licensed, provides a certificate of good standing or an explanation of why he or she is not in good standing, accompanied by any relevant documentation.

(e) In order to permit the accrediting entity to monitor the suitability of an

agency or person, the agency or person must disclose any changes in the information required by § 96.35 within thirty business days of learning of the change.

§ 96.36 Prohibition on child buying.

(a) The agency or person prohibits its employees and agents from giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child. If permitted or required by the child's country of origin, an agency or person may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally. Permitted or required contributions shall not be remitted as payment for the child or as an inducement to release the child.

(b) The agency or person has written policies and procedures in place reflecting the prohibitions in paragraph (a) of this section and reinforces them in its employee training programs.

PROFESSIONAL QUALIFICATIONS AND TRAINING FOR EMPLOYEES

§ 96.37 Education and experience requirements for social service personnel.

(a) The agency or person only uses employees with appropriate qualifications and credentials to perform, in connection with a Convention adoption, adoption-related social service functions that require the application of clinical skills and judgment (home studies, child background studies, counseling, parent preparation, post-placement, and other similar services).

(b) The agency's or person's employees meet any State licensing or regulatory requirements for the services they are providing.

(c) The agency's or person's executive director, the supervisor overseeing a case, or the social service employee providing adoption-related social services that require the application of clinical skills and judgment (home studies, child background studies, counseling, parent preparation, post-placement, and other similar services) has experience in the professional delivery of intercountry adoption services.

(d) *Supervisors.* The agency's or person's social work supervisors have prior experience in family and children's services, adoption, or intercountry adoption and either:

(1) A master's degree from an accredited program of social work;

(2) A master's degree (or doctorate) in a related human service field, including, but not limited to, psychology, psychiatry, psychiatric nursing, counseling, rehabilitation counseling, or pastoral counseling; or

(3) In the case of a social work supervisor who is or was an incumbent at the time the Convention enters into force for the United States, the supervisor has significant skills and experience in intercountry adoption and has regular access for consultation purposes to an individual with the qualifications listed in paragraph (d)(1) or paragraph (d)(2) of this section.

(e) *Non-supervisory employees.* The agency's or person's non-supervisory employees providing adoption-related social services that require the application of clinical skills and judgment other than home studies or child background studies have either:

(1) A master's degree from an accredited program of social work or in another human service field; or

(2) A bachelor's degree from an accredited program of social work; or a combination of a bachelor's degree in any field and prior experience in family and children's services, adoption, or intercountry adoption; and

(3) Are supervised by an employee of the agency or person who meets the requirements for supervisors in paragraph (d) of this section.

(f) *Home studies.* The agency's or person's employees who conduct home studies:

(1) Are authorized or licensed to complete a home study under the laws of the States in which they practice;

(2) Meet the INA requirements for home study preparers in 8 CFR 204.3(b); and

(3) Are supervised by an employee of the agency or person who meets the requirements in paragraph (d) of this section.

(g) *Child background studies.* The agency's or person's employees who prepare child background studies:

(1) Are authorized or licensed to complete a child background study under the laws of the States in which they practice; and

(2) Are supervised by an employee of the agency or person who meets the requirements in paragraph (d) of this section.

§ 96.38 Training requirements for social service personnel.

(a) The agency or person provides newly hired employees who have adoption-related responsibilities involving the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) with a comprehensive orientation to intercountry adoption that includes training on:

(1) The requirements of the Convention, the IAA, the regulations implementing the IAA, and other applicable Federal regulations;

(2) The INA regulations applicable to the immigration of children adopted from a Convention country;

(3) The adoption laws of any Convention country where the agency or person provides adoption services;

(4) Relevant State laws;

(5) Ethical considerations in intercountry adoption and prohibitions on child-buying;

(6) The agency's or person's goals, ethical and professional guidelines, organizational lines of accountability, policies, and procedures; and

(7) The cultural diversity of the population(s) served by the agency or person.

(b) In addition to the orientation training required under paragraph (a) of this section, the agency or person provides initial training to newly hired or current employees whose responsibilities include providing adoption-related social services that involve the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) that addresses:

(1) The factors in the countries of origin that lead to children needing adoptive families;

(2) Feelings of separation, grief, and loss experienced by the child with respect to the family of origin;

(3) Attachment and post-traumatic stress disorders;

(4) Psychological issues facing children who have experienced abuse or neglect and/or whose parents' rights have been terminated because of abuse or neglect;

(5) The impact of institutionalization on child development;

(6) Outcomes for children placed for adoption internationally and the benefits of permanent family placements over other forms of government care;

(7) The most frequent medical and psychological problems experienced by children from the countries of origin served by the agency or person;

(8) The process of developing emotional ties to an adoptive family;

(9) Acculturation and assimilation issues, including those arising from factors such as race, ethnicity, religion, and culture and the impact of having been adopted internationally; and

(10) Child, adolescent, and adult development as affected by adoption.

(c) The agency or person ensures that employees who provide adoption-related social services that involve the application of clinical skills and judgment (home studies, child background studies, counseling services, parent preparation, post-placement and other similar services) also receive, in addition to the orientation and initial training described in paragraphs (a) and (b) of this section, no less than thirty hours of training every two years, or more if required by State law, on current and emerging adoption practice issues through participation in seminars, conferences, documented distance learning courses, and other similar programs. Continuing education hours required under State law may count toward the thirty hours of training as long as the training is related to current and emerging adoption practice issues.

(d) The agency or person exempts newly hired and current employees from elements of the orientation and initial training required in paragraphs (a) and (b) of this section only where the employee has demonstrated experience with intercountry adoption and knowledge of the Convention and the IAA.

INFORMATION DISCLOSURE, FEE PRACTICES, AND QUALITY CONTROL POLICIES AND PRACTICES

§ 96.39 Information disclosure and quality control practices.

(a) The agency or person fully discloses in writing to the general public upon request and to prospective client(s) upon initial contact:

(1) Its adoption service policies and practices, including general eligibility criteria and fees;

(2) The supervised providers with whom the prospective client(s) can expect to work in the United States and in the child's country of origin and the usual costs associated with their services; and

(3) A sample written adoption services contract substantially like the one that the prospective client(s) will be expected to sign should they proceed.

(b) The agency or person discloses to client(s) and prospective client(s) that the following information is available upon request and makes such information available when requested:

(1) The number of its adoption placements per year for the prior three calendar years, and the number and percentage of those placements that remain intact, are disrupted, or have been dissolved as of the time the information is provided;

(2) The number of parents who apply to adopt on a yearly basis, based on data for the prior three calendar years; and

(3) The number of children eligible for adoption and awaiting an adoptive placement referral via the agency or person.

(c) The agency or person does not give preferential treatment to its board members, contributors, volunteers, employees, agents, consultants, or independent contractors with respect to the placement of children for adoption and has a written policy to this effect.

(d) The agency or person requires a client to sign a waiver of liability as part of the adoption service contract only where that waiver complies with applicable State law. Any waiver required is limited and specific, based on risks that have been discussed and explained to the client in the adoption services contract.

(e) The agency or person cooperates with reviews, inspections, and audits by the accrediting entity or the Secretary.

(f) The agency or person uses the internet in the placement of individual children eligible for adoption only where:

(1) Such use is not prohibited by applicable State or Federal law or by the laws of the child's country of origin;

(2) Such use is subject to controls to avoid misuse and links to any sites that reflect practices that involve the sale, abduction, exploitation, or trafficking of children;

(3) Such use, if it includes photographs, is designed to identify children either who are currently waiting for adoption or who have already been adopted or placed for adoption (and who are clearly so identified); and

(4) Such use does not serve as a substitute for the direct provision of adoption services, including services to the child, the prospective adoptive parent(s), and/or the birth parent(s).

§ 96.40 Fee policies and procedures.

(a) The agency or person provides to all applicants, prior to application, a written schedule of expected total fees and estimated expenses and an explanation of the conditions under which fees or expenses may be charged, waived, reduced, or refunded and of when and how the fees and expenses must be paid.

(b) Before providing any adoption service to prospective adoptive parent(s), the agency or person itemizes and discloses in writing the following information for each separate category of fees and estimated expenses that the prospective adoptive parent(s) will be charged in connection with a Convention adoption:

(1) *Home study*. The expected total fees and estimated expenses for home study preparation and approval, whether the home study is to be prepared directly by the agency or person itself, or prepared by a supervised provider, exempted provider, or approved person and approved as required under § 96.47;

(2) *Adoption expenses in the United States*. The expected total fees and estimated expenses for all adoption services other than the home study that will be provided in the United States. This category includes, but is not limited to, personnel costs, administrative overhead, operational costs, training and education, communications and publications costs, and any other costs related to providing adoption services in the United States;

(3) *Foreign country program expenses*. The expected total fees and estimated expenses for all adoption services that will be provided in the child's Convention country. This category includes, but is not limited to, costs for personnel, administrative overhead, training, education, legal services, and communications, and any other costs related to providing adoption services in the child's Convention country;

(4) *Care of the child*. The expected total fees and estimated expenses charged to prospective adoptive parent(s) for the care of the child in the country of origin prior to adoption, including, but not limited to, costs for food, clothing, shelter and medical care; foster care services; orphanage care; and any other services provided directly to the child;

(5) *Translation and document expenses*. The expected total fees and estimated expenses for obtaining any necessary documents and for any translation of documents related to the adoption, along with information on whether the prospective adoptive parent(s) will be expected to pay such costs directly or to third parties, either in the United States or in the child's Convention country, or through the agency or person. This category includes, but is not limited to, costs for obtaining, translating, or copying records or documents required to complete the adoption, costs for the child's Convention court documents, passport, adoption certificate and other documents related to the adoption, and costs for notarizations and certifications;

(6) *Contributions*. Any fixed contribution amount or percentage that the prospective adoptive parent(s) will be expected or required to make to child protection or child welfare service programs in the child's Convention country or in the United States, along with an explanation of the intended use of the contribution and the manner in which the transaction will be recorded and accounted for; and

(7) *Post-placement and post-adoption reports*. The expected total fees and estimated expenses for any post-placement or post-adoption reports that the agency or person or parent(s) must prepare in light of any requirements of the expected country of origin.

(c) If the following fees and estimated expenses were not disclosed as part of the categories identified in paragraph (b) of this section, the agency or person itemizes and discloses in writing any:

(1) *Third party fees*. The expected total fees and estimated expenses for services that the prospective adoptive parent(s) will be responsible to pay directly to a third party. Such third party fees include, but are not limited to, fees to competent authorities for services rendered or Central Authority processing fees; and

(2) *Travel and accommodation expenses*. The expected total fees and estimated expenses for any travel, transportation, and accommodation services arranged by the agency or person for the prospective adoptive parent(s).

(d) The agency or person also specifies in its adoption services contract when and how funds advanced to cover fees or expenses will be refunded if adoption services are not provided.

(e) When the agency or person uses part of its fees to provide special services, such as cultural programs for adoptee(s), scholarships or other services, it discloses this policy to the prospective adoptive parent(s) in advance of providing any adoption services and gives the prospective adoptive parent(s) a general description of the programs supported by such funds.

(f) The agency or person has mechanisms in place for transferring funds to

Convention countries when the financial institutions of the Convention country so permit and for obtaining written receipts for such transfers, so that direct cash transactions by the prospective adoptive parent(s) to pay for adoption services provided in the Convention country are minimized or unnecessary.

(g) The agency or person does not customarily charge additional fees and expenses beyond those disclosed in the adoption services contract and has a written policy to this effect. In the event that unforeseen additional fees and expenses are incurred in the Convention country, the agency or person charges such additional fees and expenses only under the following conditions:

(1) It discloses the fees and expenses in writing to the prospective adoptive parent(s);

(2) It obtains the specific consent of the prospective adoptive parent(s) prior to expending any funds in excess of $1000 for which the agency or person will hold the prospective adoptive parent(s) responsible or gives the prospective adoptive parent(s) the opportunity to waive the notice and consent requirement in advance. If the prospective adoptive parent(s) has the opportunity to waive the notice and consent requirement in advance, this policy is reflected in the written policies and procedures of the agency or person; and

(3) It provides written receipts to the prospective adoptive parent(s) for fees and expenses paid directly by the agency or person in the Convention country and retains copies of such receipts.

(h) The agency or person returns any funds to which the prospective adoptive parent(s) may be entitled within sixty days of the completion of the delivery of services.

RESPONDING TO COMPLAINTS AND RECORDS AND REPORTS MANAGEMENT

§96.41 Procedures for responding to complaints and improving service delivery.

(a) The agency or person has written complaint policies and procedures that incorporate the standards in paragraphs (b) through (h) of this section and provides a copy of such policies and procedures, including contact information for the Complaint Registry, to client(s) at the time the adoption services contract is signed.

(b) The agency or person permits any birth parent, prospective adoptive parent or adoptive parent, or adoptee to lodge directly with the agency or person signed and dated complaints about any of the services or activities of the agency or person (including its use of supervised providers) that he or she believes raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA, and advises such individuals of the additional procedures available to them if they are dissatisfied with the agency's or person's response to their complaint.

(c) The agency or person responds in writing to complaints received pursuant to paragraph (b) of this section within thirty days of receipt, and provides expedited review of such complaints that are time-sensitive or that involve allegations of fraud.

(d) The agency or person maintains a written record of each complaint received pursuant to paragraph (b) of this section and the steps taken to investigate and respond to it and makes this record available to the accrediting entity or the Secretary upon request.

(e) The agency or person does not take any action to discourage a client or prospective client from, or retaliate against a client or prospective client for: making a complaint; expressing a grievance; providing information in writing or interviews to an accrediting entity on the agency's or person's performance; or questioning the conduct of or expressing an opinion about the performance of an agency or person.

(f) The agency or person provides to the accrediting entity and the Secretary, on a semi-annual basis, a summary of all complaints received pursuant to paragraph (b) of this section during the preceding six months (including the number of complaints received and how each complaint was resolved) and an assessment of any discernible patterns in complaints received against the agency or person pursuant to paragraph (b) of this section, along with information about what systemic changes, if any, were made or are planned by the agency or person in response to such patterns.

(g) The agency or person provides any information about complaints received pursuant to paragraph (b) of this section as may be requested by the accrediting entity or the Secretary.

(h) The agency or person has a quality improvement program appropriate to its size and circumstances through which it makes systematic efforts to improve its adoption services as needed. The agency or person uses quality improvement methods such as reviewing complaint data, using client satisfaction surveys, or comparing the agency's or person's practices and performance against the data contained in the Secretary's annual reports to Congress on intercountry adoptions.

§ 96.42 Retention, preservation, and disclosure of adoption records.

(a) The agency or person retains or archives adoption records in a safe, secure, and retrievable manner for the period of time required by applicable State law.

(b) The agency or person makes readily available to the adoptee and the adoptive parent(s) upon request all non-identifying information in its custody about the adoptee's health history or background.

(c) The agency or person ensures that personal data gathered or transmitted in connection with an adoption is used only for the purposes for which the information was gathered and safeguards sensitive individual information.

(d) The agency or person has a plan that is consistent with the provisions of this section, the plan required under § 96.33, and applicable State law for transferring custody of adoption records that are subject to retention or archival requirements to an appropriate custodian, and ensuring the accessibility of those adoption records, in the event that the agency or person ceases to provide or is no longer permitted to provide adoption services under the Convention.

(e) The agency or person notifies the accrediting entity and the Secretary in writing within thirty days of the time it ceases to provide or is no longer permitted to provide adoption services and provides information about the transfer of its adoption records.

§ 96.43 Case tracking, data management, and reporting.

(a) When acting as the primary provider, the agency or person maintains all the data required in this section in a format approved by the accrediting entity and provides it to the accrediting entity on an annual basis.

(b) When acting as the primary provider, the agency or person routinely generates and maintains reports as follows:

(1) For cases involving children immigrating to the United States, information and reports on the total number of intercountry adoptions undertaken by the agency or person each year in both Convention and non-Convention cases and, for each case:

(i) The Convention country or other country from which the child emigrated;

(ii) The State to which the child immigrated;

(iii) The State, Convention country, or other country in which the adoption was finalized;

(iv) The age of the child; and

(v) The date of the child's placement for adoption.

(2) For cases involving children emigrating from the United States, information and reports on the total number of intercountry adoptions undertaken by the agency or person each year in both Convention and non-Convention cases and, for each case:

(i) The State from which the child emigrated;

(ii) The Convention country or other country to which the child immigrated;

(iii) The State, Convention country, or other country in which the adoption was finalized;

(iv) The age of the child; and

(v) The date of the child's placement for adoption.

(3) For each disrupted placement involving a Convention adoption, information and reports about the disruption, including information on:

(i) The Convention country from which the child emigrated;

(ii) The State to which the child immigrated;

(iii) The age of the child;

(iv) The date of the child's placement for adoption;

(v) The reason(s) for and resolution(s) of the disruption of the placement for adoption, including information on the child's re-placement for adoption and final legal adoption;

(vi) The names of the agencies or persons that handled the placement for adoption; and

(vii) The plans for the child.

(4) Wherever possible, for each dissolution of a Convention adoption, information and reports on the dissolution, including information on:

(i) The Convention country from which the child emigrated;

(ii) The State to which the child immigrated;

(iii) The age of the child;

(iv) The date of the child's placement for adoption;

(v) The reason(s) for and resolution(s) of the dissolution of the adoption, to the extent known by the agency or person;

(vi) The names of the agencies or persons that handled the placement for adoption; and

(vii) The plans for the child.

(5) Information on the shortest, longest, and average length of time it takes to complete a Convention adoption, set forth by the child's country of origin, calculated from the time the child is matched with the prospective adoptive parent(s) until the time the adoption is finalized by a court, excluding any period for appeal;

(6) Information on the range of adoption fees, including the lowest, highest, average, and the median of such fees, set forth by the child's country of origin, charged by the agency or person for Convention adoptions involving children immigrating to the United States in connection with their adoption.

(c) If the agency or person provides adoption services in cases not subject to the Convention that involve a child emigrating from the United States for the purpose of adoption or after an adoption has been finalized, it provides such information as required by the Secretary directly to the Secretary and demonstrates to the accrediting entity that it has provided this information.

(d) The agency or person provides any of the information described in paragraphs (a) through (c) of this section to the accrediting entity or the Secretary within thirty days of request.

SERVICE PLANNING AND DELIVERY

§96.44 Acting as primary provider.

(a) When required by §96.14(a), the agency or person acts as primary provider and adheres to the provisions in §96.14(b) through (e). When acting as the primary provider, the agency or person develops and implements a service plan for providing all adoption services and provides all such services, either directly or through arrangements with supervised providers, exempted providers, public domestic authorities, competent authorities, Central Authorities, public foreign authorities, or, to the extent permitted by §96.14(c), other foreign providers (agencies, persons, or other non-governmental entities).

(b) The agency or person has an organizational structure, financial and personnel resources, and policies and procedures in place that demonstrate that the agency or person is capable of acting as a primary provider in any Convention adoption case and, when acting as the primary provider, provides appropriate supervision to supervised providers and verifies the work of other foreign providers in accordance with §§96.45 and 96.46.

§96.45 Using supervised providers in the United States.

(a) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, ensures that each such supervised provider:

(1) Is in compliance with applicable State licensing and regulatory requirements in all jurisdictions in which it provides adoption services;

(2) Does not engage in practices inconsistent with the Convention's principles of furthering the best interests of the child and preventing the sale, abduction, exploitation, or trafficking of children; and

(3) Before entering into an agreement with the primary provider for the provision of adoption services, discloses to

the primary provider the suitability information listed in § 96.35.

(b) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, ensures that each such supervised provider operates under a written agreement with the primary provider that:

(1) Identifies clearly the adoption service(s) to be provided by the supervised provider and requires that the service(s) be provided in accordance with the applicable service standard(s) for accreditation and approval (for example: home study (§ 96.47); parent training (§ 96.48); child background studies and consent (§ 96.53));

(2) Requires the supervised provider to comply with the following standards regardless of the type of adoption services it is providing: § 96.36 (prohibition on child-buying), § 96.34 (compensation), § 96.38 (employee training), § 96.39(d) (waivers of liability), and § 96.41(b) through (e) (complaints);

(3) Identifies specifically the lines of authority between the primary provider and the supervised provider, the employee of the primary provider who will be responsible for supervision, and the employee of the supervised provider who will be responsible for ensuring compliance with the written agreement;

(4) States clearly the compensation arrangement for the services to be provided and the fees and expenses to be charged by the supervised provider;

(5) Specifies whether the supervised provider's fees and expenses will be billed to and paid by the client(s) directly or billed to the client through the primary provider;

(6) Provides that, if billing the client(s) directly for its service, the supervised provider will give the client(s) an itemized bill of all fees and expenses to be paid, with a written explanation of how and when such fees and expenses will be refunded if the service is not completed, and will return any funds collected to which the client(s) may be entitled within sixty days of the completion of the delivery of services;

(7) Requires the supervised provider to meet the same personnel qualifications as accredited agencies and approved persons, as provided for in § 96.37, except that, for purposes of §§ 96.37(e)(3), (f)(3), and (g)(2), the work of the employee must be supervised by an employee of an accredited agency or approved person;

(8) Requires the supervised provider to limit the use of and safeguard personal data gathered or transmitted in connection with an adoption, as provided for in § 96.42;

(9) Requires the supervised provider to respond within a reasonable period of time to any request for information from the primary provider, the Secretary, or the accrediting entity that issued the primary provider's accreditation or approval;

(10) Requires the supervised provider to provide the primary provider on a timely basis any data that is necessary to comply with the primary provider's reporting requirements;

(11) Requires the supervised provider to disclose promptly to the primary provider any changes in the suitability information required by § 96.35;

(12) Permits suspension or termination of the agreement on reasonable notice if the primary provider has grounds to believe that the supervised provider is not in compliance with the agreement or the requirements of this section.

§ 96.46 Using providers in Convention countries.

(a) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider:

(1) Is in compliance with the laws of the Convention country in which it operates;

(2) Does not engage in practices inconsistent with the Convention's principles of furthering the best interests of the child and preventing the sale, abduction, exploitation, or trafficking of children;

(3) Before entering into an agreement with the primary provider for the provision of adoption services, discloses to the primary provider the suitability information listed in § 96.35, taking into account the authorities in the Convention country that are analogous to the authorities identified in that section;

(4) Does not have a pattern of licensing suspensions or other sanctions and has not lost the right to provide adoption services in any jurisdiction for reasons germane to the Convention; and

(5) Is accredited in the Convention country in which it operates, if such accreditation is required by the laws of that Convention country to perform the adoption services it is providing.

(b) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider operates under a written agreement with the primary provider that:

(1) Identifies clearly the adoption service(s) to be provided by the foreign supervised provider;

(2) Requires the foreign supervised provider, if responsible for obtaining medical or social information on the child, to comply with the standards in §96.49(d) through (j);

(3) Requires the foreign supervised provider to adhere to the standard in §96.36(a) prohibiting child buying; and has written policies and procedures in place reflecting the prohibitions in §96.36(a) and reinforces them in training programs for its employees and agents;

(4) Requires the foreign supervised provider to compensate its directors, officers, and employees who provide intercountry adoption services on a fee-for-service, hourly wage, or salary basis, rather than based on whether a child is placed for adoption, located for an adoptive placement, or on a similar contingent fee basis;

(5) Identifies specifically the lines of authority between the primary provider and the foreign supervised provider, the employee of the primary provider who will be responsible for supervision, and the employee of the supervised provider who will be responsible for ensuring compliance with the written agreement;

(6) States clearly the compensation arrangement for the services to be provided and the fees and expenses to be charged by the foreign supervised provider;

(7) Specifies whether the foreign supervised provider's fees and expenses will be billed to and paid by the client(s) directly or billed to the client through the primary provider;

(8) Provides that, if billing the client(s) directly for its service, the foreign supervised provider will give the client(s) an itemized bill of all fees and expenses to be paid, with a written explanation of how and when such fees and expenses will be refunded if the service is not completed, and will return any funds collected to which the client(s) may be entitled within sixty days of the completion of the delivery of services;

(9) Requires the foreign supervised provider to respond within a reasonable period of time to any request for information from the primary provider, the Secretary, or the accrediting entity that issued the primary provider's accreditation or approval;

(10) Requires the foreign supervised provider to provide the primary provider on a timely basis any data that is necessary to comply with the primary provider's reporting requirements;

(11) Requires the foreign supervised provider to disclose promptly to the primary provider any changes in the suitability information required by §96.35; and

(12) Permits suspension or termination of the agreement on reasonable notice if the primary provider has grounds to believe that the foreign supervised provider is not in compliance with the agreement or the requirements of this section.

(c) The agency or person, when acting as the primary provider and, in accordance with §96.14, using foreign providers that are not under its supervision, verifies, through review of the relevant documentation and other appropriate steps, that:

(1) Any necessary consent to termination of parental rights or to adoption obtained by the foreign provider was obtained in accordance with applicable foreign law and Article 4 of the Convention;

(2) Any background study and report on a child in a case involving immigration to the United States (an incoming case) performed by the foreign provider

was performed in accordance with applicable foreign law and Article 16 of the Convention.

(3) Any home study and report on prospective adoptive parent(s) in a case involving emigration from the United States (an outgoing case) performed by the foreign provider was performed in accordance with applicable foreign law and Article 15 of the Convention.

STANDARDS FOR CASES IN WHICH A CHILD IS IMMIGRATING TO THE UNITED STATES (INCOMING CASES)

§ 96.47 Preparation of home studies in incoming cases.

(a) The agency or person ensures that a home study on the prospective adoptive parent(s) (which for purposes of this section includes the initial report and any supplemental statement submitted to DHS) is completed that includes the following:

(1) Information about the prospective adoptive parent(s)' identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the children for whom the prospective adoptive parent(s) would be qualified to care (specifying in particular whether they are willing and able to care for a child with special needs);

(2) A determination whether the prospective adoptive parent(s) are eligible and suited to adopt;

(3) A statement describing the counseling and training provided to the prospective adoptive parent(s);

(4) The results of a criminal background check on the prospective adoptive parent(s) and any other individual for whom a check is required by 8 CFR 204.3(e);

(5) A full and complete statement of all facts relevant to the eligibility and suitability of the prospective adoptive parent(s) to adopt a child under any specific requirements identified to the Secretary by the Central Authority of the child's country of origin; and

(6) A statement in each copy of the home study that it is a true and accurate copy of the home study that was provided to the prospective adoptive parent(s) or DHS.

(b) The agency or person ensures that the home study is performed in accordance with 8 CFR 204.3(e), and any applicable State law.

(c) Where the home study is not performed in the first instance by an accredited agency or temporarily accredited agency, the agency or person ensures that the home study is reviewed and approved in writing by an accredited agency or temporarily accredited agency. The written approval must include a determination that the home study:

(1) Includes all of the information required by paragraph (a) of this section and is performed in accordance with 8 CFR 204.3(e), and applicable State law; and

(2) Was performed by an individual who meets the requirements in § 96.37(f), or, if the individual is an exempted provider, ensures that the individual meets the requirements for home study providers established by 8 CFR 204.3(b).

(d) The agency or person takes all appropriate measures to ensure the timely transmission of the same home study that was provided to the prospective adoptive parent(s) or to DHS to the Central Authority of the child's country of origin (or to an alternative authority designated by that Central Authority).

§ 96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.

(a) The agency or person provides prospective adoptive parent(s) with at least ten hours (independent of the home study) of preparation and training, as described in paragraphs (b) and (c) of this section, designed to promote a successful intercountry adoption. The agency or person provides such training before the prospective adoptive parent(s) travel to adopt the child or the child is placed with the prospective adoptive parent(s) for adoption.

(b) The training provided by the agency or person addresses the following topics:

(1) The intercountry adoption process, the general characteristics and needs of children awaiting adoption,

and the in-country conditions that affect children in the Convention country from which the prospective adoptive parent(s) plan to adopt;

(2) The effects on children of malnutrition, relevant environmental toxins, maternal substance abuse, and of any other known genetic, health, emotional, and developmental risk factors associated with children from the expected country of origin;

(3) Information about the impact on a child of leaving familiar ties and surroundings, as appropriate to the expected age of the child;

(4) Data on institutionalized children and the impact of institutionalization on children, including the effect on children of the length of time spent in an institution and of the type of care provided in the expected country of origin;

(5) Information on attachment disorders and other emotional problems that institutionalized or traumatized children and children with a history of multiple caregivers may experience, before and after their adoption;

(6) Information on the laws and adoption processes of the expected country of origin, including foreseeable delays and impediments to finalization of an adoption;

(7) Information on the long-term implications for a family that has become multicultural through intercountry adoption; and

(8) An explanation of any reporting requirements associated with Convention adoptions, including any post-placement or post-adoption reports required by the expected country of origin.

(c) The agency or person also provides the prospective adoptive parent(s) with training that allows them to be as fully prepared as possible for the adoption of a particular child. This includes counseling on:

(1) The child's history and cultural, racial, religious, ethnic, and linguistic background;

(2) The known health risks in the specific region or country where the child resides; and

(3) Any other medical, social, background, birth history, educational data, developmental history, or any other data known about the particular child.

(d) The agency or person provides such training through appropriate methods, including:

(1) Collaboration among agencies or persons to share resources to meet the training needs of prospective adoptive parents;

(2) Group seminars offered by the agency or person or other agencies or training entities;

(3) Individual counseling sessions;

(4) Video, computer-assisted, or distance learning methods using standardized curricula; or

(5) In cases where training cannot otherwise be provided, an extended home study process, with a system for evaluating the thoroughness with which the topics have been covered.

(e) The agency or person provides additional in-person, individualized counseling and preparation, as needed, to meet the needs of the prospective adoptive parent(s) in light of the particular child to be adopted and his or her special needs, and any other training or counseling needed in light of the child background study or the home study.

(f) The agency or person provides the prospective adoptive parent(s) with information about print, internet, and other resources available for continuing to acquire information about common behavioral, medical, and other issues; connecting with parent support groups, adoption clinics and experts; and seeking appropriate help when needed.

(g) The agency or person exempts prospective adoptive parent(s) from all or part of the training and preparation that would normally be required for a specific adoption only when the agency or person determines that the prospective adoptive parent(s) have received adequate prior training or have prior experience as parent(s) of children adopted from abroad.

(h) The agency or person records the nature and extent of the training and preparation provided to the prospective adoptive parent(s) in the adoption record.

§ 96.49 Provision of medical and social information in incoming cases.

(a) The agency or person provides a copy of the child's medical records (including, to the fullest extent practicable, a correct and complete English-language translation of such records) to the prospective adoptive parent(s) as early as possible, but no later than two weeks before either the adoption or placement for adoption, or the date on which the prospective adoptive parent(s) travel to the Convention country to complete all procedures in such country relating to the adoption or placement for adoption, whichever is earlier.

(b) Where any medical record provided pursuant to paragraph (a) of this section is a summary or compilation of other medical records, the agency or person includes those underlying medical records in the medical records provided pursuant to paragraph (a) if they are available.

(c) The agency or person provides the prospective adoptive parent(s) with any untranslated medical reports or videotapes or other reports and provides an opportunity for the client(s) to arrange for their own translation of the records, including a translation into a language other than English, if needed.

(d) The agency or person itself uses reasonable efforts, or requires its supervised provider in the child's country of origin who is responsible for obtaining medical information about the child on behalf of the agency or person to use reasonable efforts, to obtain available information, including in particular:

(1) The date that the Convention country or other child welfare authority assumed custody of the child and the child's condition at that time;

(2) History of any significant illnesses, hospitalizations, special needs, and changes in the child's condition since the Convention country or other child welfare authority assumed custody of the child;

(3) Growth data, including prenatal and birth history, and developmental status over time and current developmental data at the time of the child's referral for adoption; and

(4) Specific information on the known health risks in the specific region or country where the child resides.

(e) If the agency or person provides medical information, other than the information provided by public foreign authorities, to the prospective adoptive parent(s) from an examination by a physician or from an observation of the child by someone who is not a physician, the agency or person uses reasonable efforts to include the following:

(1) The name and credentials of the physician who performed the examination or the individual who observed the child;

(2) The date of the examination or observation; how the report's information was retained and verified; and if anyone directly responsible for the child's care has reviewed the report;

(3) If the medical information includes references, descriptions, or observations made by any individual other than the physician who performed the examination or the individual who performed the observation, the identity of that individual, the individual's training, and information on what data and perceptions the individual used to draw his or her conclusions;

(4) A review of hospitalizations, significant illnesses, and other significant medical events, and the reasons for them;

(5) Information about the full range of any tests performed on the child, including tests addressing known risk factors in the child's country of origin; and

(6) Current health information.

(f) The agency or person itself uses reasonable efforts, or requires its supervised provider in the child's country of origin who is responsible for obtaining social information about the child on behalf of the agency or person to use reasonable efforts, to obtain available information, including in particular:

(1) Information about the child's birth family and prenatal history and cultural, racial, religious, ethnic, and linguistic background;

(2) Information about all of the child's past and current placements prior to adoption, including, but not limited to any social work or court reports on the child and any information

on who assumed custody and provided care for the child; and

(3) Information about any birth siblings whose existence is known to the agency or person, or its supervised provider, including information about such siblings' whereabouts.

(g) Where any of the information listed in paragraphs (d) and (f) of this section cannot be obtained, the agency or person documents in the adoption record the efforts made to obtain the information and why it was not obtainable. The agency or person continues to use reasonable efforts to secure those medical or social records that could not be obtained up until the adoption is finalized.

(h) Where available, the agency or person provides information for contacting the examining physician or the individual who made the observations to any physician engaged by the prospective adoptive parent(s), upon request.

(i) The agency or person ensures that videotapes and photographs of the child are identified by the date on which the videotape or photograph was recorded or taken and that they were made in compliance with the laws in the country where recorded or taken.

(j) The agency or person does not withhold from or misrepresent to the prospective adoptive parent(s) any available medical, social, or other pertinent information concerning the child.

(k) The agency or person does not withdraw a referral until the prospective adoptive parent(s) have had two weeks (unless extenuating circumstances involving the child's best interests require a more expedited decision) to consider the needs of the child and their ability to meet those needs, and to obtain physician review of medical information and other descriptive information, including videotapes of the child if available.

§ 96.50 Placement and post-placement monitoring until final adoption in incoming cases.

(a) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the prospective adoptive parent(s).

(b) In the post-placement phase, the agency or person monitors and supervises the child's placement to ensure that the placement remains in the best interests of the child, and ensures that at least the number of home visits required by State law or by the child's country of origin are performed, whichever is greater.

(c) When a placement for adoption is in crisis in the post-placement phase, the agency or person makes an effort to provide or arrange for counseling by an individual with appropriate skills to assist the family in dealing with the problems that have arisen.

(d) If counseling does not succeed in resolving the crisis and the placement is disrupted, the agency or person assuming custody of the child assumes responsibility for making another placement of the child.

(e) The agency or person acts promptly and in accord with any applicable legal requirements to remove the child when the placement may no longer be in the child's best interests, to provide temporary care, to find an eventual adoptive placement for the child, and, in consultation with the Secretary, to inform the Central Authority of the child's country of origin about any new prospective adoptive parent(s).

(1) In all cases where removal of a child from a placement is considered, the agency or person considers the child's views when appropriate in light of the child's age and maturity and, when required by State law, obtains the consent of the child prior to removal.

(2) The agency or person does not return from the United States a child placed for adoption in the United States unless the Central Authority of the country of origin and the Secretary have approved the return in writing.

(f) The agency or person includes in the adoption services contract with the prospective adoptive parent(s) a plan describing the agency's or person's responsibilities if a placement for adoption is disrupted. This plan addresses:

(1) Who will have legal and financial responsibility for transfer of custody in

an emergency or in the case of impending disruption and for the care of the child;

(2) If the disruption takes place after the child has arrived in the United States, under what circumstances the child will, as a last resort, be returned to the child's country of origin, if that is determined to be in the child's best interests;

(3) How the child's wishes, age, length of time in the United States, and other pertinent factors will be taken into account; and

(4) How the Central Authority of the child's country of origin and the Secretary will be notified.

(g) The agency or person provides post-placement reports until final adoption of a child to the Convention country when required by the Convention country. Where such reports are required, the agency or person:

(1) Informs the prospective adoptive parent(s) in the adoption services contract of the requirement prior to the referral of the child for adoption;

(2) Informs the prospective adoptive parent(s) that they will be required to provide all necessary information for the report(s); and

(3) Discloses who will prepare the reports and the fees that will be charged.

(h) The agency or person takes steps to:

(1) Ensure that an order declaring the adoption as final is sought by the prospective adoptive parent(s), and entered in compliance with section 301(c) of the IAA (42 U.S.C. 14931(c)); and

(2) Notify the Secretary of the finalization of the adoption within thirty days of the entry of the order.

§ 96.51 Post-adoption services in incoming cases.

(a) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the adoptive parent(s).

(b) The agency or person informs the prospective adoptive parent(s) in the adoption services contract whether the agency or person will or will not provide any post-adoption services. The agency or person also informs the prospective adoptive parent(s) in the adoption services contract whether it will provide services if an adoption is dissolved, and, if it indicates it will, it provides a plan describing the agency's or person's responsibilities.

(c) When post-adoption reports are required by the child's country of origin, the agency or person includes a requirement for such reports in the adoption services contract and makes good-faith efforts to encourage adoptive parent(s) to provide such reports.

(d) The agency or person does not return from the United States an adopted child whose adoption has been dissolved unless the Central Authority of the country of origin and the Secretary have approved the return in writing.

§ 96.52 Performance of Convention communication and coordination functions in incoming cases.

(a) The agency or person keeps the Central Authority of the Convention country and the Secretary informed as necessary about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

(b) The agency or person takes all appropriate measures, consistent with the procedures of the U.S. Central Authority and of the Convention country, to:

(1) Transmit on a timely basis the home study to the Central Authority or other competent authority of the child's country of origin;

(2) Obtain the child background study, proof that the necessary consents to the child's adoption have been obtained, and the necessary determination that the prospective placement is in the child's best interests, from the Central Authority or other competent authority in the child's country of origin;

(3) Provide confirmation that the prospective adoptive parent(s) agree to the adoption to the Central Authority or other competent authority in the child's country of origin; and

(4) Transmit the determination that the child is or will be authorized to enter and reside permanently in the United States to the Central Authority

or other competent authority in the child's country of origin.

(c) The agency or person takes all necessary and appropriate measures, consistent with the procedures of the Convention country, to obtain permission for the child to leave his or her country of origin and to enter and reside permanently in the United States.

(d) Where the transfer of the child does not take place, the agency or person returns the home study on the prospective adoptive parent(s) and/or the child background study to the authorities that forwarded them.

(e) The agency or person takes all necessary and appropriate measures to perform any tasks in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

STANDARDS FOR CASES IN WHICH A CHILD IS EMIGRATING FROM THE UNITED STATES (OUTGOING CASES)

§ 96.53 Background studies on the child and consents in outgoing cases.

(a) The agency or person takes all appropriate measures to ensure that a child background study is performed that includes information about the child's identity, adoptability, background, social environment, family history, medical history (including that of the child's family), and any special needs of the child. The child background study must include the following:

(1) Information that demonstrates that consents were obtained in accordance with paragraph (c) of this section;

(2) Information that demonstrates consideration of the child's wishes and opinions in accordance with paragraph (d) of this section and;

(3) Information that confirms that the child background study was prepared either by an exempted provider or by an individual who meets the requirements set forth in § 96.37(g).

(b) Where the child background study is not prepared in the first instance by an accredited agency or temporarily accredited agency, the agency or person ensures that the child background study is reviewed and approved in writing by an accredited agency or temporarily accredited agency. The written approval must include a determination that the background study includes all the information required by paragraph (a) of this section.

(c) The agency or person takes all appropriate measures to ensure that consents have been obtained as follows:

(1) The persons, institutions, and authorities whose consent is necessary for adoption have been counseled as necessary and duly informed of the effects of their consent, in particular, whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;

(2) All such persons, institutions, and authorities have given their consents;

(3) The consents have been expressed or evidenced in writing in the required legal form, have been given freely, were not induced by payments or compensation of any kind, and have not been withdrawn;

(4) The consent of the mother, where required, was executed after the birth of the child;

(5) The child, as appropriate in light of his or her age and maturity, has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption; and

(6) The child's consent, where required, has been given freely, in the required legal form, and expressed or evidenced in writing and not induced by payment or compensation of any kind.

(d) If the child is twelve years of age or older, or as otherwise provided by State law, the agency or person gives due consideration to the child's wishes or opinions before determining that an intercountry placement is in the child's best interests.

(e) The agency or person prior to the child's adoption takes all appropriate measures to transmit to the Central Authority or other competent authority or accredited bodies of the Convention country the child background study, proof that the necessary consents have been obtained, and the reasons for its determination that the placement is in the child's best interests. In doing so, the agency or person, as required by Article 16(2) of the Convention, does not reveal the identity of

the mother or the father if these identities may not be disclosed under State law.

§ 96.54 Placement standards in outgoing cases.

(a) Except in the case of adoption by relatives or in the case in which the birth parent(s) have identified specific prospective adoptive parent(s) or in other special circumstances accepted by the State court with jurisdiction over the case, the agency or person makes reasonable efforts to find a timely adoptive placement for the child in the United States by:

(1) Disseminating information on the child and his or her availability for adoption through print, media, and internet resources designed to communicate with potential prospective adoptive parent(s) in the United States;

(2) Listing information about the child on a national or State adoption exchange or registry for at least sixty calendar days after the birth of the child;

(3) Responding to inquiries about adoption of the child; and

(4) Providing a copy of the child background study to potential U.S. prospective adoptive parent(s).

(b) The agency or person demonstrates to the satisfaction of the State court with jurisdiction over the adoption that sufficient reasonable efforts (including no efforts, when in the best interests of the child) to find a timely and qualified adoptive placement for the child in the United States were made.

(c) In placing the child for adoption, the agency or person:

(1) To the extent consistent with State law, gives significant weight to the placement preferences expressed by the birth parent(s) in all voluntary placements;

(2) To the extent consistent with State law, makes diligent efforts to place siblings together for adoption and, where placement together is not possible, to arrange for contact between separated siblings, unless it is in the best interests of one of the siblings that such efforts or contact not take place; and

(3) Complies with all applicable requirements of the Indian Child Welfare Act.

(d) The agency or person complies with any State law requirements pertaining to the provision and payment of independent legal counsel for birth parents. If State law requires full disclosure to the birth parent(s) that the child is to be adopted by parent(s) who reside outside the United States, the agency or person provides such disclosure.

(e) The agency or person takes all appropriate measures to give due consideration to the child's upbringing and to his or her ethnic, religious, and cultural background.

(f) When particular prospective adoptive parent(s) in a Convention country have been identified, the agency or person takes all appropriate measures to determine whether the envisaged placement is in the best interests of the child, on the basis of the child background study and the home study on the prospective adoptive parent(s).

(g) The agency or person thoroughly prepares the child for the transition to the Convention country, using age-appropriate services that address the child's likely feelings of separation, grief, and loss and difficulties in making any cultural, religious, racial, ethnic, or linguistic adjustment.

(h) The agency or person takes all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances, with properly trained and qualified escorts, if used, and, if possible, in the company of the adoptive parent(s) or the prospective adoptive parent(s);

(i) Before the placement for adoption proceeds, the agency or person identifies the entity in the receiving country that will provide post-placement supervision and reports, if required by State law, and ensures that the child's adoption record contains the information necessary for contacting that entity.

(j) The agency or person ensures that the child's adoption record includes the order granting the adoption or legal custody for the purpose of adoption in the Convention country.

(k) The agency or person consults with the Secretary before arranging for the return to the United States of any

child who has emigrated to a Convention country in connection with the child's adoption.

§ 96.55 Performance of Convention communication and coordination functions in outgoing cases.

(a) The agency or person keeps the Central Authority of the Convention country and the Secretary informed as necessary about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

(b) The agency or person ensures that:

(1) Copies of all documents from the State court proceedings, including the order granting the adoption or legal custody, are provided to the Secretary;

(2) Any additional information on the adoption is transmitted to the Secretary promptly upon request; and

(3) It otherwise facilitates, as requested, the Secretary's ability to provide the certification that the child has been adopted or that custody has been granted for the purpose of adoption, in accordance with the Convention and the IAA.

(c) Where the transfer of the child does not take place, the agency or person returns the home study on the prospective adoptive parent(s) and/or the child background study to the authorities that forwarded them.

(d) The agency or person provides to the State court with jurisdiction over the adoption:

(1) Proof that consents have been given as required in § 96.53(c);

(2) An English copy or certified English translation of the home study on the prospective adoptive parent(s) in the Convention country, and the determination by the agency or person that the placement with the prospective adoptive parent(s) is in the child's best interests;

(3) Evidence that the prospective adoptive parent(s) in the Convention country agree to the adoption;

(4) Evidence that the child will be authorized to enter and reside permanently in the Convention country or on the same basis as that of the prospective adoptive parent(s); and

(5) Evidence that the Central Authority of the Convention country has agreed to the adoption, if such consent is necessary under its laws for the adoption to become final.

(e) The agency or person makes the showing required by § 96.54(b) to the State court with jurisdiction over the adoption.

(f) The agency or person takes all necessary and appropriate measures to perform any tasks in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

§ 96.56 [Reserved]

Subpart G—Decisions on Applications for Accreditation or Approval

§ 96.57 Scope.

The provisions in this subpart establish the procedures for when the accrediting entity issues decisions on applications for accreditation or approval. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to agencies seeking temporary accreditation.

§ 96.58 Notification of accreditation and approval decisions.

(a) The accrediting entity must notify agencies and persons that applied by the transitional application deadline of its accreditation and approval decisions on a uniform notification date to be established by the Secretary. On that date, the accrediting entity must inform each applicant and the Secretary in writing whether the agency's or person's application has been granted or denied or remains pending. The accrediting entity may not provide any information about its accreditation or approval decisions to any agency or person or to the public until the uniform notification date. If the Secretary requests information on the interim or final status of an applicant prior to the uniform notification date, the accrediting entity must provide such information to the Secretary.

(b) Notwithstanding the provisions in paragraph (a) of this section, the accrediting entity may, in its discretion, communicate with agencies and persons that applied by the transitional application date about the status of their pending applications for the sole purpose of affording them an opportunity to correct deficiencies that may hinder or prevent accreditation or approval.

(c) The accrediting entity must routinely inform applicants that applied after the transitional application date in writing of its accreditation and approval decisions, as those decisions are finalized, but may not do so earlier than the uniform notification date referenced in paragraph (a) of this section. The accrediting entity must routinely provide this information to the Secretary in writing.

§ 96.59 Review of decisions to deny accreditation or approval.

(a) There is no administrative or judicial review of an accrediting entity's decision to deny an application for accreditation or approval. As provided in § 96.79, a decision to deny for these purposes includes:

(1) A denial of the agency's or person's initial application for accreditation or approval;

(2) A denial of an application made after cancellation or refusal to renew by the accrediting entity; and

(3) A denial of an application made after cancellation or debarment by the Secretary.

(b) The agency or person may petition the accrediting entity for reconsideration of a denial. The accrediting entity must establish internal review procedures that provide an opportunity for an agency or person to petition for reconsideration of the denial.

§ 96.60 Length of accreditation or approval period.

(a) Except as provided in paragraph (b) of this section, the accrediting entity will accredit or approve an agency or person for a period of four years. The accreditation or approval period will commence either on the date the Convention enters into force for the United States (if the agency or person is accredited or approved before that date) or on the date that the agency or person is granted accreditation or approval.

(b) In order to stagger the renewal requests from agencies and persons that applied for accreditation or approval by the transitional application deadline, to prevent renewal requests from coming due at the same time, the accrediting entity may accredit or approve some agencies and persons that applied by the transitional application date for a period of between three and five years for their first accreditation or approval cycle. The accrediting entity must establish criteria, to be approved by the Secretary, for choosing which agencies and persons it will accredit or approve for a period of other than four years.

§ 96.61 [Reserved]

Subpart H—Renewal of Accreditation or Approval

§ 96.62 Scope.

The provisions in this subpart establish the procedures for renewal of an agency's accreditation or a person's approval. Temporary accreditation may not be renewed, and the provisions in this subpart do not apply to temporarily accredited agencies.

§ 96.63 Renewal of accreditation or approval.

(a) The accrediting entity must advise accredited agencies and approved persons that it monitors of the date by which they should seek renewal of their accreditation or approval so that the renewal process can reasonably be completed prior to the expiration of the agency's or person's current accreditation or approval. If the accredited agency or approved person does not wish to renew its accreditation or approval, it must immediately notify the accrediting entity and take all necessary steps to complete its Convention cases and to transfer its pending Convention cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate, under the oversight of the accrediting entity, before its accreditation or approval expires.

(b) The accredited agency or approved person may seek renewal from a different accrediting entity than the one that handled its prior application. If it changes accrediting entities, the accredited agency or approved person must so notify the accrediting entity that handled its prior application by the date on which the agency or person must (pursuant to paragraph (a) of this section) seek renewal of its status. The accredited agency or approved person must follow the new accrediting entity's instructions when submitting a request for renewal and preparing documents and other information for the new accrediting entity to review in connection with the renewal request.

(c) The accrediting entity must process the request for renewal in a timely fashion. Before deciding whether to renew the accreditation or approval of an agency or person, the accrediting entity may, in its discretion, advise the agency or person of any deficiencies that may hinder or prevent its renewal and defer a decision to allow the agency or person to correct the deficiencies. The accrediting entity must notify the accredited agency, approved person, and the Secretary in writing when it renews or refuses to renew an agency's or person's accreditation or approval.

(d) Sections 96.24, 96.25, and 96.26, which relate to evaluation procedures and to requests for and use of information, and §96.27, which relates to the substantive criteria for evaluating applicants for accreditation or approval, other than §96.27(e), will govern determinations about whether to renew accreditation or approval. In lieu of §96.27(e), if the agency or person has been suspended by an accrediting entity or the Secretary during its most current accreditation or approval cycle, the accrediting entity may take the reasons underlying the suspension into account when determining whether to renew accreditation or approval and may refuse to renew accreditation or approval based on the prior suspension.

§96.64 [Reserved]

Subpart I—Routine Oversight by Accrediting Entities

§96.65 Scope.

The provisions in this subpart establish the procedures for routine oversight of accredited agencies and approved persons. Temporary accreditation is governed by the provisions of subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to temporarily accredited agencies.

§96.66 Oversight of accredited agencies and approved persons by the accrediting entity.

(a) The accrediting entity must monitor agencies it has accredited and persons it has approved at least annually to ensure that they are in substantial compliance with the standards in subpart F of this part, as determined using a method approved by the Secretary in accordance with §96.27(d). The accrediting entity must investigate complaints about accredited agencies and approved persons, as provided in subpart J of this part.

(b) An accrediting entity may, on its own initiative, conduct site visits to inspect an agency's or person's premises or programs, with or without advance notice, for purposes of random verification of its continued compliance or to investigate a complaint. The accrediting entity may consider any information about the agency or person that becomes available to it about the compliance of the agency or person. The provisions of §§96.25 and 96.26 govern requests for and use of information.

(c) The accrediting entity must require accredited agencies or approved persons to attest annually that they have remained in substantial compliance and to provide supporting documentation to indicate such ongoing compliance with the standards in subpart F of this part.

§ 96.67 [Reserved]

Subpart J—Oversight Through Review of Complaints

§ 96.68 Scope.

The provisions in this subpart establish the procedures that the accrediting entity will use for processing complaints against accredited agencies and approved persons (including complaints concerning their use of supervised providers) that raise an issue of compliance with the Convention, the IAA, or the regulations implementing the IAA, as determined by the accrediting entity or the Secretary, and that are therefore relevant to the oversight functions of the accrediting entity or the Secretary. Temporary accreditation is governed by the provisions of subpart N of this part; as provided in § 96.103, procedures for processing complaints on temporarily accredited agencies must comply with this subpart.

§ 96.69 Filing of complaints against accredited agencies and approved persons.

(a) Complaints described in § 96.68 will be subject to review by the accrediting entity pursuant to §§ 96.71 and 96.72, when submitted as provided in this section and § 96.70.

(b) Complaints against accredited agencies and approved persons by parties to specific Convention adoption cases and relating to that case must first be submitted by the complainant in writing to the primary provider and to the agency or person providing adoption services, if a U.S. provider different from the primary provider. If the complaint cannot be resolved through the complaint processes of the primary provider or the agency or person providing the services (if different), or if the complaint was resolved by an agreement to take action but the primary provider or the agency or person providing the service (if different) failed to take such action within thirty days of agreeing to do so, the complaint may then be filed with the Complaint Registry in accordance with § 96.70.

(c) An individual who is not party to a specific Convention adoption case but who has information about an accredited agency or approved person may provide that information by filing it in the form of a complaint with the Complaint Registry in accordance with § 96.70.

(d) A Federal, State, or local government official or a foreign Central Authority may file a complaint with the Complaint Registry in accordance with § 96.70, or may raise the matter in writing directly with the accrediting entity, who will record the complaint in the Complaint Registry, or with the Secretary, who will record the complaint in the Complaint Registry, if appropriate, and refer it to the accrediting entity for review pursuant to § 96.71 or take such other action as the Secretary deems appropriate.

§ 96.70 Operation of the Complaint Registry.

(a) The Secretary will establish a Complaint Registry to support the accrediting entities in fulfilling their oversight responsibilities, including the responsibilities of recording, screening, referring, and otherwise taking action on complaints received, and to support the Secretary in the Secretary's oversight responsibilities as the Secretary deems appropriate. The Secretary may provide for the Complaint Registry to be funded in whole or in part from fees collected by the Secretary pursuant to section 403(b) of the IAA (42 U.S.C. 14943(b)) or by the accrediting entities.

(b) The Complaint Registry will:

(1) Receive and maintain records of complaints about accredited agencies, temporarily accredited agencies, and approved persons (including complaints concerning their use of supervised providers) and make such complaints available to the appropriate accrediting entity and the Secretary;

(2) Receive and maintain information regarding action taken to resolve each complaint by the accrediting entity or the Secretary;

(3) Track compliance with any deadlines applicable to the resolution of complaints;

(4) Generate reports designed to show possible patterns of complaints; and

(5) Perform such other functions as the Secretary may determine.

(c) Forms and information necessary to submit complaints to the Complaint Registry electronically or by such other means as the Secretary may determine will be accessible through the Department's website to persons who wish to file complaints. Such forms will be designed to ensure that each complaint complies with the requirements of § 96.69.

(d) Accrediting entities will have access to, and the capacity to enter data into, the Complaint Registry as the Secretary deems appropriate.

(e) Nothing in this part shall be construed to limit the Secretary's authority to take such action as the Secretary deems appropriate with respect to complaints.

§ 96.71 Review by the accrediting entity of complaints against accredited agencies and approved persons.

(a) The accrediting entity must establish written procedures, including deadlines, for recording, investigating, and acting upon complaints it receives pursuant to §§ 96.69 and 96.70(b)(1). The procedures must be consistent with this section and be approved by the Secretary. The accrediting entity must make written information about its complaint procedures available upon request.

(b) If the accrediting entity determines that a complaint implicates the Convention, the IAA, or the regulations implementing the IAA:

(1) The accrediting entity must verify that the complainant has already attempted to resolve the complaint as described in § 96.69(b) and, if not, may refer the complaint to the agency or person, or to the primary provider, for attempted resolution through its internal complaint procedures;

(2) The accrediting entity may conduct whatever investigative activity (including site visits) it considers necessary to determine whether any relevant accredited agency or approved person may maintain accreditation or approval as provided in § 96.27. The provisions of §§ 96.25 and 96.26 govern requests for and use of information. The accrediting entity must give priority to complaints submitted pursuant to § 96.69(d);

(3) If the accrediting entity determines that the agency or person may not maintain accreditation or approval, it must take adverse action pursuant to subpart K of this part.

(c) When the accrediting entity has completed its complaint review process, it must provide written notification of the outcome of its investigation, and any actions taken, to the complainant, or to any other entity that referred the information.

(d) The accrediting entity will enter information about the outcomes of its investigations and its actions on complaints into the Complaint Registry as provided in its agreement with the Secretary.

(e) The accrediting entity may not take any action to discourage an individual from, or retaliate against an individual for, making a complaint, expressing a grievance, questioning the conduct of, or expressing an opinion about the performance of an accredited agency, an approved person, or the accrediting entity.

§ 96.72 Referral of complaints to the Secretary and other authorities.

(a) An accrediting entity must report promptly to the Secretary any substantiated complaint that:

(1) Reveals that an accredited agency or approved person has engaged in a pattern of serious, willful, grossly negligent, or repeated failures to comply with the standards in subpart F of this part; or

(2) Indicates that continued accreditation or approval would not be in the best interests of the children and families concerned.

(b) An accrediting entity must, after consultation with the Secretary, refer, as appropriate, to a State licensing authority, the Attorney General, or other law enforcement authorities any substantiated complaints that involve conduct that is:

(1) Subject to the civil or criminal penalties imposed by section 404 of the IAA (42 U.S.C. 14944);

(2) In violation of the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*); or

(3) Otherwise in violation of Federal, State, or local law.

(c) When an accrediting entity makes a report pursuant to paragraphs (a) or (b) of this section, it must indicate whether it is recommending that the Secretary take action to debar the agency or person, either temporarily or permanently.

§ 96.73 [Reserved]

Subpart K—Adverse Action by the Accrediting Entity

§ 96.74 Scope.

The provisions in this subpart establish the procedures governing adverse action by an accrediting entity against accredited agencies and approved persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions of this subpart do not apply to temporarily accredited agencies.

§ 96.75 Adverse action against accredited agencies or approved persons not in substantial compliance.

The accrediting entity must take adverse action when it determines that an accredited agency or approved person may not maintain accreditation or approval as provided in § 96.27. The accrediting entity is authorized to take any of the following actions against an accredited agency or approved person whose compliance the entity oversees. Each of these actions by an accrediting entity is considered an adverse action for purposes of the IAA and the regulations in this part:

(a) Suspending accreditation or approval;

(b) Canceling accreditation or approval;

(c) Refusing to renew accreditation or approval;

(d) Requiring an accredited agency or approved person to take a specific corrective action to bring itself into compliance; and

(e) Imposing other sanctions including, but not limited to, requiring an accredited agency or approved person to cease providing adoption services in a particular case or in a specific Convention country.

§ 96.76 Procedures governing adverse action by the accrediting entity.

(a) The accrediting entity must decide which adverse action to take based on the seriousness and type of violation and on the extent to which the accredited agency or approved person has corrected or failed to correct deficiencies of which it has been previously informed. The accrediting entity must notify an accredited agency or approved person in writing of its decision to take an adverse action against the agency or person. The accrediting entity's written notice must identify the deficiencies prompting imposition of the adverse action.

(b) Before taking adverse action, the accrediting entity may, in its discretion, advise an accredited agency or approved person in writing of any deficiencies in its performance that may warrant an adverse action and provide it with an opportunity to demonstrate that an adverse action would be unwarranted before the adverse action is imposed. If the accrediting entity takes the adverse action without such prior notice, it must provide a similar opportunity to demonstrate that the adverse action was unwarranted after the adverse action is imposed, and may withdraw the adverse action based on the information provided.

(c) The provisions in §§ 96.25 and 96.26 govern requests for and use of information.

§ 96.77 Responsibilities of the accredited agency, approved person, and accrediting entity following adverse action by the accrediting entity.

(a) If the accrediting entity takes an adverse action against an agency or person, the action will take effect immediately unless the accrediting entity agrees to a later effective date.

(b) If the accrediting entity suspends or cancels the accreditation or approval of an agency or person, the agency or person must immediately, or by any later effective date set by the accrediting entity, cease to provide adoption services in all Convention cases. In the case of suspension, it must consult with the accrediting entity about whether to transfer its Convention adoption cases and adoption records. In the case of cancellation, it

must execute the plans required by §§96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(c) If the accrediting entity refuses to renew the accreditation or approval of an agency or person, the agency or person must cease to provide adoption services in all Convention cases upon expiration of its existing accreditation or approval. It must take all necessary steps to complete its Convention cases before its accreditation or approval expires. It must also execute the plans required by §§96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its pending Convention cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(d) The accrediting entity must notify the Secretary, in accordance with procedures established in its agreement with the Secretary, when it takes an adverse action that changes the accreditation or approval status of an agency or person. The accrediting entity must also notify the relevant State licensing authority as provided in the agreement.

§96.78 Accrediting entity procedures to terminate adverse action.

(a) The accrediting entity must maintain internal petition procedures, approved by the Secretary, to give accredited agencies and approved persons an opportunity to terminate adverse actions on the grounds that the deficiencies necessitating the adverse action have been corrected. The accrediting entity must inform the agency or person of these procedures when it informs them of the adverse action pursuant to §96.76(a). An accrediting entity is not required to maintain procedures to terminate adverse actions on any other grounds, or to maintain procedures to review its adverse actions, and must obtain the consent of the Secretary if it wishes to make such procedures available.

(b) An accrediting entity may terminate an adverse action it has taken only if the agency or person demonstrates to the satisfaction of the accrediting entity that the deficiencies that led to the adverse action have been corrected. The accrediting entity must notify an agency or person in writing of its decision on the petition to terminate the adverse action.

(c) If the accrediting entity described in paragraph (b) of this section is no longer providing accreditation or approval services, the agency or person may petition any accrediting entity with jurisdiction over its application.

(d) If the accrediting entity cancels or refuses to renew an agency's or person's accreditation or approval, and does not terminate the adverse action pursuant to paragraph (b) of this section, the agency or person may reapply for accreditation or approval. Before doing so, the agency or person must request and obtain permission to make a new application from the accrediting entity that cancelled or refused to renew its accreditation or approval or, if such entity is no longer designated as an accrediting entity, from any alternate accrediting entity designated by the Secretary to give such permission. The accrediting entity may grant such permission only if the agency or

person demonstrates to the satisfaction of the accrediting entity that the specific deficiencies that led to the cancellation or refusal to renew have been corrected.

(e) If the accrediting entity grants the agency or person permission to reapply, the agency or person may file an application with that accrediting entity in accordance with subpart D of this part.

(f) Nothing in this section shall be construed to prevent an accrediting entity from withdrawing an adverse action if it concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the accrediting entity will take appropriate steps to notify the Secretary and the Secretary will take appropriate steps to notify the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.79 Administrative or judicial review of adverse action by the accrediting entity.

(a) Except to the extent provided by the procedures in § 96.78, an adverse action by an accrediting entity shall not be subject to administrative review.

(b) Section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)) provides for judicial review in Federal court of adverse actions by an accrediting entity, regardless of whether the entity is described in § 96.5(a) or (b). When any petition brought under section 202(c)(3) raises as an issue whether the deficiencies necessitating the adverse action have been corrected, the procedures maintained by the accrediting entity pursuant to § 96.78 must first be exhausted. Adverse actions are only those actions listed in § 96.75. There is no judicial review of an accrediting entity's decision to deny accreditation or approval, including:

(1) A denial of an initial application;

(2) A denial of an application made after cancellation or refusal to renew by the accrediting entity; and

(3) A denial of an application made after cancellation or debarment by the Secretary.

(c) In accordance with section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)), an accredited agency or approved person that is the subject of an adverse action by an accrediting entity may petition the United States district court in the judicial district in which the agency is located or the person resides to set aside the adverse action imposed by the accrediting entity. The United States district court shall review the adverse action in accordance with 5 U.S.C. 706. When an accredited agency or approved person petitions a United States district court to review the adverse action of an accrediting entity, the accrediting entity will be considered an agency as defined in 5 U.S.C. 701 for the purpose of judicial review of the adverse action.

§ 96.80 [Reserved]

Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary

§ 96.81 Scope.

The provisions in this subpart establish the procedures governing adverse action by the Secretary against accredited agencies and approved persons. Temporary accreditation is governed by the provisions in subpart N of this part. Unless otherwise provided in subpart N of this part, the provisions in this subpart do not apply to temporarily accredited agencies.

§ 96.82 The Secretary's response to actions by the accrediting entity.

(a) There is no administrative review by the Secretary of an accrediting entity's decision to deny accreditation or approval, nor of any decision by an accrediting entity to take an adverse action.

(b) When informed by an accrediting entity that an agency has been accredited or a person has been approved, the Secretary will take appropriate steps to ensure that relevant information about the accredited agency or approved person is provided to the Permanent Bureau of the Hague Conference on Private International Law. When informed by an accrediting entity that it has taken an adverse action that impacts an agency's or person's accreditation or approval status, the Secretary will take appropriate steps to inform the Permanent Bureau of the

Hague Conference on Private International Law.

§ 96.83 Suspension or cancellation of accreditation or approval by the Secretary.

(a) The Secretary must suspend or cancel the accreditation or approval granted by an accrediting entity when the Secretary finds, in the Secretary's discretion, that the agency or person is substantially out of compliance with the standards in subpart F of this part and that the accrediting entity has failed or refused, after consultation with the Secretary, to take action.

(b) The Secretary may suspend or cancel the accreditation or approval granted by an accrediting entity if the Secretary finds that such action:

(1) Will protect the interests of children;

(2) Will further U.S. foreign policy or national security interests; or

(3) Will protect the ability of U.S. citizens to adopt children under the Convention.

(c) If the Secretary suspends or cancels the accreditation or approval of an agency or person, the Secretary will take appropriate steps to notify both the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.84 Reinstatement of accreditation or approval after suspension or cancellation by the Secretary.

(a) An agency or person may petition the Secretary for relief from the Secretary's suspension or cancellation of its accreditation or approval on the grounds that the deficiencies necessitating the suspension or cancellation have been corrected. If the Secretary is satisfied that the deficiencies that led to the suspension or cancellation have been corrected, the Secretary shall, in the case of a suspension, terminate the suspension or, in the case of a cancellation, notify the agency or person that it may reapply for accreditation or approval to the same accrediting entity that handled its prior application for accreditation or approval. If that accrediting entity is no longer providing accreditation or approval services, the agency or person may reapply to any accrediting entity with jurisdiction over its application. If the Secretary terminates a suspension or permits an agency or person to reapply for accreditation or approval, the Secretary will so notify the appropriate accrediting entity. If the Secretary terminates a suspension, the Secretary will also take appropriate steps to notify the Permanent Bureau of the Hague Conference on Private International Law of the reinstatement.

(b) Nothing in this section shall be construed to prevent the Secretary from withdrawing a cancellation or suspension if the Secretary concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the Secretary will take appropriate steps to notify the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.85 Temporary and permanent debarment by the Secretary.

(a) The Secretary may temporarily or permanently debar an agency from accreditation or a person from approval on the Secretary's own initiative, at the request of DHS, or at the request of an accrediting entity. A debarment of an accredited agency or approved person will automatically result in the cancellation of accreditation or approval by the Secretary, and the accrediting entity shall deny any pending request for renewal of accreditation or approval.

(b) The Secretary may issue a debarment order only if the Secretary, in the Secretary's discretion, determines that:

(1) There is substantial evidence that the agency or person is out of compliance with the standards in subpart F of this part; and

(2) There has been a pattern of serious, willful, or grossly negligent failures to comply, or other aggravating circumstances indicating that continued accreditation or approval would not be in the best interests of the children and families concerned. For purposes of this paragraph:

(i) ''The children and families concerned'' include any children and any families whose interests have been or may be affected by the agency's or person's actions;

(ii) A failure to comply with § 96.47 (home study requirements) shall constitute a ''serious failure to comply'' unless it is shown by clear and convincing evidence that such noncompliance had neither the purpose nor the effect of determining the outcome of a decision or proceeding by a court or other competent authority in the United States or the child's country of origin; and

(iii) Repeated serious, willful, or grossly negligent failures to comply with § 96.47 (home study requirements) by an agency or person after consultation between the Secretary and the accrediting entity with respect to previous noncompliance by such agency or person shall constitute a pattern of serious, willful, or grossly negligent failures to comply.

§ 96.86 Length of debarment period and reapplication after temporary debarment.

(a) In the case of a temporary debarment order, the order will take effect on the date specified in the order and will specify a date, not earlier than three years later, on or after which the agency or person may petition the Secretary for withdrawal of the temporary debarment. If the Secretary withdraws the temporary debarment, the agency or person may then reapply for accreditation or approval to the same accrediting entity that handled its prior application for accreditation or approval. If that accrediting entity is no longer providing accreditation or approval services, the agency or person may apply to any accrediting entity with jurisdiction over its application.

(b) In the case of a permanent debarment order, the order will take effect on the date specified in the order. The agency or person will not be permitted to apply again to an accrediting entity for accreditation or approval, or to the Secretary for termination of the debarment.

(c) Nothing in this section shall be construed to prevent the Secretary from withdrawing a debarment if the Secretary concludes that the action was based on a mistake of fact or was otherwise in error. Upon taking such action, the Secretary will take appropriate steps to notify the accrediting entity and the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.87 Responsibilities of the accredited agency, approved person, and accrediting entity following suspension, cancellation, or debarment by the Secretary.

If the Secretary suspends or cancels the accreditation or approval of an agency or person, or debars an agency or person, the agency or person must cease to provide adoption services in all Convention cases. In the case of suspension, it must consult with the accrediting entity about whether to transfer its Convention adoption cases and adoption records. In the case of cancellation or debarment, it must execute the plans required by §§ 96.33(e) and 96.42(d) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate. When the agency or person is unable to transfer such Convention cases or adoption records in accordance with the plans or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

§ 96.88 Review of suspension, cancellation, or debarment by the Secretary.

(a) Except to the extent provided by the procedures in § 96.84, an adverse action by the Secretary shall not be subject to administrative review.

(b) Section 204(d) of the IAA (42 U.S.C. 14924(d)) provides for judicial review of final actions by the Secretary. When any petition brought under section 204(d) raises as an issue whether the deficiencies necessitating a suspension or cancellation of accreditation or approval have been corrected, procedures maintained by the Secretary pursuant to § 96.84(a) must first be exhausted. A suspension or cancellation

of accreditation or approval, and a debarment (whether temporary or permanent) by the Secretary are final actions subject to judicial review. Other actions by the Secretary are not final actions and are not subject to judicial review.

(c) In accordance with section 204(d) of the IAA (42 U.S.C. 14924(d)), an agency or person that has been suspended, cancelled, or temporarily or permanently debarred by the Secretary may petition the United States District Court for the District of Columbia, or the United States district court in the judicial district in which the person resides or the agency is located, pursuant to 5 U.S.C. 706, to set aside the action.

§96.89 [Reserved]

Subpart M—Dissemination and Reporting of Information by Accrediting Entities

§96.90 Scope.

The provisions in this subpart govern the dissemination and reporting of information on accredited agencies and approved persons by accrediting entities. Temporary accreditation is governed by the provisions of subpart N of this part and, as provided for in §96.110, reports on temporarily accredited agencies must comply with this subpart.

§96.91 Dissemination of information to the public about accreditation and approval status.

(a) Once the Convention has entered into force for the United States, the accrediting entity must maintain and make available to the public on a quarterly basis the following information:

(1) The name, address, and contact information for each agency and person it has accredited or approved;

(2) The names of agencies and persons to which it has denied accreditation or approval that have not subsequently been accredited or approved;

(3) The names of agencies and persons that have been subject to withdrawal of temporary accreditation, suspension, cancellation, refusal to renew accreditation or approval, or debarment by the accrediting entity or the Secretary; and

(4) Other information specifically authorized in writing by the accredited agency or approved person to be disclosed to the public.

(b) Once the Convention has entered into force for the United States, each accrediting entity must make the following information available to individual members of the public upon specific request:

(1) Confirmation of whether or not a specific agency or person has a pending application for accreditation or approval, and, if so, the date of the application and whether it is under active consideration or whether a decision on the application has been deferred; and

(2) If an agency or person has been subject to a withdrawal of temporary accreditation, suspension, cancellation, refusal to renew accreditation or approval, or debarment, a brief statement of the reasons for the action.

§96.92 Dissemination of information to the public about complaints against accredited agencies and approved persons.

Once the Convention has entered into force for the United States, each accrediting entity must maintain a written record documenting each complaint received and the steps taken in response to it. This information may be disclosed to the public as follows:

(a) The accrediting entity must verify, upon inquiry from a member of the public, whether there have been any substantiated complaints against an accredited agency or approved person, and if so, provide information about the status and nature of any such complaints.

(b) The accrediting entity must have procedures for disclosing information about complaints that are substantiated.

§96.93 Reports to the Secretary about accredited agencies and approved persons and their activities.

(a) The accrediting entity must make annual reports to the Secretary on the information it collects from accredited agencies and approved persons pursuant to §96.43. The accrediting entity must make semi-annual reports to the Secretary that summarize for the preceding six-month period the following information:

(1) The accreditation and approval status of applicants, accredited agencies, and approved persons;

(2) Any instances where it has denied accreditation or approval;

(3) Any adverse actions taken against an accredited agency or approved person and any withdrawals of temporary accreditation;

(4) All substantiated complaints against accredited agencies and approved persons and the impact of such complaints on their accreditation or approval status;

(5) The number, nature, and outcome of complaint investigations carried out by the accrediting entity as well as the shortest, longest, average, and median length of time expended to complete complaint investigations; and

(6) Any discernible patterns in complaints received about specific agencies or persons, as well as any discernible patterns of complaints in the aggregate.

(b) The accrediting entity must report to the Secretary within thirty days of the time it learns that an accredited agency or approved person:

(1) Has ceased to provide adoption services; or

(2) Has transferred its Convention cases and adoption records.

(c) In addition to the reporting requirements contained in § 96.72, an accrediting entity must immediately notify the Secretary in writing:

(1) When it accredits an agency or approves a person;

(2) When it renews the accreditation or approval of an agency or person; or

(3) When it takes an adverse action against an accredited agency or approved person that impacts its accreditation or approval status or withdraws an agency's temporary accreditation.

§ 96.94 [Reserved]

Subpart N—Procedures and Standards Relating to Temporary Accreditation

§ 96.95 Scope.

(a) The provisions in this subpart govern only temporary accreditation. The provisions in subpart F of this part cover full accreditation of agencies and approval of persons.

(b) Agencies that meet the eligibility requirements established in this subpart may apply for temporary accreditation that will run for a one-or two-year period following the Convention's entry into force for the United States. Persons may not be temporarily approved. Temporary accreditation is only available to agencies that apply by the transitional application deadline and who complete the temporary accreditation process by the deadline for initial accreditation or approval in accordance with § 96.19.

§ 96.96 Eligibility requirements for temporary accreditation.

(a) An accrediting entity may not temporarily accredit an agency unless the agency demonstrates to the satisfaction of the accrediting entity that:

(1) It has provided adoption services in fewer than 100 intercountry adoption cases in the calendar year preceding the year in which the transitional application deadline falls. For purposes of this subpart, the number of cases includes all intercountry adoption cases that were handled by, or under the responsibility of, the agency, regardless of whether they involved countries party to the Convention;

(2) It qualifies for nonprofit tax treatment under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or for nonprofit status under the law of any State;

(3) It is properly licensed under State law to provide adoption services in at least one State. It is, and for the last three years prior to the transitional application deadline has been, providing intercountry adoption services;

(4) It has the capacity to maintain and provide to the accrediting entity and the Secretary, within thirty days of request, all of the information relevant to the Secretary's reporting requirements under section 104 of the IAA (42 U.S.C. 14914); and

(5) It has not been involved in any improper conduct related to the provision of intercountry adoption or other services, as evidenced in part by the following:

(i) The agency has maintained its State license without suspension or cancellation for misconduct during the

entire period in which it has provided intercountry adoption services;

(ii) The agency has not been subject to a finding of fault or liability in any administrative or judicial action in the three years preceding the transitional application deadline; and

(iii) The agency has not been the subject of any criminal findings of fraud or financial misconduct in the three years preceding the transitional application deadline.

(b) An accrediting entity may not temporarily accredit an agency unless the agency also demonstrates to the satisfaction of the accrediting entity that it has a comprehensive plan for applying for and achieving full accreditation before the agency's temporary accreditation expires, and is taking steps to execute that plan.

§ 96.97 Application procedures for temporary accreditation.

(a) An agency seeking temporary accreditation must submit an application to an accrediting entity with jurisdiction over its application, with the required fee(s), by the transitional application deadline established pursuant to § 96.19 of this part. Applications for temporary accreditation that are filed after the temporary application deadline will not be considered.

(b) An agency may not seek temporary accreditation and full accreditation at the same time. The agency's application must clearly state whether it is seeking temporary accreditation or full accreditation. An eligible agency's option of applying for temporary accreditation will be deemed to have been waived if the agency also submits a separate application for full accreditation prior to the transitional application deadline. The agency may apply to only one accrediting entity at a time.

(c) The accrediting entity must establish and follow uniform application procedures and must make information about these procedures available to agencies that are considering whether to apply for temporary accreditation. The accrediting entity must evaluate the applicant for temporary accreditation in a timely fashion. The accrediting entity must use its best efforts to provide a reasonable opportunity for an agency that applies for temporary accreditation by the transitional application deadline to complete the temporary accreditation process by the deadline for initial accreditation or approval. If an agency seeks temporary accreditation under this subpart, it will be included on the initial list deposited by the Secretary with the Permanent Bureau of the Hague Conference on Private International Law only if it is granted temporary accreditation by the deadline for initial accreditation or approval established pursuant to § 96.19(a).

§ 96.98 Length of temporary accreditation period.

(a) One-year temporary accreditation. An agency that has provided adoption services in 50–99 intercountry adoptions in the calendar year preceding the year in which the transitional application date falls may apply for a one-year period of temporary accreditation. The one-year period will commence on the date that the Convention enters into force for the United States.

(b) Two-year temporary accreditation. An agency that has provided adoption services in fewer than 50 intercountry adoptions in the calendar year preceding the year in which the transitional application date falls may apply for a two-year period of temporary accreditation. The two-year period will commence on the date that the Convention enters into force for the United States.

§ 96.99 Converting an application for temporary accreditation to an application for full accreditation.

(a) The accrediting entity may, in its discretion, permit an agency that has applied for temporary accreditation to convert its application to an application for full accreditation, subject to submission of any additional required documentation, information, and fee(s). The accrediting entity may grant a request for conversion if the accrediting entity has determined that the applicant is not in fact eligible for temporary accreditation based on the number of adoption cases it has handled; if the agency has concluded that it can complete the full accreditation process sooner than expected; or for

any other reason that the accrediting entity deems appropriate.

(b) If an application is converted after the transitional application deadline, it will be treated as an application filed after the transitional application deadline, and the agency may not necessarily be provided an opportunity to complete the accreditation process in time to be included on the initial list of accredited agencies and approved persons that the Secretary will deposit with the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.100 Procedures for evaluating applicants for temporary accreditation.

(a) To evaluate an agency for temporary accreditation, the accrediting entity must:

(1) Review the agency's written application and supporting documentation; and

(2) Verify the information provided by the agency, as appropriate. The accrediting entity may also request additional documentation and information from the agency in support of the application as it deems necessary.

(b) The accrediting entity may also decide, in its discretion, that it must conduct a site visit to determine whether to approve the application for temporary accreditation. The site visit may include interviews with birth parents, adoptive parent(s), prospective adoptive parent(s), and adult adoptee(s) served by the agency, interviews with the agency's employees, and interviews with other individual(s) knowledgeable about its provision of adoption services. It may also include a review of on-site documents. The accrediting entity must, to the extent possible, advise the agency in advance of documents it wishes to review during the site visit. The provisions of §§ 96.25 and 96.26 will govern requests for and use of information.

(c) Before deciding whether to grant temporary accreditation to the agency, the accrediting entity may, in its discretion, advise the agency of any deficiencies that may hinder or prevent its temporary accreditation and defer a decision to allow the agency to correct the deficiencies.

(d) The accrediting entity may only use the criteria contained in § 96.96 when determining whether an agency is eligible for temporary accreditation.

(e) The eligibility criteria contained in § 96.96 and the standards contained in § 96.104 do not eliminate the need for an agency to comply fully with the laws of the jurisdictions in which it operates. An agency must provide adoption services in Convention cases consistent with the laws of any State in which it operates and with the Convention and the IAA.

§ 96.101 Notification of temporary accreditation decisions.

(a) The accrediting entity must notify agencies of its temporary accreditation decisions on the uniform notification date to be established by the Secretary pursuant to § 96.58(a). On that date, the accrediting entity must inform each applicant and the Secretary in writing whether the agency has been granted temporary accreditation. The accrediting entity may not provide any information about its temporary accreditation decisions to any agency or to the public until the uniform notification date. If the Secretary requests information on the interim or final status of an agency prior to the uniform notification date, the accrediting entity must provide such information to the Secretary.

(b) Notwithstanding paragraph (a) of this section, the accrediting entity may, in its discretion, communicate with agencies about the status of their pending applications for temporary accreditation for the sole purpose of affording them an opportunity to correct deficiencies that may hinder their temporary accreditation. When informed by an accrediting entity that an agency has been temporarily accredited, the Secretary will take appropriate steps to ensure that relevant information about a temporarily accredited agency is provided to the Permanent Bureau of the Hague Conference on Private International Law.

§ 96.102 Review of temporary accreditation decisions.

There is no administrative or judicial review of an accrediting entity's decision to deny temporary accreditation.

§ 96.103 Oversight by accrediting entities.

(a) The accrediting entity must oversee an agency that it has temporarily accredited by monitoring whether the agency is in substantial compliance with the standards contained in § 96.104 and through the process of assessing the agency's application for full accreditation when it is filed. The accrediting entity must also investigate any complaints or other information that becomes available to it about an agency it has temporarily accredited. Complaints against a temporarily accredited agency must be handled in accordance with subpart J of this part. For purposes of subpart J of this part, the temporarily accredited agency will be treated as if it were a fully accredited agency, except that:

(1) The relevant standards will be those contained in § 96.104 rather than those contained in subpart F of this part; and

(2) Enforcement action against the agency will be taken in accordance with § 96.105 and § 96.107 rather than in accordance with subpart K of this part.

(b) The accrediting entity may determine, in its discretion, that it must conduct a site visit to investigate a complaint or other information or otherwise monitor the agency.

(c) The accrediting entity may consider any information that becomes available to it about the compliance of the agency. The provisions of §§ 96.25 and 96.26 govern requests for and use of information.

§ 96.104 Performance standards for temporary accreditation.

The accrediting entity may not maintain an agency's temporary accreditation unless the agency demonstrates to the satisfaction of the accrediting entity that it is in substantial compliance with the following standards:

(a) The agency follows applicable licensing and regulatory requirements in all jurisdictions in which it provides adoption services;

(b) It does not engage in any improper conduct related to the provision of intercountry adoption services, as evidenced in part by the following:

(1) It maintains its State license without suspension or cancellation for misconduct;

(2) It is not subject to a finding of fault or liability in any administrative or judicial action; and

(3) It is not the subject of any criminal findings of fraud or financial misconduct;

(c) It adheres to the standards in § 96.36 prohibiting child buying;

(d) It adheres to the standards for responding to complaints in accordance with § 96.41;

(e) It adheres to the standards on adoption records and information relating to Convention cases in accordance with § 96.42;

(f) It adheres to the standards on providing data to the accrediting entity in accordance with § 96.43;

(g) When acting as the primary provider in a Convention adoption it complies with the standards in §§ 96.44 and 96.45 when using supervised providers in the United States and it complies with the standards in §§ 96.44 and 96.46 when using supervised providers or, to the extent permitted by § 96.14(c), other foreign providers in a Convention country;

(h) When performing or approving a home study in an incoming Convention case, it complies with the standards in § 96.47;

(i) When performing or approving a child background study or obtaining consents in an outgoing Convention case, it complies with the standards in § 96.53;

(j) When performing Convention functions in incoming or outgoing cases, it complies with the standards in § 96.52 or § 96.55;

(k) It has a plan to transfer its Convention cases and adoption records if it ceases to provide or is no longer permitted to provide adoption services in Convention cases. The plan includes provisions for an organized closure and reimbursement to clients of funds paid for services not yet rendered;

(l) It is making continual progress toward completing the process of obtaining full accreditation by the time its temporary accreditation expires; and

(m) It takes all necessary and appropriate measures to perform any tasks

in a Convention adoption case that the Secretary identifies are required to comply with the Convention, the IAA, or any regulations implementing the IAA.

§ 96.105 Adverse action against a temporarily accredited agency by an accrediting entity.

(a) If the accrediting entity determines that an agency it has temporarily accredited is substantially out of compliance with the standards in § 96.104, it may, in its discretion, withdraw the agency's temporary accreditation.

(b) The accrediting entity must notify the agency in writing of any decision to withdraw the agency's temporary accreditation. The written notice must identify the deficiencies necessitating the withdrawal. Before withdrawing the agency's temporary accreditation, the accrediting entity may, in its discretion, advise a temporarily accredited agency in writing of any deficiencies in its performance that may warrant withdrawal and provide it with an opportunity to demonstrate that withdrawal would be unwarranted before withdrawal occurs. If the accrediting entity withdraws the agency's temporary accreditation without such prior notice, it must provide a similar opportunity to demonstrate that the withdrawal was unwarranted after the withdrawal occurs, and may reinstate the agency's temporary accreditation based on the information provided.

(c) The provisions of §§ 96.25 and 96.26 govern requests for and use of information.

(d) The accrediting entity must notify the Secretary, in accordance with procedures established in its agreement with the Secretary, when it withdraws or reinstates an agency's temporary accreditation. The accrediting entity must also notify the relevant State licensing authority as provided in the agreement.

§ 96.106 Review of the withdrawal of temporary accreditation by an accrediting entity.

(a) A decision by an accrediting entity to withdraw an agency's temporary accreditation shall not be subject to administrative review.

(b) Withdrawal of temporary accreditation is analogous to cancellation of accreditation and is therefore an adverse action pursuant to § 96.75. In accordance with section 202(c)(3) of the IAA (42 U.S.C. 14922(c)(3)), a temporarily accredited agency that is the subject of an adverse action by an accrediting entity may petition the United States district court in the judicial district in which the agency is located to set aside the adverse action imposed by the accrediting entity. The United States district court shall review the adverse action in accordance with 5 U.S.C. 706. When a temporarily accredited agency petitions a United States district court to review the adverse action of an accrediting entity, the accrediting entity will be considered an agency as defined in 5 U.S.C. 701 for the purpose of judicial review of the adverse action.

§ 96.107 Adverse action against a temporarily accredited agency by the Secretary.

(a) The Secretary may, in the Secretary's discretion, withdraw an agency's temporary accreditation if the Secretary finds that the agency is substantially out of compliance with the standards in § 96.104 and the accrediting entity has failed or refused, after consultation with the Secretary, to take appropriate enforcement action.

(b) The Secretary may also withdraw an agency's temporary accreditation if the Secretary finds that such action;

(1) Will protect the interests of children;

(2) Will further U.S. foreign policy or national security interests; or

(3) Will protect the ability of U.S. citizens to adopt children under the Convention.

(c) If the Secretary withdraws an agency's temporary accreditation, the Secretary will notify the accrediting entity.

§ 96.108 Review of the withdrawal of temporary accreditation by the Secretary.

(a) There is no administrative review of a decision by the Secretary to withdraw an agency's temporary accreditation.

(b) Section 204(d) of the IAA (42 U.S.C. 14924(d)) provides for judicial review of final actions by the Secretary. Withdrawal of temporary accreditation, which is analogous to cancellation of accreditation, is a final action subject to judicial review.

(c) An agency whose temporary accreditation has been withdrawn by the Secretary may petition the United States District Court for the District of Columbia, or the United States district court in the judicial district in which the agency is located, to set aside the action pursuant to section 204(d) of the IAA (42 U.S.C. 14924(d)).

§ 96.109 Effect of the withdrawal of temporary accreditation by the accrediting entity or the Secretary.

(a) If an agency's temporary accreditation is withdrawn, it must cease to provide adoption services in all Convention cases and must execute the plan required by § 96.104(k) under the oversight of the accrediting entity, and transfer its Convention adoption cases and adoption records to an accredited agency, approved person, or a State archive, as appropriate.

(b) Where the agency is unable to transfer such Convention cases or adoption records in accordance with the plan or as otherwise agreed by the accrediting entity, the accrediting entity will so advise the Secretary who, with the assistance of the accrediting entity, will coordinate efforts to identify other accredited agencies or approved persons to assume responsibility for the cases, and to transfer the records to other accredited agencies or approved persons, or to public domestic authorities, as appropriate.

(c) When an agency's temporary accreditation is withdrawn or reinstated, the Secretary will, where appropriate, take steps to inform the Permanent Bureau of the Hague Conference on Private International Law.

(d) An agency whose temporary accreditation has been withdrawn may continue to seek full accreditation or may withdraw its pending application and apply for full accreditation at a later time. Its application for full accreditation must be made to the same accrediting entity that granted its application for temporary accreditation. If that entity is no longer providing accreditation services, it may apply to any accrediting entity with jurisdiction over its application.

(e) If an agency continues to pursue its application for full accreditation or subsequently applies for full accreditation, the accrediting entity may take the circumstances of the withdrawal of its temporary accreditation into account when evaluating the agency for full accreditation.

§ 96.110 Dissemination and reporting of information about temporarily accredited agencies.

The accrediting entity must disseminate and report information about agencies it has temporarily accredited as if they were fully accredited agencies, in accordance with subpart M of this part.

§ 96.111 Fees charged for temporary accreditation.

(a) Any fees charged by an accrediting entity for temporary accreditation will include a non-refundable fee for temporary accreditation set forth in a schedule of fees approved by the Secretary as provided in § 96.8(a). Such fees may not exceed the costs of temporary accreditation and must include the costs of all activities associated with the temporary accreditation cycle (including, but not limited to, costs for completing the temporary accreditation process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities). The temporary accreditation fee may not include the costs of site visit(s). The schedule of fees may provide, however,

that, in the event that a site visit is required to determine whether to approve an application for temporary accreditation, to investigate a complaint or other information, or otherwise to monitor the agency, the accrediting entity may assess additional fees for actual costs incurred for travel and maintenance of evaluators and for any additional administrative costs to the accrediting entity. In such a case, the accrediting entity may estimate the additional fees and may require that the estimated amount be paid in advance, subject to a refund of any overcharge. Temporary accreditation may be denied or withdrawn if the estimated fees are not paid.

(b) An accrediting entity must make its schedule of fees available to the public, including prospective applicants for temporary accreditation, upon request. At the time of application, the accrediting entity must specify the fees to be charged in a contract between the parties and must provide notice to the applicant that no portion of the fee will be refunded if the applicant fails to become temporarily accredited.

PART 97—ISSUANCE OF ADOPTION CERTIFICATES AND CUSTODY DECLARATIONS IN HAGUE CONVENTION ADOPTION CASES

Sec.

97.1 Definitions.
97.2 Application for a Hague Adoption Certificate or a Hague Custody Declaration (outgoing Convention case).
97.3 Requirements subject to verification in an outgoing Convention case.
97.4 Issuance of a Hague Adoption Certificate or a Hague Custody Declaration (outgoing Convention case).
97.5 Certification of Hague Convention Compliance in an incoming Convention case where final adoption occurs in the United States.
97.6–97.7 [Reserved]

AUTHORITY: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); Intercountry Adoption Act of 2000, 42 U.S.C. 14901–14954.

SOURCE: 71 FR 64456, Nov. 2, 2006, unless otherwise noted.

§ 97.1 Definitions.

As used in this part:

(a) *Adoption Court* means the State court with jurisdiction over the adoption or the grant of custody for purpose of adoption.

(b) *U.S. Authorized Entity* means a public domestic authority or an agency or person that is accredited or temporarily accredited or approved by an accrediting entity pursuant to 22 CFR part 96, or a supervised provider acting under the supervision and responsibility of an accredited agency or temporarily accredited agency or approved person.

(c) *Foreign Authorized Entity* means a foreign Central Authority or an accredited body or entity other than the Central Authority authorized by the relevant foreign country to perform Central Authority functions in a Convention adoption case.

(d) *Hague Adoption Certificate* means a certificate issued by the Secretary in an outgoing case (where the child is emigrating from the United States to another Convention country) certifying that a child has been adopted in the United States in accordance with the Convention and, except as provided in § 97.4(b), the IAA.

(e) *Hague Custody Declaration* means a declaration issued by the Secretary in an outgoing case (where the child is emigrating from the United States to another Convention country) declaring that custody of a child for purposes of adoption has been granted in the United States in accordance with the Convention and, except as provided in § 97.4(b), the IAA.

(f) Terms defined in 22 CFR 96.2 have the meaning given to them therein.

§ 97.2 Application for a Hague Adoption Certificate or a Hague Custody Declaration (outgoing Convention case).

(a) Once the Convention has entered into force for the United States, any party to an outgoing Convention adoption or custody proceeding may apply to the Secretary for a Hague Adoption Certificate or a Hague Custody Declaration. Any other interested person may also make such application, but such application will not be processed unless such applicant demonstrates

that a Hague Adoption Certificate or Hague Custody Declaration is needed to obtain a legal benefit or for purposes of a legal proceeding, as determined by the Secretary in the Secretary's discretion.

(b) Applicants for a Hague Adoption Certificate or Hague Custody Declaration shall submit to the Secretary:

(1) A completed application form in such form as the Secretary may prescribe, with any required fee;

(2) An official copy of the order of the adoption court finding that the child is eligible for adoption and that the adoption or proposed adoption is in the child's best interests and granting the adoption or custody for purposes of adoption;

(3) An official copy of the adoption court's findings (either in the order granting the adoption or custody for purposes of adoption or separately) verifying, in substance, that each of the requirements of §97.3 has been complied with or, if the adoption court has not verified compliance with a particular requirement in §97.3, authenticated documentation showing that such requirement nevertheless has been met and a written explanation of why the adoption court's verification of compliance with the requirement cannot be submitted; and

(4) Such additional documentation and information as the Secretary may request at the Secretary's discretion.

(c) If the applicant fails to submit all of the documentation and information required pursuant to paragraph (b)(4) of this section within 120 days of the Secretary's request, the Secretary may consider the application abandoned.

§97.3 Requirements subject to verification in an outgoing Convention case.

(a) *Preparation of child background study*. An accredited agency, temporarily accredited agency, or public domestic authority must complete or approve a child background study that includes information about the child's identity, adoptability, background, social environment, family history, medical history (including that of the child's family), and any special needs of the child.

(b) *Transmission of child data*. A U.S. authorized entity must conclude that the child is eligible for adoption and, without revealing the identity of the birth mother or the birth father if these identities may not be disclosed under applicable State law, transmit to a foreign authorized entity the background study, proof that the necessary consents have been obtained, and the reason for its determination that the proposed placement is in the child's best interests, based on the home study and child background study and giving due consideration to the child's upbringing and his or her ethnic, religious, and cultural background.

(c) *Reasonable efforts to find domestic placement*. Reasonable efforts pursuant to 22 CFR 96.54 must be made to actively recruit and make a diligent search for prospective adoptive parent(s) to adopt the child in the United States and a timely adoptive placement in the United States not found.

(d) *Preparation and transmission of home study*. A U.S. authorized entity must receive from a foreign authorized entity a home study on the prospective adoptive parent(s) prepared in accordance with the laws of the receiving country, under the responsibility of a foreign Central Authority, foreign accredited body, or public foreign authority, that includes:

(1) Information on the prospective adoptive parent(s)' identity, eligibility, and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the children for whom they would be qualified to care;

(2) Confirmation that a competent authority has determined that the prospective adoptive parent(s) are eligible and suited to adopt and has ensured that the prospective adoptive parent(s) have been counseled as necessary; and

(3) The results of a criminal background check.

(e) *Authorization to enter*. The Central Authority or other competent authority of the receiving country must declare that the child will be authorized to enter and reside in the receiving country permanently or on the same basis as the adopting parent(s).

(f) *Consent by foreign authorized entity.* A foreign authorized entity or competent authority must declare that it consents to the adoption, if its consent is necessary under the law of the relevant foreign country for the adoption to become final.

(g) *Guardian counseling and consent.* Each person, institution, and authority (other than the child) whose consent is necessary for the adoption must be counseled as necessary and duly informed of the effects of the consent (including whether or not an adoption will terminate the legal relationship between the child and his or her family of origin); must freely give consent expressed or evidenced in writing in the required legal form without any inducement by compensation of any kind; and consent must not have been subsequently withdrawn. If the consent of the mother is required, it may be given only after the birth of the child.

(h) *Child counseling and consent.* As appropriate in light of the child's age and maturity, the child must be counseled and informed of the effects of the adoption and the child's views must be considered. If the child's consent is required, the child must also be counseled and informed of the effects of granting consent, and must freely give consent expressed or evidenced in writing in the required legal form without any inducement by compensation of any kind.

(i) *Authorized entity duties.* A U.S. authorized entity must:

(1) Ensure that the prospective adoptive parent(s) agree to the adoption;

(2) Agree, together with a foreign authorized entity, that the adoption may proceed;

(3) Take all appropriate measures to ensure that the transfer of the child takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive parent(s) or the prospective adoptive parent(s), and arrange to obtain permission for the child to leave the United States; and

(4) Arrange to keep a foreign authorized entity informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required; to return the home study and the child background study to the authorities that forwarded them if the transfer of the child does not take place; and to be consulted in the event a new placement or alternative long-term care for the child is required.

(j) *Contacts.* Unless the child is being adopted by a relative, there may be no contact between the prospective adoptive parent(s) and the child's birthparent(s) or any other person who has care of the child prior to the competent authority's determination that the prospective adoptive parent(s) are eligible and suited to adopt and the adoption court's determinations that the child is eligible for adoption, that the requirements in paragraphs (c) and (g) of this section have been met, and that an intercountry adoption is in the child's best interests, *provided that* this prohibition on contacts shall not apply if the relevant State or public domestic authority has established conditions under which such contact may occur and any such contact occurred in accordance with such conditions.

(k) *Improper financial gain.* No one may derive improper financial or other gain from an activity related to the adoption, and only costs and expenses (including reasonable professional fees of persons involved in the adoption) may be charged or paid.

§ 97.4 Issuance of a Hague Adoption Certificate or a Hague Custody Declaration (outgoing Convention case).

(a) Once the Convention has entered into force for the United States, the Secretary shall issue a Hague Adoption Certificate or a Hague Custody Declaration if the Secretary, in the Secretary's discretion, is satisfied that the adoption or grant of custody was made in compliance with the Convention and the IAA.

(b) If compliance with the Convention can be certified but it is not possible to certify compliance with the IAA, the Secretary personally may authorize issuance of an appropriately modified Hague Adoption Certificate or Hague Custody Declaration, in the interests of justice or to prevent grave physical harm to the child.

§97.5 Certification of Hague Convention Compliance in an incoming convention case where final adoption occurs in the United States.

(a) Once the Convention has entered into force for the United States, any person may request the Secretary to certify that a Convention adoption in an incoming case finalized in the United States was done in accordance with the Convention.

(b) Persons seeking such a certification must submit the following documentation:

(1) A copy of the certificate issued by a consular officer pursuant to 22 CFR 42.24(j) certifying that the granting of custody of the child has occurred in compliance with the Convention;

(2) An official copy of the adoption court's order granting the final adoption; and

(3) Such additional documentation and information as the Secretary may request at the Secretary's discretion.

(c) If a person seeking the certification described in paragraph (a) of this section fails to submit all the documentation and information required pursuant to paragraph (b) of this section within 120 days of the Secretary's request, the Department may consider the request abandoned.

(d) The Secretary may issue the certification if the Secretary, in the Secretary's discretion, is satisfied that the adoption was made in compliance with the Convention. The Secretary may decline to issue a certification, including to a party to the adoption, in the Secretary's discretion. A certification will not be issued to a non-party requestor unless the requestor demonstrates that the certification is needed to obtain a legal benefit or for purposes of a legal proceeding, as determined by the Secretary in the Secretary's discretion.

(e) A State court's final adoption decree, when based upon the certificate issued by a consular officer pursuant to 22 CFR 42.24(j), certifying that the grant of custody of the child has occurred in compliance with the Convention, or upon its determination that the requirements of Article 17 of the Convention have been met constitutes the certification of the adoption under Article 23 of the Convention.

§§97.6–97.7 [Reserved]

PART 98—INTERCOUNTRY ADOPTION—CONVENTION RECORD PRESERVATION

Sec.
98.1 Definitions.
98.2 Preservation of Convention records.

AUTHORITY: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); Intercountry Adoption Act of 2000, 42 U.S.C. 14901–14954.

SOURCE: 71 FR 8164, Feb. 15, 2006, unless otherwise noted.

§98.1 Definitions.

As used in this part:

(a) Convention means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

(b) Convention record means any item, collection, or grouping of information contained in an electronic or physical document, an electronic collection of data (including the information contained in the Case Registry), a photograph, an audio or video tape, or any other information storage medium of any type whatever that contains information about a specific past, current, or prospective adoption covered by the Convention (regardless of whether the adoption was made final) that has been generated or received by the Secretary or the Department of Homeland Security (DHS). Convention record includes a record, generated or received by the Secretary or DHS, about a specific adoption case involving two Convention countries other than the United States in connection with which the Secretary or DHS performs a Central Authority function.

(c) Such other terms as are defined in 22 CFR 96.2 shall have the meaning given to them therein.

§98.2 Preservation of Convention records.

Once the Convention has entered into force for the United States, the Secretary and DHS will preserve, or require the preservation of, Convention

records for a period of not less than 75 years. For Convention records involving a child who is immigrating to the United States and Convention records involving a child who is emigrating from the United States, the 75-year period shall start on the date that the Secretary or DHS generates or receives the first Convention record related to the adoption of the child. For an intercountry adoption or placement for adoption involving two Convention countries other than the United States, the 75-year period shall start on the date that the Secretary or DHS generates or receives the first Convention record in connection with the performance of a Central Authority function.

PART 99—REPORTING ON CONVENTION AND NON-CONVENTION ADOPTIONS OF EMIGRATING CHILDREN

Sec.
99.1 Definitions.
99.2 Reporting requirements for adoption cases involving children emigrating from the United States.
99.3 [Reserved]

AUTHORITY: The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); The Intercountry Adoption Act of 2000, 42 U.S.C. 14901–14954.

SOURCE: 72 FR 9854, Mar. 6, 2007, unless otherwise noted.

§ 99.1 Definitions.

As used in this part, the term:

(a) *Convention* means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993.

(b) Such other terms as are defined in 22 CFR 96.2 shall have the meaning given to them therein.

§ 99.2 Reporting requirements for adoption cases involving children emigrating from the United States.

(a) Once the Convention has entered into force for the United States, an agency (including an accredited agency and temporarily accredited agency), person (including an approved person), public domestic authority, or other adoption service provider providing adoption services in a case involving the emigration of a child from the United States must report information to the Secretary in accordance with this section if it is identified as the reporting provider in accordance with paragraph (b) of this section.

(b) In a Convention case in which an accredited agency, temporarily accredited agency, or approved person is providing adoption services, the primary provider is the reporting provider. In any other Convention case, or in a non-Convention case, the reporting provider is the agency, person, public domestic authority, or other adoption service provider that is providing adoption services in the case, if it is the only provider of adoption services. If there is more than one provider of adoption services in a non-Convention case, the reporting provider is the one that has child placement responsibility, as evidenced by the following factors:

(1) Entering into placement contracts with prospective adoptive parent(s) to provide child referral and placement;

(2) Accepting custody from a birthparent or other legal guardian for the purpose of placement for adoption;

(3) Assuming responsibility for liaison with a foreign government or its designees with regard to arranging an adoption; or

(4) Receiving information from, or sending information to a foreign country about a child that is under consideration for adoption.

(c) A reporting provider, as identified in paragraph (b) of this section, must report the following identifying information to the Secretary for each outgoing case within 30 days of learning that the case involves emigration of a child from the United States to a foreign country:

(1) Name, date of birth of child, and place of birth of child;

(2) The U.S. State from which the child is emigrating;

(3) The country to which the child is immigrating;

(4) The U.S. State where the final adoption is taking place, or the U.S. State where legal custody for the purpose of adoption is being granted and

the country where the final adoption is taking place; and

(5) Its name, address, phone number, and other contact information.

(d) A reporting provider, as identified in paragraph (b) of this section, must report any changes to information previously provided as well as the following milestone information to the Secretary for each outgoing case within 30 days of occurrence:

(1) Date case determined to involve emigration from the United States (generally the time the child is matched with adoptive parents);

(2) Date of U.S. final adoption or date on which custody for the purpose of adoption was granted in United States;

(3) Date of foreign final adoption if custody for purpose of adoption was granted in the United States, to the extent practicable; and

(4) Any additional information when requested by the Secretary in a particular case.

§ 99.3 [Reserved]

SUBCHAPTER K—ECONOMIC AND OTHER FUNCTIONS

PART 101—ECONOMIC AND COMMERCIAL FUNCTIONS

Sec.
101.1 Protection of American interests.
101.2 Promotion of American interests.
101.3 Services for American businessmen and organizations.
101.4 Economic and commercial reporting.

AUTHORITY: Sec. 302, 60 Stat. 1001; 22 U.S.C. 842.

SOURCE: 22 FR 10871, Dec. 27, 1957, unless otherwise noted.

§ 101.1 Protection of American interests.

Officers of the Foreign Service shall protect the rights and interests of the United States in its international agricultural, commercial, and financial relations. In pursuance of this duty, they shall:

(a) Guard against the infringement of rights of American citizens in matters relating to commerce and navigation which are based on custom, international law, or treaty.

(b) Observe, report on, and, whenever possible, endeavor to remove discriminations against American agricultural, commercial, and industrial interests in other countries.

(c) Protect the national commercial reputation of the United States.

§ 101.2 Promotion of American interests.

Officers of the Foreign Service shall further the agricultural and commercial interests of the United States:

(a) By carefully studying and reporting on the potentialities of their districts as a market for American products or as a competitor of American products in international trade.

(b) By investigating and submitting World Trade Directory Reports on the general standing and distributing capacity of foreign firms within their districts.

(c) By preparing and submitting upon request trade lists of commercial firms within their districts.

(d) By keeping constantly on the alert for and submitting immediate reports on concrete trade opportunities.

(e) By endeavoring to create, within the scope of the duties to which they are assigned, a demand for American products within their districts.

(f) By facilitating and reporting on proposed visits of alien businessmen to the United States.

(g) By taking appropriate steps to facilitate the promotion of such import trade into the United States as the economic interests of the United States may require.

§ 101.3 Services for American businessmen and organizations.

Officers of the Foreign Service shall perform the following-enumerated services for American citizens and business organizations in connection with the conduct of foreign trade subject to such rules and limitations thereon as may be prescribed by the Secretary of State:

(a) Answering trade inquiries.

(b) Lending direct assistance to American citizens and business firms.

(c) Encouraging the establishment of, and supporting, American chambers of commerce.

(d) Preparing themselves for and, upon instructions, performing trade conference work when in the United States on leave, or otherwise.

§ 101.4 Economic and commercial reporting.

Officers of the Foreign Service shall prepare and submit reports in connection with their duties of protecting and promoting American agricultural commercial interests and for the purpose of providing general information on economic developments within their respective districts for the Departments of State, Agriculture, and Commerce, and for other governmental departments and agencies, in accordance with such rules and regulations as the Secretary of State may prescribe.

PART 102—CIVIL AVIATION

Subpart A—United States Aircraft Accidents Abroad

Sec.
102.8 Reporting accidents.
102.9 Arranging for entry and travel of investigating and airline representatives.
102.10 Rendering assistance at the scene of the accident.
102.11 Arranging for the payment of expenses attendant upon an accident.
102.12 Protective services for survivors.
102.13 Protective services with respect to deceased victims of accidents.
102.14 Salvage of mail and other property.
102.15 Protection and preservation of wreckage.
102.16 Records and reports in connection with investigation.

FOREIGN AIRCRAFT ACCIDENTS INVOLVING UNITED STATES PERSONS OR PROPERTY

102.17 Reports on accident.
102.18 Protection of United States citizens involved.
102.19 Protection of United States property.

Subpart B—Recommendations to the President Under Section 801 of the Federal Aviation Act of 1958

102.21 Purpose.
102.22 [Reserved]
102.23 Applicability.
102.24 [Reserved]
102.25 Submission of comments.
102.26 [Reserved]
102.27 Docket.

Subpart A—United States Aircraft Accidents Abroad

AUTHORITY: Sec. 302, 60 Stat. 1001; 22 U.S.C. 842.

SOURCE: 22 FR 10871, Dec. 27, 1957, unless otherwise noted.

§ 102.8 Reporting accidents.

(a) *To airline and Civil Aeronautics Administration representatives.* If a scheduled United States air carrier is involved the airline representatives concerned will probably be the first to be informed of the accident, in which event he will be expected to report the accident to the Foreign Service post, to the nearest Civil Aeronautics Administration office, and to his home office in the United States. If this is not the case, the Foreign Service post should report promptly to the nearest office of the airline concerned and to the nearest office of the Civil Aeronautics Administration, any accident occurring to a scheduled civil air carrier of United States registry within its consular district. To be properly prepared, each post should obtain and have on file for ready reference, the address and telephone number of representatives of any United States airline engaged in scheduled operations within or over the post district.

(b) *To Department and supervisory Foreign Service offices.* A Foreign Service post should report promptly to the Department accidents to any United States civil aircraft occurring in the post district. The report should summarize all available information and, in the case of a scheduled United States air carrier, should state whether the airline has taken over the responsibility of notifying the nearest Civil Aeronautics Administration field office. This report should be submitted by the most expeditious means possible (priority telephone or telegraph message) at Government expense. If the accident involves a private plane or nonscheduled air carrier, these circumstances should be reported, also whether the nearest office of the Civil Aeronautics Administration has been informed. In the latter case, the Department will ascertain from the Civil Aeronautics Board whether it desires to investigate the case, and inform the Foreign Service post accordingly. Consular posts should submit a similar report to their supervisory missions or to their supervisory consular offices in territories where there are no United States missions. Supplementary reports should be supplied the Department and the supervisory Foreign Service office whenever considered appropriate. A final report, after the urgency has diminished, and when the post's role is negligible should cover the post's activities in connection with the accident (see § 102.16(b)).

§ 102.9 Arranging for entry and travel of investigating and airline representatives.

Representatives of the Civil Aeronautics Board, the Civil Aeronautics Administration and the United States

airline involved may not have the documents necessary for entry into the country where the accident occurred. The local Foreign Service post should lend all assistance possible in obtaining the entry of such representatives into the country where the accident occurred and in expediting their travel to the scene of the accident.

§ 102.10 Rendering assistance at the scene of the accident.

Always in the case of a scheduled United States air carrier and whenever necessary in the case of a non-scheduled carrier or private plane, a local Foreign Service post should dispatch a member of its staff to the scene of the accident in order to insure that proper protection is afforded United States citizens and property involved in the accident and that any evidence as to the cause of the accident is preserved until the arrival of United States Government investigating personnel. (For steps to be taken when the aircraft was carrying a courier or diplomatic pouches, see § 102.14(b).) In the absence of an airline representative, the Foreign Service representative should lend the competent local authorities all possible assistance compatible with the provisions of § 102.11 in caring for the survivors, identifying and disposing of the remains of victims, salvaging and protecting property and preserving wreckage pending an investigation. If an airline representative is already at the scene of the accident or if one arrives shortly thereafter, the Foreign Service representative should assist him in the discharge of his recognized responsibilities in connection with passengers and cargo. However, the Foreign Service representative is also obligated to assist investigating personnel of the United States Government by preserving evidence as to the cause of the accident. Any attempt on the part of the airline representative to exceed his recognized sphere of activity should be called to the attention of the airline involved and the competent local authorities.

§ 102.11 Arranging for the payment of expenses attendant upon an accident.

(a) The Department of State has no funds from which expenses attendant upon an accident to United States aircraft can be paid. In emergencies involving scheduled carriers and in the absence of airline representatives, or other authority, the Foreign Service post should request a deposit from the airline (through the Department if desired) with specific authorization to incur whatever financial obligations the airline is willing to assume for the hiring of guards (in case local police protection is considered inadequate), the provision of accommodations, medical care, and onward transportation for survivors and for other expenses resulting from the accident. In accidents involving a private plane or non-scheduled carrier, the Foreign Service post is not in a position to expend any funds without prior authorization from the Department. In such cases, and in extreme cases involving scheduled carriers, when airline and investigation personnel may be delayed in reaching the scene, the Foreign Service representative, as the representative of all segments of the United States Government in the area, should endeavor to protect and promote the interests of the Government, the airline, and the individual citizen by any means available to him that are consistent with these regulations, and should request funds and instructions as required from the Department.

(b) The local Foreign Service post is not authorized to expend any funds for guarding the wreckage to preserve evidence as to the cause of the accident unless the Civil Aeronautics Board or the Civil Aeronautics Administration authorizes in advance the expenditure of such funds on a reimbursable basis. In the absence of such advance authorization, the Foreign Service post can arrange only for such protection as local authorities are willing to furnish gratuitously.

(c) Voluntary services and personal services in excess of those authorized by law may be accepted and utilized in the case of an aircraft accident since the law which normally prohibits such acceptance (31 U.S.C. 665) does not

apply ''in case of sudden emergency involving the loss of human life or the destruction of property''.

§ 102.12 Protective services for survivors.

(a) *Medical care and hospitalization.* The Foreign Service representative should lend any assistance possible (see §§ 102.10 and 102.11) in arranging for the best medical and hospital attention available for injured survivors of the accident. If a scheduled United States carrier is involved in an accident, the primary responsibility for providing medical care for passengers and crew rests with the airline, and in such situations the Foreign Service representative should assist the airline in every way that is feasible (see §§ 102.10 and 102.11).

(b) *Accommodation and onward transportation.* If a scheduled United States carrier is involved in an accident, primary responsibility for providing accommodation and onward transportation for passengers and crew rests with the airline, and in such situations the Foreign Service representative should assist the airline in every way that is feasible (see §§ 102.10 and 102.11). If the accident involves a private plane or non-scheduled carrier, he should assist passengers and members of the crew who do not require hospitalization in any way compatible with §§ 102.10 and 102.11 in obtaining appropriate comfortable accommodations accessible from the scene of the accident. If practicable, surviving passengers should remain in the vicinity of the accident until the United States Government investigating personnel can obtain from them all information pertaining to the accident. Surviving passengers leaving the vicinity should furnish addresses at which they can be reached later. The Foreign Service representative should assist the passengers, insofar as he can under the provision of §§ 102.10 and 102.11, in obtaining necessary clearances from local authorities and in getting onward transportation by the most expeditious means of common carrier transportation available. The surviving aircraft crew will be expected to remain in the vicinity of the accident until otherwise instructed by the investigating personnel.

§ 102.13 Protective services with respect to deceased victims of accidents.

(a) *Interim disposition of remains.* Generally, local authorities will assume custody of the remains of deceased victims of the accident and consign them to a mortuary until final disposition can be made.

(b) *Identification of remains.* When necessary, the local Foreign Service post should assist in identifying the remains of United States citizens who are victims of the accident by requesting the Department to procure dental charts, passport application data and photographs, fingerprints, or other United States records.

(c) *Reports on deaths of United States citizens.* The local Foreign Service post shall report the deaths of United States citizens occurring in an aircraft accident in accordance with the procedure prescribed in §§ 72.1 to 72.8 of this chapter.

(d) *Disposition of remains.* When a scheduled United States air carrier meets with an accident, the United States airline concerned will usually transport the identifiable remains of victims of the accident to the place of final interment designated by the next of kin. If the Foreign Service post is requested, or finds it necessary, to dispose of identifiable remains, it shall follow the procedure prescribed in §§ 72.9 to 72.14 of this chapter. Where remains are unidentifiable, the local authorities may be expected to make final disposition of these remains locally in accordance with the health requirements of the country concerned, usually by common burial or by cremation, and without regard to the disposition desired by possible next of kin.

§ 102.14 Salvage of mail and other property.

(a) *Mail.* Article 3, sections 6 and 7, of the Air Mail Provisions annexed to the Universal Postal Union Convention, Paris, 1947, provide that the personnel who survive the aircraft accident shall, when possible, deliver the mail to the post office nearest the place of the accident or to the one best-qualified to

reforward the mail. If the aircraft personnel are unable to do this, the local post office concerned shall make every effort, without delay, to take delivery of the mail and to forward it to the offices of designation by the most rapid means, after determining the condition of the correspondence and reconditioning it if damaged. Most post offices are familiar with these provisions, but if in any case the mail is not being properly cared for, the local Foreign Service post should bring the proper procedure to the attention of the nearest post office.

(b) *Diplomatic pouches.* Immediately upon arriving at the scene of the accident, the Foreign Service representative should ascertain whether the aircraft was carrying a courier or diplomatic pouches. If a courier is found to be aboard, the same personal arrangements should be made for him as are made for other passengers (see §§ 102.10 to 102.13). An immediate search should also be made for whatever diplomatic pouches the courier may have been carrying and for any pouches that may have been carried as regular cargo. Usually, the cargo manifest will list diplomatic pouches carried as air freight or cargo. The passenger manifest normally will list the total number of pieces of luggage or pouches checked by a courier (if one is aboard), but since he usually carries his pouches with him into the cabin of the plane, the pouch invoices on his person or in his briefcase will offer positive proof of the number of pouches he had in his custody. If any are found, they should be cleared through appropriate government officials of the country and taken to the nearest United States Foreign Service office to await disposition instructions. If it is learned that the postal authorities have already recovered United States diplomatic pouches that may have been involved, these pouches should be obtained from the postal authorities and taken to the nearest United States Foreign Service office to await diposition instructions. A telegraphic message should be dispatched to the Department and to the regional courier office having jurisdiction over that area, giving a description of the pouches recovered. This description should include the office of addressor and addressee and the classification indicator (C, A, or S). The Department and the regional courier office will coordinate instructions to the office for the disposition of these pouches.

(c) *Baggage, personal effects and cargo.* The Foreign Service representative should request the local authorities to arrange for the security storage and protection of such baggage, personal effects and cargo as is recoverable from the aircraft until the property can be released to its owners by local customs and accident investigating authorities, or by the courts. When released, the personal effects of United States citizens, who died in the accident, should be taken into possession and disposed of by the local Foreign Service post in accordance with the procedure prescribed in §§ 72.15 to 72.55 of this chapter.

§ 102.15 Protection and preservation of wreckage.

In so far as local law permits, the Foreign Service representative should see that arrangements are made (by the airline representative with the local authorities, if a scheduled carrier is involved) for the protection of the wrecked aircraft and its property contents against further damage, pilferage, and access by unauthorized persons, until the arrival of the accident investigation personnel. The prior removal of any of the wreckage or the contents of the aircraft should be prevented unless such action is necessitated by very compelling reasons, such as the need for treating the injured or for removing bodies, or when the wreckage constitutes a public hazard. When under the latter conditions the wreckage and contents of the aircraft must be moved or disturbed in any way, if possible, a record should be made or photographs taken showing the position and condition of the wreckage prior to disturbance. In the case of a private aircraft or non-scheduled carrier, protection should be arranged for the wrecked aircraft and its contents pending the receipt of information from the Department as to whether the Civil Aeronautics Board will investigate the case, and until

final disposition is made of the property. If the owner of a private aircraft is killed in the wreck and is a United States citizen, the aircraft constitutes part of his personal estate and should be disposed of in accordance with the provisions of §§72.15 to 72.55 of this chapter. For rules governing the payment of expenses in connection with the protection and preservation of wrecked United States aircraft, see §102.11.

§102.16 Records and reports in connection with investigation.

(a) *Records*. The Foreign Service representative should maintain a record of the various transactions taking place prior to the arrival of airline, Civil Aeronautics Board and Civil Aeronautics Administration representatives. This record should include all pertinent details with respect to the disposition of persons and property, obligations assumed, arrangements made, et cetera, and should also include any statements made by witnesses.

(b) *Reports*. Reports should be submitted to the Department for its information and the information of aviation authorities and other interested parties in the United States regarding the progress of any investigation which is held and its final outcome when known.

FOREIGN AIRCRAFT ACCIDENTS INVOLVING UNITED STATES PERSONS OR PROPERTY

§102.17 Reports on accident.

When an accident occurs to a foreign aircraft in the district of a Foreign Service post and United States citizens or property are involved, the local Foreign Service post shall report the disaster fully to the Department and to the supervisory mission (or the supervisory consular office where there is no mission).

§102.18 Protection of United States citizens involved.

The local Foreign Service post shall follow substantially the procedures prescribed in §§102.11 to 102.13 in protecting United States citizens (whether alive or dead) involved in a foreign aircraft accident.

§102.19 Protection of United States property.

The local Foreign Service office shall follow substantially the procedures set forth in §§102.11 and 102.14 in protecting United States mail and baggage, personal effects and cargo belonging to United States citizens.

Subpart B—Recommendations to the President Under Section 801 of the Federal Aviation Act of 1958

AUTHORITY: Sec. 4, Act of May 26, 1949, as amended (63 Stat. 111; 22 U.S.C. 2658); E.O. 11920 (June 11, 1976, 41 FR 23665).

SOURCE: 41 FR 31548, July 29, 1976, unless otherwise noted.

§102.21 Purpose.

The purpose of this subpart is to set forth procedures for the receipt by the Department of State of comments from private parties on possible recommendations by the Department to the President on decisions of the Civil Aeronautics Board submitted for the President's approval under section 801 of the Federal Aviation Act of 1958, which relates to overseas and international air transportation.

§102.22 [Reserved]

§102.23 Applicability.

(a) This subpart applies to all communications between private parties and officials or employees of the Department of State, including those stationed abroad, on matters set forth in §102.21 of this subpart.

(b) This subpart applies, with respect to any particular proceeding before the Civil Aeronautics Board, from the time that the Board's decision has been submitted to the President for consideration until the President has issued a final decision with respect to that proceeding.

§102.24 [Reserved]

§102.25 Submission of comments.

(a) All communications by private parties with Departmental officials or employees concerning a Presidential

decision under section 801 of the Federal Aviation Act shall, whenever possible, be made in writing. Any such communication which is not made in writing shall be summarized by the official or employee of the Department who receives the communication.

(b) All such summaries and written communications, except those relating to matters that are specifically authorized under criteria established by Executive Order to be kept confidential in the interest of national defense or foreign policy, are to be placed in a public docket and available for public inspection and copying and for responsive comment.

§ 102.26 [Reserved]

§ 102.27 Docket.

(a) All comments submitted under this subpart shall reference the number of the Civil Aeronautics Board docket relating to the proceeding which is the subject of the comment.

(b) The original and four copies of such comments may be mailed to the Director, Office of Aviation, Department of State, Washington, DC 20520, or delivered to the Director, Office of Aviation, Room 5830, Department of State, Washington, DC 20520, 8:45 a.m. to 5:30 p.m. local time, Monday through Friday except Federal holidays. Written comments submitted to Department officials other than the Director of the Office of Aviation and summaries of oral communications prepared in accordance with § 102.25(a) of this subpart shall be forwarded to the Director of the Office of Aviation.

(c) All comments submitted under this subpart and placed in the docket, are available for public inspection and copying and for responsive comment at the address and times specified in paragraph (b) of this section.

PART 103—REGULATIONS FOR IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION AND THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT OF 1998 ON THE TAKING OF SAMPLES AND ON ENFORCEMENT OF REQUIREMENTS CONCERNING RECORDKEEPING AND INSPECTIONS

Subpart A—General

Sec.
103.1 Purpose.
103.2 Definitions.

Subpart B—Samples

103.3 Requirement to provide a sample.

Subpart C—Recordkeeping and Inspection Requirements

103.4 General.
103.5 Violations.
103.6 Penalties.
103.7 Initiation of administrative enforcement proceedings.
103.8 Final agency decision after administrative proceedings.
103.9 Final agency decision after settlement negotiations.
103.10 Appeals.
103.11 Payment of final assessment.
103.12 Reporting a violation.

AUTHORITY: Pub. L. 105–277, 112 Stat. 2681, Div. I (22 U.S.C. 6701 *et seq.*).

SOURCE: 64 FR 73813, Dec. 30, 1999, unless otherwise noted.

Subpart A—General

§ 103.1 Purpose.

This part is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention Implementation Act of 1998 (Act), 22 U.S.C. 6701 *et seq*. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce, 15 CFR Parts 710 through 722, also implement sections of the Act.

§ 103.2 Definitions.

The following are definitions of terms as used in this part only.

Bureau of Export Administration (BXA). The Bureau of Export Administration of the United States Department of Commerce, including the Office of Export Administration and the Office of Export Enforcement.

Chemical Weapons Convention (CWC or Convention). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and its annexes opened for signature on January 13, 1993, and entered into force on April 29, 1997.

CWCIA. The Chemical Weapons Convention Implementation Act of 1998. (22 U.S.C. 6701 *et seq.*)

CWCR. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce. (15 CFR parts 710 through 722.)

Executive Director. The Executive Director, Office of the Legal Adviser, U.S. Department of State.

Facility agreement. A written agreement or arrangement between a State Party to the Convention and the Organization for the Prohibition of Chemical Weapons relating to a specific facility subject to on-site verification pursuant to Articles IV, V, and VI of the Convention.

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further administrative review under this part, but which may be subject to collection proceedings or judicial review in an appropriate federal court as authorized by law.

Host Team. The U.S. Government team that accompanies the Inspection Team during a CWC inspection to which this part applies.

Host Team Leader. The head of the U.S. Government team that hosts and accompanies the Inspection Team during a CWC inspection to which this part applies.

Inspection assistant. An individual designated by the Technical Secretariat to assist inspectors in an inspection, such as medical, security and administrative personnel and interpreters.

Inspection Team. The group of inspectors and inspection assistants assigned by the Director-General of the OPCW's Technical Secretariat to conduct a particular inspection.

Lead agency. The executive department or agency responsible for implementation of the CWC declaration and inspection requirements for specified facilities. The lead agencies are the Department of Defense (DOD) for facilities owned and operated by DOD (including those operated by contractors to the agency), and those facilities leased to and operated by DOD (including those operated by contractors to the agency); the Department of Energy (DOE) for facilities owned and operated by DOE (including those operated by contractors to the agency), and those facilities leased to and operated by DOE (including those operated by contractors to the agency), including the National Laboratories and components of the nuclear weapons complex; and the Department of Commerce (DOC) for all facilities that are not owned and operated by or leased to and operated by DOD, DOE or other U.S. Government agencies. Other departments and agencies that have notified the United States National Authority of their decision to be excluded from the CWCR shall also have lead agency responsibilities for facilities that are owned or operated by (including those operated by contractors to the agency), or that are leased to or operated by, those other departments and agencies (including those operated by contractors to the agency).

Office of Chemical and Biological Weapons Conventions. The office in the Bureau of Arms Control of the United States Department of State that includes the United States National Authority Coordinating Staff.

Organization for the Prohibition of Chemical Weapons (OPCW). The entity established by the Convention to achieve the object and purpose of the Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

Party. The United States Department of State and any person named as a respondent under this part.

Perimeter. In case of a challenge inspection, the external boundary of the

site, defined by either geographic coordinates or description on a map.

Person. Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

Respondent. Any person named as the subject of a letter of intent to charge, or a Notice of Violation and Assessment (NOVA) and proposed order.

Secretary. The Secretary of State.

Technical Secretariat. The Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

United States National Authority. The Department of State serving as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and States Parties to the Convention and implementing the provisions of the CWCIA in coordination with an interagency group designated by the President consisting of the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Energy, the Chairman of the Joint Chiefs of Staff and the heads of agencies considered necessary or advisable by the President, or their designees. The Secretary of State is the Director of the United States National Authority.

Subpart B—Samples

§ 103.3 Requirement to provide a sample.

(a) *Voluntary provision of a sample*. The Host Team Leader will notify appropriate site representatives of any request by an Inspection Team to take a sample. At the request of the appropriate site representative, this notification will be in writing. A site representative may volunteer to provide a sample to the Inspection Team, or may communicate to the Host Team Leader any reason for which the representative believes a sample should not be required.

(b) *Notification of requirement to provide a sample*. If a sample is not provided pursuant to paragraph (a) of this section, the Host Team Leader will notify, in writing, the owner or operator, occupant or agent in charge of an inspected premises of any requirement, under paragraph (c) or (e) of this section, to provide a sample pursuant to a request, made in accordance with paragraph (k) of this section, of an Inspection Team of the Technical Secretariat.

(c) *Requirement to provide a sample*. Pursuant to section 304(f)(1) of the CWCIA, unless a lead agency advises the United States National Authority pursuant to paragraph (d) of this section, the owner or operator, occupant or agent in charge of the premises to be inspected is hereby required to provide a sample pursuant to a request, made in accordance with paragraph (k) of this section, of an Inspection Team of the Technical Secretariat that a sample be taken in accordance with the applicable provisions contained in the Chemical Weapons Convention and the CWCIA.

(d) *Consultations with the United States National Authority*. After consulting with the Host Team Leader, a lead agency that finds that any of the following conditions, as modified pursuant to paragraph (j) of this section if applicable, may not have been satisfied shall promptly advise the United States National Authority, which, in coordination with the interagency group designated by the President in section 2 of Executive Order 13128, shall make a decision:

(1) The taking of a sample is consistent with the inspection aims under the Convention and with its Confidentiality Annex;

(2) The taking of a sample does not unnecessarily hamper or delay the operation of a facility or affect its safety, and is arranged so as to ensure the timely and effective discharge of the Inspection Team's functions with the least possible inconvenience and disturbance to the facility;

(3) The taking of a sample is consistent with the applicable facility agreement. In particular:

(i) Any sample will be taken at sampling points agreed to in the relevant facility agreement; and

(ii) Any sample will be taken according to procedures agreed to in the relevant facility agreement;

(4) In the absence of a facility agreement, due consideration is given to existing sampling points used by the owner or operator, occupant or agent in charge of the premises, consistent with any procedures developed pursuant to the CWCR (15 CFR parts 710 through 722);

(5) The taking of a sample does not affect the safety of the premises and will be consistent with safety regulations established at the premises, including those for protection of controlled environments within a facility and for personal safety;

(6) The taking of a sample does not pose a threat to the national security interests of the United States; and

(7) The taking of a sample is consistent with any conditions negotiated pursuant to paragraph (j) of this section, if applicable.

(e) *Determination by United States National Authority*. (1) If, after being advised by the lead agency pursuant to paragraph (d) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that all of the conditions of paragraph (d) are satisfied and that a sample shall be required, then the owner or the operator, occupant or agent in charge of the premises shall provide a sample pursuant to a request of the Inspection Team of the Technical Secretariat.

(2) If, however, after being advised by the lead agency pursuant to paragraph (d) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that any of the conditions of paragraph (d) are not satisfied and that a sample shall not be required, then the owner or the operator, occupant or agent in charge of the premises shall not be required to provide a sample pursuant to a request of the Inspection Team of the Technical Secretariat.

(f) *Person to take a sample*. If a sample is required, the owner or the operator, occupant or agent in charge of the inspected premises will determine whether the sample will be taken by a representative of the premises, the Inspection Team, or any other individual present. The owner or the operator, occupant or agent in charge of the inspected premises may elect to have a representative present during the taking of a sample.

(g) *Requirement that samples remain in the United States*. No sample collected in the United States pursuant to an inspection permitted by the CWCIA may be transferred for analysis to any laboratory outside the territory of the United States.

(h) *Handling of samples*. Samples will be handled in accordance with the Convention, the CWCIA, other applicable law, and the provisions of any applicable facility agreement.

(i) *Failure to comply with this section*. Failure by any person to comply with this section may be treated as a violation of section 306 of the Act and section 103.5(a).

(j) *Conditions that restrict sampling activities during challenge inspections*. During challenge inspections within the inspected premises the Host Team may negotiate conditions that restrict activities regarding sampling, e.g., conditions that restrict where, when, and how samples are taken, whether samples are removed from the site, and how samples are analyzed.

(k) *Format of Inspection Team request*. It is the policy of the United States Government that Inspection Team requests for samples should be in written form from the head of the Inspection Team. When necessary, before a sample is required to be provided, the Host Team Leader should seek a written request from the head of the Inspection Team.

(l) *Requirement to provide a sample in the band around the outside of the perimeter during a challenge inspection*. In a band, not to exceed a width of 50 meters, around the outside of the perimeter of the inspected site, the Inspection Team, during a challenge inpsection, may take wipes, air, soil or effluent samples where either:

(1) There is consent; or

(2) Such activity is authorized by a search warrant obtained pursuant to section 305(b)(4) of the CWCIA.

Subpart C—Recordkeeping and Inspection Requirements

§ 103.4 General.

This subpart implements the enforcement of the civil penalty provisions of section 501 of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), and sets forth relevant administrative proceedings by which such violations are adjudicated. Both the Department of State (in this subpart), and the Department of Commerce (in part 719 of the CWCR at 15 CFR parts 710 through 722) are involved in the implementation and enforcement of section 501.

§ 103.5 Violations.

(a) *Refusal to permit entry or inspection.* No person may willfully fail or refuse to permit entry or inspection, or disrupt, delay or otherwise impede an inspection, authorized by the CWCIA.

(b) *Failure to establish or maintain records.* No person may willfully fail or refuse:

(1) To establish or maintain any record required by the CWCIA or the Chemical Weapons Convention Regulations (CWCR, 15 CFR parts 710 through 722) of the Department of Commerce; or

(2) To submit any report, notice, or other information to the United States Government in accordance with the CWCIA or CWCR; or

(3) To permit access to or copying of any record that is exempt from disclosure under the CWCIA or the CWCR.

§ 103.6 Penalties.

(a) *Civil penalties*—(1) *Civil penalty for refusal to permit entry or inspection.* Any person that is determined to have willfully failed or refused to permit entry or inspection, or to have willfully disrupted, delayed or otherwise impeded an authorized inspection, as set forth in § 103.5(a), shall pay a civil penalty in an amount not to exceed $25,000 for each violation. Each day the violation continues constitutes a separate violation.

(2) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain any record, or to submit any report, notice, or other information required by the CWCIA or the CWCR, or to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCR as set forth in § 103.5(b), shall pay a civil penalty in an amount not to exceed $5,000 for each violation.

(b) *Criminal penalties.* Any person that knowingly violates the CWCIA by willfully failing or refusing to permit entry or inspection; or by disrupting, delaying or otherwise impeding an inspection authorized by the CWCIA; or by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information; or by willfully failing or refusing to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCR, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, or be imprisoned for not more than one year, or both.

(c) *Other remedial action*—(1) *Injunction.* The United States may, in a civil action, obtain an injunction against:

(i) The conduct prohibited under 18 U.S.C. 229 or 229C; or

(ii) The preparation or solicitation to engage in conduct prohibited under 18 U.S.C. 229 or 229D.

(2) In addition, the United States may, in a civil action, restrain any violation of section 306 or section 405 of the CWCIA, or compel the taking of any action required by or under the CWCIA or the Convention.

§ 103.7 Initiation of administrative enforcement proceedings.

(a) *Issuance of Notice of Violation and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, Department of Commerce, may request that the Secretary initiate an administrative enforcement proceeding under this section and 15 CFR 719.5. If the request is in accordance with applicable law, the Secretary will initiate an administrative enforcement proceeding by issuing a Notice of Violation and Assessment (NOVA). The Office of Chief Counsel for Export Administration, Department of

Commerce shall serve the NOVA as directed by the Secretary.

(b) *Content of NOVA*. The NOVA shall constitute a formal complaint, and will set forth the basis for the issuance of the proposed order. It will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the amount of the civil penalty to be assessed. The NOVA will inform the respondent of the right to request a hearing pursuant to paragraph (e) of this section and the CWCR (15 CFR parts 710 through 722) at 15 CFR 719.6, inform the respondent that failure to request such a hearing shall result in the proposed order becoming final and unappealable on signature of the Secretary of State, and provide payment instructions. A copy of the regulations that govern the administrative proceedings will accompany the NOVA.

(c) *Proposed order*. A proposed order shall accompany every NOVA. It will briefly set forth the substance of the alleged violation(s) and the statutory, regulatory or other provisions violated. It will state the amount of the civil penalty to be assessed.

(d) *Notice*. The Secretary shall notify, via the Department of Commerce, the respondent (or respondent's agent for service of process or attorney) of the initiation of administrative proceedings by sending, via first class mail, facsimile, or by personal delivery, the relevant documents.

(e) *Time to answer*. If the respondent wishes to contest the NOVA and proposed order issued by the Secretary, the respondent must request a hearing in writing within 15 days from the date of the NOVA. If the respondent requests a hearing, the respondent must answer the NOVA within 30 days from the date of the request for hearing. The request for hearing and answer must be filed with the Administrative Law Judge (ALJ), along with a copy of the NOVA and proposed order, and served on the Office of Chief Counsel for Export Administration, Department of Commerce, and any other address(es) specified in the NOVA, in accordance with 15 CFR 719.8.

(f) *Content of answer*. The respondent's answer must be responsive to the NOVA and proposed order, and must fully set forth the nature of the respondent's defense(s). The answer must specifically admit or deny each separate allegation in the NOVA; if the respondent is without knowledge, the answer will so state and will operate as a denial. Failure to deny or controvert a particular allegation will be deemed an admission of that allegation. The answer must also set forth any additional or new matter the respondent believes supports a defense or claim of mitigation. Any defense or partial defense not specifically set forth in the answer shall be deemed waived, and evidence thereon may be refused, except for good cause shown.

(g) *English required*. The request for hearing, answer, and all other papers and documentary evidence must be submitted in English.

(h) *Waiver*. The failure of the respondent to file a request for a hearing and an answer within the times provided constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA and proposed order. If no hearing is requested and no answer is provided, the Secretary will sign the proposed order, which shall, upon signature, become final and unappealable.

(i) *Administrative procedures*. The regulations that govern the administrative procedures that apply when a hearing is requested are set forth in the CWCR at 15 CFR part 719.

§ 103.8 Final agency decision after administrative proceedings.

(a) *Review of initial decision*—(1) *Petition for review*. Any party may, within 7 days of the Administrative Law Judge's (ALJ) certification of the initial decision and order, petition the Secretary for review of the initial decision. A petition for review shall be addressed to and served on the Executive Director of the Office of the Legal Adviser, U.S. Department of State, 2201 C Street, N.W., Room 5519, Washington D.C. 20520, and shall also be served on the Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H–3839, Washington, D.C.

20230, and on the respondent. Petitions for review may be filed only on one or more of the following grounds:

(i) That a necessary finding of fact is omitted, erroneous or not supported by substantial evidence of record;

(ii) That a necessary legal conclusion or finding is contrary to law;

(iii) That a prejudicial procedural error has occurred; or

(iv) That the decision or the extent of sanctions is arbitrary, capricious or an abuse of discretion.

(2) *Content of petition for review*. The petition must specifically set forth the grounds on which review is requested and be supported by citations to the record, statutes, regulations, and principal authorities.

(3) *Decision to review*. Review of the initial decision by the Secretary is discretionary, and is not a matter of right. The Secretary shall accept or decline review of the initial decision and order within 3 days after a petition for review is filed. If no such petition is filed, the Secretary may, on his or her own initiative, notify the parties within 10 days after the ALJ's certification of the initial decision and order that he or she intends to exercise his or her discretion to review the initial decision.

(4) *Effect of decision to review*. The initial decision is stayed until further order of the Secretary upon a timely petition for review, or upon action to review taken by the Secretary on his or her own initiative.

(5) *Review declined*. If the Secretary declines to exercise discretionary review, such order, and the resulting final agency decision, will be served on all parties personally, by overnight mail, or by registered or certified mail, return receipt requested. The Secretary need not give reasons for declining review.

(6) *Review accepted*. If the Secretary grants a petition for review or decides to review the initial decision on his or her own initiative, he or she will issue an order confirming that acceptance and specifying any issues to be briefed by all parties within 10 days after the order. Briefing shall be limited to the issues specified in the order. Only those issues specified in the order will be considered by the Secretary. The parties may, within 5 days after the filing of any brief of the issues, file and serve a reply to that brief. The Department of Commerce shall review all written submissions, and, based on the record, make a recommendation to the Secretary as to whether the ALJ's initial decision should be modified or vacated. The Secretary will make a final decision within 30 days after the ALJ's certification of the initial decision and order.

(b) *Final decision*. Unless the Secretary, within 30 days after the date of the ALJ's certification of the initial decision and order, modifies or vacates the decision and order, with or without conditions, the ALJ's initial decision and order shall become effective as the final decision and order of the United States Government. If the Secretary does modify or vacate the initial decision and order, that decision and order of the Secretary shall become the final decision and order of the United States Government. The final decision and order shall be served on the parties and will be made available to the public.

(c) *Computation of time for the purposes of this section*. In computing any period of time prescribed or allowed by this section, the day of the act, event, or default from which the designated period of time begins to run is not included. The last day of the period is computed to be included unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 6(a) of the Federal Rules of Civil Procedure), in which case the period runs until the end of the next day that is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of time prescribed or allowed is 7 days or less.

§ 103.9 Final agency decision after settlement negotiations.

(a) *Settlements based on letter of intent to charge*—(1) *Approval of settlement*. Pursuant to § 719.5(b) of the CWCR (15 CFR parts 710 through 722), the Department of Commerce may notify a respondent by letter of the intent to charge. If, following the issuance of such a letter of intent to charge, the Department of Commerce and respondent reach an agreement to settle a

case, the Department of Commerce will recommend the proposed settlement to the Secretary. If the recommended settlement is in accordance with applicable law the Secretary will approve and sign it. No action is required by the ALJ in cases where the Secretary approves and signs such a settlement agreement and order.

(2) *Refusal to approve settlement*. If the Secretary refuses to approve the recommended settlement, the Secretary will notify the parties and the case will proceed as though no settlement proposal had been made.

(b) *Settlements following issuance of a NOVA*—(1) *Approval of settlement*. When the Department of Commerce and respondent reach an agreement to settle a case after administrative proceedings have been initiated before an ALJ, the Department of Commerce will recommend the settlement to the Secretary of State. If the recommended settlement is in accordance with applicable law, the Secretary will approve and sign it. If the Secretary approves the settlement, the Secretary shall notify the ALJ that the case is withdrawn from adjudication.

(2) *Refusal to approve settlement*. If the Secretary of State refuses to approve the recommended settlement, the Secretary will notify the parties of the disapproval, and the case will proceed as though no settlement proposal had been made.

(c) *Scope of settlement*. Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought pursuant to this part. This reflects the fact that the Government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility is vested in the Attorney General and the Department of Justice.

(d) *Finality*. Cases that are settled may not be reopened or appealed.

§ 103.10 Appeals.

Any person adversely affected by a final order respecting an assessment may, within 30 days after the final order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit or for any other circuit in which the person resides or transacts business, to appeal the order.

§ 103.11 Payment of final assessment.

(a) *Time for payment*. Full payment of the civil penalty must be made within 30 days of the date upon which the final order becomes effective, or within the time specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order*. The Secretary, through the Attorney General, may file suit in an appropriate district court if necessary to enforce compliance with a final order issued pursuant to this part. This suit will include a claim for interest at current prevailing rates from the date payment was due or ordered or, if an appeal was filed pursuant to § 103.10, from the date of final judgment.

(c) *Offsets*. The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 103.12 Reporting a violation.

If a person learns that a violation of the Convention, the CWCIA, this part, or the CWCR (15 CFR parts 710 through 722) has occurred or may occur, that person may notify: United States National Authority, Office of Chemical and Biological Weapons Conventions, Bureau of Arms Control, U.S. Department of State, Washington, DC 20520, Telephone: (703) 235–1204 or toll-free (877) CWC-NACS ((877) 292–6227), Facsimile: (703) 235–1065.

PART 104—INTERNATIONAL TRAFFICKING IN PERSONS: INTERAGENCY COORDINATION OF ACTIVITIES AND SHARING OF INFORMATION

Sec.
104.1 Coordination of implementation of the Trafficking Victims Protection Act of 2000, as amended.
104.2 Sharing of information regarding international trafficking in persons.

AUTHORITY: 22 U.S.C. 7103(f)(5); Executive Order 13257 (as amended by Executive Order 13333).

SOURCE: 70 FR 59655, Oct. 13, 2005, unless otherwise noted. Redesignated at 71 FR 12132, Mar. 9, 2006.

§ 104.1 Coordination of implementation of the Trafficking Victims Protection Act of 2000, as amended.

The Director of the Office to Monitor and Combat Trafficking in Persons of the Department of State, who is the Chairperson of the Senior Policy Operating Group of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons, shall call meetings of the Senior Policy Operating Group on a regular basis to coordinate activities of Federal departments and agencies regarding policies (including grants and grant policies) involving the international trafficking in persons and the implementation of the Trafficking Victims Protection Act of 2000, as amended.

§ 104.2 Sharing of information regarding international trafficking in persons.

Each Federal Department or agency represented on the Senior Policy Operating Group shall, to the extent permitted by law, share information on all matters relating to grants, grant policies, or other significant actions regarding the international trafficking in persons. In its coordinating role, the Senior Policy Operating Group shall establish appropriate mechanisms to effect such information sharing.

SUBCHAPTER L [RESERVED]

SUBCHAPTER M—INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

PART 120—PURPOSE AND DEFINITIONS

Sec.
120.1 General authorities, receipt of licenses, and ineligibility.
120.2 Designation of defense articles and defense services.
120.3 Policy on designating or determining defense articles and services on the U.S. Munitions List.
120.4 Commodity jurisdiction.
120.5 Relation to regulations of other agencies.
120.6 Defense article.
120.7 Significant military equipment.
120.8 Major defense equipment.
120.9 Defense service.
120.10 Technical data.
120.11 Public domain.
120.12 Directorate of Defense Trade Controls.
120.13 United States.
120.14 Person.
120.15 U.S. person.
120.16 Foreign person.
120.17 Export.
120.18 Temporary import.
120.19 Reexport or retransfer.
120.20 License or other approval.
120.21 Manufacturing license agreement.
120.22 Technical assistance agreement.
120.23 Distribution agreement.
120.24 Port Directors.
120.25 Empowered Official.
120.26 Presiding Official.
120.27 U.S. criminal statutes.
120.28 Listing of forms referred to in this subchapter.
120.29 Missile Technology Control Regime.
120.30 The Automated Export System (AES).
120.31 North Atlantic Treaty Organization.
120.32 Major non-NATO ally.
120.33 Defense Trade Cooperation Treaty between the United States and Australia.
120.34 Defense Trade Cooperation Treaty between the United States and the United Kingdom.
120.35 Australia Implementing Arrangement.
120.36 United Kingdom Implementing Arrangement.
120.37 Foreign ownership and foreign control.
120.38 Maintenance levels.
120.39 Regular employee.
120.40 Affiliate.
120.41 Specially designed.
120.42 Subject to the Export Administration Regulations (EAR).
120.43 [Reserved]
120.44 Foreign defense article or defense service.

AUTHORITY: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39283, July 22, 1993, unless otherwise noted.

§ 120.1 General authorities, receipt of licenses, and ineligibility.

(a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778), as amended, authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services is delegated to the Secretary of State by Executive Order 13637. This subchapter implements that authority, as well as other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*). By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary of State for Defense Trade Controls, Bureau of Political-Military Affairs.

(b)(1) *Authorized officials.* All authorities administered by the Deputy Assistant Secretary of State for Defense Trade Controls pursuant to this subchapter may be exercised at any time by the Under Secretary of State for Arms Control and International Security or the Assistant Secretary of State for Political-Military Affairs.

(2) The Deputy Assistant Secretary of State for Defense Trade Controls supervises the Directorate of Defense Trade Controls, which is comprised of the following offices:

(i) The Office of Defense Trade Controls Licensing and the Director, Office of Defense Trade Controls Licensing, which have responsibilities related to licensing or other approvals of defense trade, including references under parts 120, 123, 124, 125, 126, 129, and 130 of this subchapter.

(ii) The Office of Defense Trade Controls Compliance and the Director, Office of Defense Trade Controls Compliance, which have responsibilities related to violations of law or regulation and compliance therewith, including references contained in parts 122, 126, 127, 128, and 130 of this subchapter, and that portion under part 129 of this subchapter pertaining to registration.

(iii) The Office of Defense Trade Controls Policy and the Director, Office of Defense Trade Controls Policy, which have responsibilities related to the general policies of defense trade, including references under parts 120 and 126 of this subchapter, and the commodity jurisdiction procedure under part 120 of this subchapter.

(c) *Receipt of licenses and eligibility*. (1) A U.S. person may receive a license or other approval pursuant to this subchapter. A foreign person may not receive such a license or other approval, except as follows:

(i) A foreign governmental entity in the U.S. may receive a license or other approval;

(ii) A foreign person may receive a reexport or retransfer approval; or

(iii) A foreign person may receive a prior approval for brokering activities.

A request for a license or other approval by a U.S. person or by a person referred to in paragraphs (c)(1)(i) and (c)(1)(iii) of this section will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to part 122 or 129 of this subchapter, as appropriate.

(2) Persons who have been convicted of violating the U.S. criminal statutes enumerated in § 120.27, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (e.g., charged by criminal information in lieu of indictment) with violating the U.S. criminal statutes enumerated in § 120.27, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under § 126.7(a) of this subchapter, are generally ineligible to be involved in activities regulated under the subchapter.

(d) The exemptions provided in this subchapter do not apply to transactions in which the exporter, any party to the export (*see* § 126.7(e) of this subchapter), any source or manufacturer, broker or other participant in the brokering activities, is generally ineligible as set forth in paragraph (c)(2) of this section, unless prior written authorization has been granted by the Directorate of Defense Trade Controls.

[78 FR 52684, Aug. 26, 2013, as amended at 79 FR 8084, Feb. 11, 2014]

§ 120.2 Designation of defense articles and defense services.

The Arms Export Control Act (22 U.S.C. 2778(a) and 2794(7)) provides that the President shall designate the articles and services deemed to be defense articles and defense services for purposes of import or export controls. The President has delegated to the Secretary of State the authority to control the export and temporary import of defense articles and services. The items designated by the Secretary of State for purposes of export and temporary import control constitute the U.S. Munitions List specified in part 121 of this subchapter. Defense articles on the U.S. Munitions List specified in part 121 of this subchapter that are also subject to permanent import control by the Attorney General on the U.S. Munitions Import List enumerated in 27 CFR part 447 are subject to temporary import controls administered by the Secretary of State. Designations of defense articles and defense services are made by the Department of State with the concurrence of the Department of Defense. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778). For a designation or determination on whether a particular item is enumerated on the U.S. Munitions List, *see* § 120.4 of this subchapter.

[78 FR 22752, Apr. 16, 2013]

§ 120.3 Policy on designating or determining defense articles and services on the U.S. Munitions List.

(a) For purposes of this subchapter, a specific article or service may be designated a defense article (*see* § 120.6 of this subchapter) or defense service (*see* § 120.9 of this subchapter) if it:

(1) Meets the criteria of a defense article or defense service on the U.S. Munitions List; or

(2) Provides the equivalent performance capabilities of a defense article on the U.S. Munitions List.

(b) For purposes of this subchapter, a specific article or service shall be determined in the future as a defense article or defense service if it provides a critical military or intelligence advantage such that it warrants control under this subchapter.

NOTE TO PARAGRAPHS (a) AND (b): An article or service determined in the future pursuant to this subchapter as a defense article or defense service, but not currently on the U.S. Munitions List, will be placed in U.S. Munitions List Category XXI until the appropriate U.S. Munitions List category has been amended to provide the necessary entry.

(c) A specific article or service is not a defense article or defense service for purposes of this subchapter if it:

(1) Is determined to be under the jurisdiction of another department or agency of the U.S. Government (*see* § 120.5 of this subchapter) pursuant to a commodity jurisdiction determination (*see* § 120.4 of this subchapter) unless superseded by changes to the U.S. Munitions List or by a subsequent commodity jurisdiction determination; or

(2) Meets one of the criteria of § 120.41(b) of this subchapter when the article is used in or with a defense article and specially designed is used as a control criteria (*see* § 120.41 of this subchapter).

NOTE TO § 120.3: The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose), by itself, is not a factor in determining whether the article or service is subject to the controls of this subchapter.

[78 FR 22753, Apr. 16, 2013]

§ 120.4 Commodity jurisdiction.

(a) The commodity jurisdiction procedure is used with the U.S. Government if doubt exists as to whether an article or service is covered by the U.S. Munitions List. It may also be used for consideration of a redesignation of an article or service currently covered by the U.S. Munitions List. The Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List. Upon electronic submission of a Commodity Jurisdiction (CJ) Determination Form (Form DS–4076), the Directorate of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List. The determination, consistent with §§ 120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce, and other U.S. Government agencies and industry in appropriate cases.

(b) Registration with the Directorate of Defense Trade Controls as defined in part 122 of this subchapter is not required prior to submission of a commodity jurisdiction request. If it is determined that the commodity is a defense article or defense service covered by the U.S. Munitions List, registration is required for exporters, manufacturers, and furnishers of such defense articles and defense services (see part 122 of this subchapter), as well as for brokers who are engaged in brokering activities related to such articles or services.

(c) Requests shall identify the article or service, and include a history of this product's design, development, and use. Brochures, specifications, and any other documentation related to the article or service should be submitted as electronic attachments per the instructions for Form DS–4076.

(d)(1) [Reserved]

(2) A designation that an article or service meets the criteria of a defense article or defense service, or provides the equivalent performance capabilities of a defense article on the U.S. Munitions List set forth in this subchapter, is made on a case-by-case basis by the Department of State, taking into account:

(i) The form and fit of the article; and

(ii) The function and performance capability of the article.

(3) A designation that an article or service has a critical military or intelligence advantage such that it warrants control under this subchapter is made, on a case-by-case basis, by the Department of State, taking into account:

(i) The function and performance capability of the article; and

(ii) The nature of controls imposed by other nations on such items (including the Wassenaar Arrangement and other multilateral controls).

NOTE 1 TO PARAGRAPH (d): The *form* of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The *fit* of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The *function* of a commodity is the action or actions it is designed to perform. *Performance capability* is the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency).

NOTE 2 TO PARAGRAPH (d): For software, the *form* means the design, logic flow, and algorithms. The *fit* is defined by its ability to interface or connect with a defense article. The *function* means the action or actions the software performs directly related to a defense article or as a standalone application.

Performance capability means the measure of the software's effectiveness to perform a designated function.

(e) The Directorate of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Directorate of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.

(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.

(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Deputy Assistant Secretary of State for Defense Trade Controls. The Deputy Assistant Secretary's determination of the appeal will be provided, in writing, within 30 days of receipt of the appeal. If desired, an appeal of the Deputy Assistant Secretary's decision can then be made to the Assistant Secretary for Political-Military Affairs.

[58 FR 39283, July 22, 1993, as amended at 71 FR 20536, Apr. 21, 2006; 75 FR 46843, Aug. 4, 2010; 78 FR 22753, Apr. 16, 2013; 79 FR 8084, Feb. 11, 2014]

§ 120.5 Relation to regulations of other agencies.

(a) If a defense article or service is covered by the U.S. Munitions List set forth in this subchapter, its export and temporary import is regulated by the Department of State (*see* also § 120.2 of this subchapter). The President has delegated the authority to control defense articles and services for purposes of permanent import to the Attorney General. The defense articles and services controlled by the Secretary of State and the Attorney General collectively comprise the U.S. Munitions List under the Arms Export Control Act (AECA). As the Attorney General exercises independent delegated authority to designate defense articles and services for purposes of permanent import controls, the permanent import control list administered by the Department of Justice has been separately labeled the U.S. Munitions Import List (27 CFR part 447) to distinguish it from the list set out in this subchapter. In carrying out the functions delegated to the Attorney General pursuant to the AECA, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace and the external security and foreign policy of the United States. The Department of Commerce regulates the export, reexport, and in-country transfer of items on the Commerce Control List and other items subject to its jurisdiction, as well as the provision of certain proliferation activities, under the Export Administration Regulations (EAR) (15 CFR parts 730 through 774). For the relationship of this subchapter to regulations of the Department of Energy and

the Nuclear Regulatory Commission, *see* § 123.20 of this subchapter.

(b) A license or other approval from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (*see* § 120.42 of this subchapter). Separate approval from the Department of Commerce is not required for these items when approved for export under a Department of State license or other approval. Those items subject to the EAR exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce for any subsequent transactions. The inclusion of items subject to the EAR on a Department of State license or approval does not change the jurisdiction of the items. (*See* § 123.1(b) of this subchapter for guidance on identifying items subject to the EAR in a license application to the Department of State.)

[78 FR 22753, Apr. 16, 2013; 78 FR 61754, Oct. 3, 2013]

§ 120.6 Defense article.

Defense article means any item or technical data designated in § 121.1 of this subchapter. The policy described in § 120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in § 121.1 of this subchapter. It does not include basic marketing information on function or purpose or general system descriptions.

§ 120.7 Significant military equipment.

(a) *Significant military equipment* means articles for which special export controls are warranted because of their capacity for substantial military utility or capability.

(b) Significant military equipment includes:

(1) Items in § 121.1 of this subchapter which are preceded by an asterisk; and

(2) All classified articles enumerated in § 121.1 of this subchapter.

[58 FR 39283, July 22, 1993, as amended at 62 FR 67275, Dec. 24, 1997]

§ 120.8 Major defense equipment.

Pursuant to section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6) note), *major defense equipment* means any item of significant military equipment (as defined in § 120.7) on the U.S. Munitions List having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000.

§ 120.9 Defense service.

(a) *Defense service* means:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see § 120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also § 124.1.)

(b) [Reserved]

[62 FR 67275, Dec. 24, 1997]

§ 120.10 Technical data.

(a) *Technical data* means, for purposes of this subchapter:

(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities or information in the public domain as defined in § 120.11 of this subchapter. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

[58 FR 39283, July 22, 1993, as amended at 61 FR 48831, Sept. 17, 1996; 71 FR 20537, Apr. 21, 2006; 78 FR 22754, Apr. 16, 2013; 78 FR 61754, Oct. 3, 2013]

§ 120.11 Public domain.

(a) *Public domain* means information which is published and which is generally accessible or available to the public:

(1) Through sales at newsstands and bookstores;

(2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

(3) Through second class mailing privileges granted by the U.S. Government;

(4) At libraries open to the public or from which the public can obtain documents;

(5) Through patents available at any patent office;

(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;

(7) Through public release (*i.e.*, unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also § 125.4(b)(13) of this subchapter);

(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

(b) [Reserved]

§ 120.12 Directorate of Defense Trade Controls.

Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State, Washington, DC 20522–0112.

[71 FR 20537, Apr. 21, 2006]

§ 120.13 United States.

United States, when used in the geographical sense, includes the several states, the Commonwealth of Puerto Rico, the insular possessions of the United States, the District of Columbia, the Commonwealth of the Northern Mariana Islands, any territory or possession of the United States, and any territory or possession over which the United States exercises any powers of administration, legislation, and jurisdiction.

§ 120.14 Person.

Person means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. If a provision in this subchapter does not refer exclusively to a foreign person (§ 120.16) or U.S. person (§ 120.15), then it refers to both.

§ 120.15 U.S. person.

U.S. person means a person (as defined in § 120.14 of this part) who is a lawful permanent resident as defined

by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in § 120.16 of this part.

[71 FR 20537, Apr. 21, 2006]

§ 120.16 Foreign person.

Foreign person means any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).

[71 FR 20537, Apr. 21, 2006]

§ 120.17 Export.

(a) *Export* means:

(1) Sending or taking a defense article out of the United States in any manner, except by mere travel outside of the United States by a person whose personal knowledge includes technical data; or

(2) Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, whether in the United States or abroad; or

(3) Disclosing (including oral or visual disclosure) or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government (e.g., diplomatic missions); or

(4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad; or

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

(6) A launch vehicle or payload shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter. However, for certain limited purposes (see § 126.1 of this subchapter), the controls of this subchapter may apply to any sale, transfer or proposal to sell or transfer defense articles or defense services.

(b) [Reserved]

§ 120.18 Temporary import.

Temporary import means bringing into the United States from a foreign country any defense article that is to be returned to the country from which it was shipped or taken, or any defense article that is in transit to another foreign destination. Temporary import includes withdrawal of a defense article from a customs bonded warehouse or foreign trade zone for the purpose of returning it to the country of origin or country from which it was shipped or for shipment to another foreign destination. Permanent imports are regulated by the Attorney General under the direction of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (see 27 CFR parts 447, 478, 479, and 555).

[71 FR 20537, Apr. 21, 2006]

§ 120.19 Reexport or retransfer.

Reexport or *retransfer* means the transfer of defense articles or defense services to an end-use, end-user, or destination not previously authorized by license, written approval, or exemption pursuant to this subchapter.

[77 FR 16597, Mar. 21, 2012]

§ 120.20 License or other approval.

License means a document bearing the word ''license'' issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or his authorized designee, that permits the export, temporary import, or brokering of a specific defense article or defense service controlled by this subchapter.

Other approval means a document issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or his authorized designee, that approves an activity regulated by this subchapter (e.g., approvals for

brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in this subchapter.

[79 FR 8084, Feb. 11, 2014]

§ 120.21 Manufacturing license agreement.

An agreement (e.g., contract) whereby a U.S. person grants a foreign person an authorization to manufacture defense articles abroad and which involves or contemplates:

(a) The export of technical data (as defined in § 120.10) or defense articles or the performance of a defense service; or

(b) The use by the foreign person of technical data or defense articles previously exported by the U.S. person. (See part 124 of this subchapter).

§ 120.22 Technical assistance agreement.

An agreement (e.g., contract) for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles. Assembly of defense articles is included under this section, provided production rights or manufacturing know-how are not conveyed. Should such rights be transferred, § 120.21 is applicable. (See part 124 of this subchapter).

§ 120.23 Distribution agreement.

An agreement (e.g., a contract) to establish a warehouse or distribution point abroad for defense articles exported from the United States for subsequent distribution to entities in an approved sales territory (see part 124 of this subchapter).

§ 120.24 Port Directors.

Port Directors of U.S. Customs and Border Protection means the U.S. Customs and Border Protection Port Directors at the U.S. Customs and Border Protection Ports of Entry (other than the port of New York, New York where their title is the Area Directors).

[70 FR 50959, Aug. 29, 2005]

§ 120.25 Empowered Official.

(a) *Empowered Official* means a U.S. person who:

(1) Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and

(2) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and

(3) Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the International Traffic in Arms Regulations; and

(4) Has the independent authority to:

(i) Inquire into any aspect of a proposed export, temporary import, or brokering activity by the applicant;

(ii) Verify the legality of the transaction and the accuracy of the information to be submitted; and

(iii) Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

(b) For the purposes of a broker who is a foreign person, the empowered official may be a foreign person who otherwise meets the criteria for an empowered official in paragraph (a) of this section.

[58 FR 39283, July 22, 1993, as amnded at 78 FR 52685, Aug. 26, 2013]

§ 120.26 Presiding Official.

Presiding Official means a person authorized by the U.S. Government to conduct hearings in administrative proceedings.

§ 120.27 U.S. criminal statutes.

(a) For purposes of this subchapter, the phrase *U.S. criminal statutes* means:

(1) Section 38 of the Arms Export Control Act (22 U.S.C. 2778);

(2) Section 11 of the Export Administration Act of 1979 (50 U.S.C. app. 2410);

(3) Section 793, 794, or 798 of title 18, United States Code (relating to espionage involving defense or classified information) or section 2332d, 2339A, 2339B, 2339C, or 2339D of such title (relating to financial transactions with the government of a country designated as a country supporting international terrorism, providing material

support to terrorists or terrorist organizations, financing of terrorism, or receiving military-type training from a foreign terrorist organization);

(4) Section 16 of the Trading with the Enemy Act (50 U.S.C. app. 16);

(5) Section 206 of the International Emergency Economic Powers Act (relating to foreign assets controls; 50 U.S.C. 1705);

(6) Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd–1) or section 104 of the Foreign Corrupt Practices Act (15 U.S.C. 78dd–2 or 78dd–3);

(7) Chapter 105 of title 18, United States Code (relating to sabotage);

(8) Section 4(b) of the Internal Security Act of 1950 (relating to communication of classified information; 50 U.S.C. 783(a));

(9) Sections 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276);

(10) Section 601 of the National Security Act of 1947 (relating to intelligence identities protection; 50 U.S.C. 421);

(11) [Reserved]

(12) Section 371 of title 18, United States Code (when it involves conspiracy to violate any of the statutes listed in this section);

(13) Sections 3, 4, 5, and 6 of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458 sections 6903–6906, relating to missile systems designed to destroy aircraft (18 U.S.C. 2332g), prohibitions governing atomic weapons (42 U.S.C. 2122), radiological dispersal services (18 U.S.C. 2332h), and variola virus (18 U.S.C. 175c);

(14) Sections 2779 and 2780 of title 22, United States Code (relating to fees of military sales agents and other payments, and transactions with countries supporting acts of international terrorism);

(15) Section 542 of title 18, United States Code (relating to the entry of goods by means of false statements), where the underlying offense involves a defense article, including technical data, or violations related to the Arms Export Control Act or International Traffic in Arms Regulations;

(16) Section 545 of title 18, United States Code (relating to smuggling goods into the United States), where the underlying offense involves a defense article, including technical data, or violations related to the Arms Export Control Act or International Traffic in Arms Regulations;

(17) Section 554 of title 18, United States Code (relating to smuggling goods from the United States), where the underlying offense involves a defense article, including technical data, or violations related to the Arms Export Control Act or International Traffic in Arms Regulations; and

(18) Section 1001 of title 18, United States Code (relating to false statements or entries generally), Section 1831 of title 18, United States Code (relating to economic espionage), and Section 1832 of title 18, United States Code (relating to theft of trade secrets) where the underlying offense involves a defense article, including technical data, or violations related to the Arms Export Control Act or International Traffic in Arms Regulations.

(b) [Reserved]

[58 FR 39283, July 22, 1993, as amended at 71 FR 20537, Apr. 21, 2006; 78 FR 52685, Aug. 26, 2013]

§ 120.28 Listing of forms referred to in this subchapter.

The forms referred to in this subchapter are available from the following government agencies:

(a) Department of State, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, Washington, DC 20522–0112.

(1) Application/License for permanent export of unclassified defense articles and related technical data (Form DSP–5).

(2) Statement of Registration (Form DS–2032).

(3) Application/License for temporary import of unclassified defense articles (Form DSP–61).

(4) Application/License for temporary export of unclassified defense articles (Form DSP–73).

(5) Non-transfer and use certificate (Form DSP–83).

(6) Application/License for permanent/temporary export or temporary import of classified defense articles and related classified technical data (Form DSP–85).

(7) Authority to Export Defense Articles and Defense Services sold under the Foreign Military Sales program (Form DSP–94).

(8) Commodity Jurisdiction (CJ) Determination Form (Form DS–4076).

(b) Department of Commerce, Bureau of Industry and Security:

(1) International Import Certificate (Form BIS–645P/ATF–4522).

(2) Electronic Export Information filed via the Automated Export System.

(c) Department of Defense, Defense Security Cooperation Agency: Letter of Offer and Acceptance.

[58 FR 39283, July 22, 1993, as amended at 68 FR 61100, Oct. 27, 2003; 71 FR 20537, Apr. 21, 2006; 75 FR 46844, Aug. 4, 2010; 76 FR 45197, July 28, 2011; 77 FR 16597, Mar. 21, 2012; 77 FR 22670, Apr. 17, 2012]

§ 120.29 Missile Technology Control Regime.

(a) For purposes of this subchapter, *Missile Technology Control Regime (MTCR)* means the policy statement among the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan, announced on April 16, 1987, to restrict sensitive missile-relevant transfers based on the MTCR Annex, and any amendments thereto.

(b) The term *MTCR Annex* means the MTCR Guidelines and the Equipment, Software and Technology Annex of the MTCR, and any amendments thereto.

(c) *List of all items on the MTCR Annex*. Section 71(a) of the Arms Export Control Act (22 U.S.C. 2797) refers to the establishment as part of the U.S. Munitions List of a list of all items on the MTCR Annex, the export of which is not controlled under Section 6(1) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(1)), as amended. MTCR Annex items specified in the U.S. Munitions List shall be identified in § 121.16 of this subchapter or annotated by the parenthetical ''(MT)'' at the end of each applicable paragraph.

[78 FR 22754, Apr. 16, 2013; 78 FR 61754, Oct. 3, 2013]

§ 120.30 The Automated Export System (AES).

The Automated Export System (AES) is the Department of Commerce, Bureau of Census, electronic filing of export information. The AES shall serve as the primary system for collection of export data for the Department of State. In accordance with this subchapter U.S. exporters are required to report export information using AES for all hardware exports. Exports of technical data and defense services shall be reported directly to the Directorate of Defense Trade Controls (DDTC). Also, requests for special reporting may be made by DDTC on a case-by-case basis, (e.g., compliance, enforcement, congressional mandates).

[68 FR 61100, Oct. 27, 2003]

§ 120.31 North Atlantic Treaty Organization.

North Atlantic Treaty Organization (NATO) is comprised of the following member countries: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and the United States.

[77 FR 22670, Apr. 17, 2012]

§ 120.32 Major non-NATO ally.

Major non-NATO ally, as defined in section 644(q) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(q)), means a country that is designated in accordance with section 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321(k)) as a major non-NATO ally for purposes of the Foreign Assistance Act of 1961 and the Arms Export Control Act (22 U.S.C. 2151 *et seq*. and 22 U.S.C. 2751 *et seq*.). The following countries are designated as major non-NATO allies: Afghanistan (*see* § 126.1(g) of this subchapter), Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Thailand, and Republic of Korea. Taiwan shall be treated as though it were designated a major non-NATO ally.

[77 FR 76865, Dec. 31, 2012]

§ 120.33 Defense Trade Cooperation Treaty between the United States and Australia.

Defense Trade Cooperation Treaty between the United States and Australia means the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007. For additional information on making exports pursuant to this treaty, *see* § 126.16 of this subchapter.

[78 FR 21526, Apr. 11, 2013]

§ 120.34 Defense Trade Cooperation Treaty between the United States and the United Kingdom.

Defense Trade Cooperation Treaty between the United States and the United Kingdom means the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington DC and London, June 21 and 26, 2007. For additional information on making exports pursuant to this Treaty, see § 126.17 of this subchapter.

[77 FR 16597, Mar. 21, 2012]

§ 120.35 Australia Implementing Arrangement.

Australia Implementing Arrangement means the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Washington, March 14, 2008, as it may be amended.

[78 FR 21526, Apr. 11, 2013]

§ 120.36 United Kingdom Implementing Arrangement.

United Kingdom Implementing Arrangement means the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington DC, February 14, 2008, as it may be amended.

[77 FR 16597, Mar. 21, 2012]

§ 120.37 Foreign ownership and foreign control.

Foreign ownership means more than 50 percent of the outstanding voting securities of the firm are owned by one or more foreign persons (as defined in § 120.16). Foreign control means one or more foreign persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Foreign control is presumed to exist where foreign persons own 25 percent or more of the outstanding voting securities unless one U.S. person controls an equal or larger percentage.

[76 FR 45197, July 28, 2011]

§ 120.38 Maintenance levels.

(a) *Organizational-level maintenance* (or basic-level maintenance) is the first level of maintenance that can be performed ''on-equipment'' (directly on the defense article or support equipment) without specialized training. It consists of repairing, inspecting, servicing, calibrating, lubricating, or adjusting equipment, as well as replacing minor parts, components, assemblies, and line-replaceable spares or units. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)) and does not enhance the basic performance or capability of the defense article.

(b) *Intermediate-level maintenance* is second-level maintenance performed ''off-equipment'' (on removed parts, components, or equipment) at or by designated maintenance shops or centers, tenders, or field teams. It may consist of calibrating, repairing, testing, or replacing damaged or unserviceable parts, components, or assemblies. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)) and does not enhance the basic performance or capability of the defense article.

(c) *Depot-level maintenance* is third-level maintenance performed on- or off-

equipment at or by a major repair facility, shipyard, or field team, each with necessary equipment and personnel of requisite technical skill. It consists of providing evaluation or repair beyond unit or organization capability. This maintenance consists of inspecting, testing, calibrating, repairing, overhauling, refurbishing, reconditioning, and one-to-one replacing of any defective parts, components or assemblies. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)) and does not enhance the basic performance or capability of the defense article.

[78 FR 40927, July 8, 2013]

§ 120.39 Regular employee.

(a) A regular employee means for purposes of this subchapter:

(1) An individual permanently and directly employed by the company, or

(2) An individual in a long term contractual relationship with the company where the individual works at the company's facilities, works under the company's direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license).

(b) [Reserved]

[76 FR 28177, May 16, 2011]

§ 120.40 Affiliate.

An *affiliate* of a registrant is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant.

NOTE TO § 120.40: For purposes of this section, ''control'' means having the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Control is rebuttably presumed to exist where there is ownership of 25 percent or more of the outstanding voting securities if no other person controls an equal or larger percentage.

[78 FR 52686, Aug. 26, 2013]

§ 120.41 Specially designed.

(a) Except for commodities or software described in paragraph (b) of this section, a commodity or software (*see* § 121.8(f) of this subchapter) is specially designed if it:

(1) As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph; or

(2) Is a part (*see* § 121.8(d) of this subchapter), component (*see* § 121.8(b) of this subchapter), accessory (*see* § 121.8(c) of this subchapter), attachment (*see* § 121.8(c) of this subchapter), or software for use in or with a defense article.

(b) For purposes of this subchapter, a part, component, accessory, attachment, or software is not specially designed if it:

(1) Is subject to the EAR pursuant to a commodity jurisdiction determination;

(2) Is, regardless of form or fit, a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;

(3) Has the same function, performance capabilities, and the same or ''equivalent'' form and fit as a commodity or software used in or with a commodity that:

(i) Is or was in production (*i.e.*, not in development); and

(ii) Is not enumerated on the U.S. Munitions List;

(4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles enumerated on the U.S. Munitions List and also commodities not on the U.S. Munitions List; or

(5) Was or is being developed as a general purpose commodity or software, *i.e.*, with no knowledge for use in or with a particular commodity (e.g., a F/A–18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool).

NOTE TO PARAGRAPHS (a) AND (b): The term ''commodity'' refers to any article, material,

or supply, except technology/technical data or software.

NOTE TO PARAGRAPH (a)(1): An example of a commodity that as a result of development has properties peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a U.S. Munitions List category would be a swimmer delivery vehicle specially designed to dock with a submarine to provide submerged transport for swimmers or divers from submarines.

NOTE TO PARAGRAPH (b): The term ''enumerated'' refers to any article on the U.S. Munitions List or the Commerce Control List and not in a ''catch-all'' paragraph. A ''catch-all'' paragraph is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls parts, components, accessories, or attachments if they were specially designed for an enumerated item. For the purposes of the U.S. Munitions List, a ''catch-all'' paragraph includes the phrases ''and specially designed parts and components therefor,'' or ''(parts, components, accessories, attachments, and associated equipment) specially designed for/to/with.

NOTE 1 TO PARAGRAPH (b)(3): For the purpose of this definition, ''production'' means all production stages, such as product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance. This includes ''serial production'' where commodities have passed production readiness testing (*i.e.*, an approved, standardized design ready for large scale production) and have been or are being produced on an assembly line for multiple commodities using the approved, standardized design.

NOTE 2 TO PARAGRAPH (b)(3): For the purpose of this definition, ''development'' is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.

NOTE 3 TO PARAGRAPH (b)(3): Commodities in ''production'' that are subsequently subject to ''development'' activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)), including those pertaining to quality improvements, cost reductions, or feature enhancements, remain in ''production.'' However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in ''development'' until and unless they enter into ''production.''

NOTE 4 TO PARAGRAPH (*b*)(3): The *form* of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The *fit* of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The *function* of a commodity is the action or actions it is designed to perform. *Performance capability* is the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency). For software, the *form* means the design, logic flow, and algorithms. The *fit* is defined by its ability to interface or connect with a defense article. The *function* means the action or actions the software performs directly related to a defense article or as a standalone application. *Performance capability* means the measure of the software's effectiveness to perform a designated function.

NOTE 5 TO PARAGRAPH (b)(3): With respect to a commodity, ''equivalent'' means its form has been modified solely for fit purposes.

NOTE 1 TO PARAGRAPHS (b)(4) AND (5): For a defense article not to be specially designed on the basis of paragraph (b)(4) or (5) of this section, documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) *or* (5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5).

NOTE 2 TO PARAGRAPHS (b)(4) AND (5): For the purpose of this definition, ''knowledge'' includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.

[78 FR 22754, Apr. 16, 2013; 78 FR 61754, Oct. 3, 2013]

§ 120.42 Subject to the Export Administration Regulations (EAR).

Items ''subject to the EAR'' are those items listed on the Commerce Control List in part 774 of the EAR and all other items that meet the definition of that term in accordance with § 734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.

[78 FR 22755, Apr. 16, 2013]

§ 120.43 [Reserved]

§ 120.44 Foreign defense article or defense service.

Foreign defense article or defense service means any article or service described on the U.S. Munitions List of non-U.S. origin. Unless otherwise provided in this subchapter, the terms *defense article* and *defense service* refer to both U.S. and foreign origin defense articles and defense services described on the U.S. Munitions List. A defense article or defense service is determined exclusively in accordance with the Arms Export Control Act and this subchapter, regardless of any designation (either affirming or contrary) that may be attributed to the same article or service by any foreign government or international organization.

[78 FR 52686, Aug. 26, 2013]

PART 121—THE UNITED STATES MUNITIONS LIST

ENUMERATION OF ARTICLES

Sec.
121.1 General. The United States Munitions List.
121.2 Interpretations of the U.S. Munitions List.
121.3 Aircraft.
121.4 Ground vehicles.
121.5 Apparatus and devices under Category IV(c).
121.6–121.7 [Reserved]
121.8 End-items, components, accessories, attachments, parts, firmware, software, and systems.
121.9 [Reserved]
121.10 Forgings, castings and machined bodies.
121.11 Military demolition blocks and blasting caps.
121.12–121.13 [Reserved]
121.14 Submersible vessels.
121.15 Surface vessels of war.
121.16 Missile Technology Control Regime Annex.

AUTHORITY: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39287, July 22, 1993, unless otherwise noted.

ENUMERATION OF ARTICLES

§ 121.1 General. The United States Munitions List.

(a) The following articles, services, and related technical data are designated as defense articles and defense services pursuant to sections 38 and 47(7) of the Arms Export Control Act. Changes in designations will be published in the FEDERAL REGISTER. Information and clarifications on whether specific items are defense articles and services under this subchapter may appear periodically through the Internet Web site of the Directorate of Defense Trade Controls.

(b)(1) *Order of review*. In order to classify your article on the U.S. Munitions List, you should begin with a review of the general characteristics of your item. This will usually guide you to the appropriate category on the U.S. Munitions List. Once the appropriate category is identified, you should match the particular characteristics and functions of your article to a specific entry within the appropriate category.

(2) *Composition of an entry*. Within each U.S. Munitions List category, defense articles are enumerated by an alpha paragraph designation. These designations may include subparagraph(s) to further define the enumerated defense article. Each U.S. Munitions List category starts with end-platform designations followed by major systems and equipment, and parts, components, accessories, and attachments. Most U.S. Munitions List categories contain an entry on technical data (*see* § 120.10 of this subchapter) and defense services (*see* § 120.9 of this subchapter) related to the enumerated defense articles of that U.S. Munitions List category.

(3) *Significant military equipment*. An asterisk may precede an entry in a U.S. Munitions List category. The asterisk means the enumerated defense article is deemed to be ''Significant Military Equipment'' to the extent specified in § 120.7 of this subchapter. Note that technical data directly related to the

manufacture or production of any defense articles enumerated in any category designated as Significant Military Equipment (SME) is also designated as SME.

(c) *Missile Technology Control Regime (MTCR) Annex*. Inclusion in § 121.16 of this subchapter, or annotation with the parenthetical ''(MT)'' at the end of a U.S. Munitions List paragraph, indicates those defense articles and defense services that are on the MTCR Annex. *See* § 120.29 of this subchapter.

(d) *Specially designed*. When applying the definition of specially designed (*see* § 120.41 of this subchapter), follow the sequential analysis set forth as follows:

(1) if your commodity or software is controlled for reasons other than having a specially designed control parameter on the U.S. Munitions List, no further review of the definition of specially designed is required.

(2) if your commodity or software is not enumerated on the U.S. Munitions List, it may be controlled because of a specially designed control parameter. If so, begin any analysis with § 120.41(a) and proceed through each subsequent paragraph. If a commodity or software would not be controlled as a result of the application of the standards in § 120.41(a), then it is not necessary to work through § 120.41(b).

(3) if a commodity or software is controlled as a result of § 120.41(a), then it is necessary to continue the analysis and to work through each of the elements of § 120.41(b).

(4) commodities or software described in any § 120.41(b) subparagraph are not specially designed commodities or software controlled on the U.S. Munitions List, but may be subject to the jurisdiction of another U.S. Government regulatory agency (*see* § 120.5 of this subchapter).

(e) *Classified*. For the purpose of this subchapter, ''classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

CATEGORY I—FIREARMS, CLOSE ASSAULT WEAPONS AND COMBAT SHOTGUNS

*(a) Nonautomatic and semi-automatic firearms to caliber .50 inclusive (12.7 mm).

*(b) Fully automatic firearms to .50 caliber inclusive (12.7 mm).

*(c) Firearms or other weapons (e.g. insurgency-counterinsurgency, close assault weapons systems) having a special military application regardless of caliber.

*(d) Combat shotguns. This includes any shotgun with a barrel length less than 18 inches.

*(e) Silencers, mufflers, sound and flash suppressors for the articles in (a) through (d) of this category and their specifically designed, modified or adapted components and parts.

(f) Riflescopes manufactured to military specifications (See category XII(c) for controls on night sighting devices.)

*(g) Barrels, cylinders, receivers (frames) or complete breech mechanisms for the articles in paragraphs (a) through (d) of this category.

(h) Components, parts, accessories and attachments for the articles in paragraphs (a) through (g) of this category.

(i) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(j) The following interpretations explain and amplify the terms used in this category and throughout this subchapter:

(1) A firearm is a weapon not over .50 caliber (12.7 mm) which is designed to expel a projectile by the action of an explosive or which may be readily converted to do so.

(2) A rifle is a shoulder firearm which can discharge a bullet through a rifled barrel 16 inches or longer.

(3) A carbine is a lightweight shoulder firearm with a barrel under 16 inches in length.

(4) A pistol is a hand-operated firearm having a chamber integral with or permanently aligned with the bore.

(5) A revolver is a hand-operated firearm with a revolving cylinder containing chambers for individual cartridges.

(6) A submachine gun, ''machine pistol'' or ''machine gun'' is a firearm originally designed to fire, or capable of being fired, fully automatically by a single pull of the trigger.

NOTE: This coverage by the U.S. Munitions List in paragraphs (a) through (i) of this category excludes any non-combat shotgun with a barrel length of 18 inches or longer, BB, pellet, and muzzle loading (black powder) firearms. This category does not cover

riflescopes and sighting devices that are not manufactured to military specifications. It also excludes accessories and attachments (e.g., belts, slings, after market rubber grips, cleaning kits) for firearms that do not enhance the usefulness, effectiveness, or capabilities of the firearm, components and parts. The Department of Commerce regulates the export of such items. See the Export Administration Regulations (15 CFR parts 730–799). In addition, license exemptions for the items in this category are available in various parts of this subchapter (e.g. §§123.17, 123.18 and 125.4).

CATEGORY II—GUNS AND ARMAMENT

*(a) Guns over caliber .50 (12.7mm, whether towed, airborne, self-propelled, or fixed, including but not limited to, howitzers, mortars, cannons and recoilless rifles.

(b) Flame throwers specifically designed or modified for military application.

(c) Apparatus and devices for launching or delivering ordnance, other than those articles controlled in Category IV.

*(d) Kinetic energy weapon systems specifically designed or modified for destruction or rendering mission-abort of a target.

(e) Signature control materials (e.g., parasitic, structural, coatings, screening) techniques, and equipment specifically designed, developed, configured, adapted or modified to alter or reduce the signature (e.g., muzzle flash suppression, radar, infrared, visual, laser/electro-optical, acoustic) of defense articles controlled by this category.

*(f) Engines specifically designed or modified for the self-propelled guns and howitzers in paragraph (a) of this category.

(g) Tooling and equipment specifically designed or modified for the production of defense articles controlled by this category.

(h) Test and evaluation equipment and test models specifically designed or modified for the articles controlled by this category. This includes but is not limited to diagnostic instrumentation and physical test models.

(i) Autoloading systems for electronic programming of projectile function for the defense articles controlled in this Category.

(j) All other components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in paragraphs (a) through (i) of this category. This includes but is not limited to mounts and carriages for the articles controlled in this category.

(k) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (j) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(l) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter:

(1) The kinetic energy weapons systems in paragraph (d) of this category include but are not limited to:

(i) Launch systems and subsystems capable of accelerating masses larger than 0.1g to velocities in excess of 1.6km/s, in single or rapid fire modes, using methods such as: electromagnetic, electrothermal, plasma, light gas, or chemical;

(ii) Prime power generation, electric armor, energy storage, thermal management; conditioning, switching or fuel-handling equipment; and the electrical interfaces between power supply gun and other turret electric drive function;

(iii) Target acquisition, tracking fire control or damage assessment systems; and

(iv) Homing seeker, guidance or divert propulsion (lateral acceleration) systems for projectiles.

(2) The articles in this category include any end item, component, accessory, attachment part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category.

(3) The articles specifically designed or modified for military application controlled in this category include any article specifically developed, configured, or adapted for military application.

CATEGORY III—AMMUNITION/ORDNANCE

*(a) Ammunition/ordnance for the articles in Categories I and II of this section.

(b) Ammunition/ordnance handling equipment specifically designed or modified for the articles controlled in this category, such as, belting, linking, and de-linking equipment.

(c) Equipment and tooling specifically designed or modified for the production of defense articles controlled by this category.

(d) Components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in this category:

*(1) Guidance and control components for the articles in paragraph (a) of this category;

*(2) Safing, arming and fuzing components (including target detection and localization devices) for the articles in paragraph (a) of this category; and

(3) All other components, parts, accessories, attachments and associated equipment for the articles in paragraphs (a) through (c) of this category.

(e) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category. Technical data directly related to the manufacture or production of any defense articles

enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(f) The following explains and amplifies the terms used in this category and elsewhere in this subchapter:

(1) The components, parts, accessories and attachments controlled in this category include, but are not limited to cartridge cases, powder bags (or other propellant charges), bullets, jackets, cores, shells (excluding shotgun shells), projectiles (including canister rounds and submunitions therefor), boosters, firing components therefor, primers, and other detonating devices for the defense articles controlled in this category.

(2) This category does not control cartridge and shell casings that, prior to export, have been rendered useless beyond the possibility of restoration for use as a cartridge or shell casing by means of heating, flame treatment, mangling, crushing, cutting or popping.

(3) Equipment and tooling in paragraph (c) of this category does not include equipment for hand-loading ammunition.

(4) The articles in this category include any end item, component, accessory, attachment, part, firmware, software, or system that has been designed or manufactured using technical data and defense services controlled by this category.

(5) The articles specifically designed or modified for military application controlled in this category include any article specifically developed, configured, or adapted for military application

CATEGORY IV—LAUNCH VEHICLES, GUIDED MISSILES, BALLISTIC MISSILES, ROCKETS, TORPEDOES, BOMBS AND MINES

*(a) Rockets (including but not limited to meteorological and other sounding rockets), bombs, grenades, torpedoes, depth charges, land and naval mines, as well as launchers for such defense articles, and demolition blocks and blasting caps. (See §121.11.)

*(b) Launch vehicles and missile and anti-missile systems including but not limited to guided, tactical and strategic missiles, launchers, and systems.

(c) Apparatus, devices, and materials for the handling, control, activation, monitoring, detection, protection, discharge, or detonation of the articles in paragraphs (a) and (b) of this category. (See §121.5.)

*(d) Missile and space launch vehicle powerplants.

*(e) Military explosive excavating devices.

*(f) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that are derived directly from or specifically developed or modified for defense articles.

*(g) Non/nuclear warheads for rockets and guided missiles.

(h) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in this category.

(i) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. (See §125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

CATEGORY V—EXPLOSIVES AND ENERGETIC MATERIALS, PROPELLANTS, INCENDIARY AGENTS AND THEIR CONSTITUENTS

*(a) Explosives, and mixtures thereof:

(1) ADNBF (aminodinitrobenzofuroxan or 7-Amino 4,6-dinitrobenzofurazane-1-oxide) (CAS 97096–78–1);

(2) BNCP (cis-bis (5-nitrotetrazolato) tetra amine-cobalt (III) perchlorate) (CAS 117412–28–9);

(3) CL–14 (diamino dinitrobenzofuroxan or 5,7-diamino-4,6-dinitrobenzofurazane-1-oxide) (CAS 117907–74–1);

(4) CL–20 (HNIW or Hexanitrohexaazaisowurtzitane); (CAS 135285–90-4); chlathrates of CL–20 (see paragraphs (g)(3) and (4) of this category);

(5) CP (2-(5-cyanotetrazolato) penta aminecobalt (III) perchlorate); (CAS 70247–32–4);

(6) DADE (1,1-diamino-2,2-dinitroethylene, FOX7);

(7) DDFP (1,4-dinitrodifurazanopiperazine);

(8) DDPO (2,6-diamino-3,5-dinitropyrazine-1-oxide, PZO); (CAS 194486–77–6);

(9) DIPAM (3,3′-Diamino-2,2′,4,4′,6,6′-hexanitrobiphenyl or dipicramide) (CAS 17215–44–0);

(10) DNGU (DINGU or dinitroglycoluril) (CAS 55510–04–8);

(11) Furazans, as follows:

(i) DAAOF (diaminoazoxyfurazan);

(ii) DAAzF (diaminoazofurazan) (CAS 78644–90–3);

(12) HMX and derivatives (see paragraph (g)(5) of this category):

(i) HMX (Cyclotetramethylenetetranitramine; octahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazine; 1,3,5,7-tetranitro-1,3,5,7-tetraza-cyclooctane; octogen, octogene) (CAS 2691–41–0);

(ii) Diflouroaminated analogs of HMX;

(iii) K–55 (2,4,6,8-tetranitro-2,4,6,8-tetraazabicyclo [3,3,0]-octanone-3, tetranitrosemiglycouril, or keto-bicyclic HMX) (CAS 130256-72–3);

(13) HNAD (hexanitroadamantane) (CAS 143850–71–9);

(14) HNS (hexanitrostilbene) (CAS 20062–22–0);

(15) Imidazoles, as follows:

(i) BNNII (Octohydro-2,5-bis(nitroimino) imidazo [4,5-d]Imidazole);

(ii) DNI (2,4-dinitroimidazole) (CAS 5213–49–0);

(iii) FDIA (1-fluoro-2,4-dinitroimidazole);

(iv) NTDNIA (N-(2-nitrotriazolo)-2,4-dinitro-imidazole);

(v) PTIA (1-picryl-2,4,5-trinitroimidazole);

(16) NTNMH (1-(2-nitrotriazolo)-2-dinitromethylene hydrazine);

(17) NTO (ONTA or 3-nitro-1,2,4-triazol-5-one) (CAS 932–64–9);

(18) Polynitrocubanes with more than four nitro groups;

(19) PYX (2,6-Bis(picrylamino)-3,5-dinitropyridine) (CAS 38082–89–2);

(20) RDX and derivatives:

(i) RDX (cyclotrimethylenetrinitramine), cyclonite, T4, hexahydro-1,3,5-trinitro-1,3,5-triazine, 1,3,5-trinitro-1,3,5-triazacyclohexane, hexogen, or hexogene) (CAS 121–82–4);

(ii) Keto-RDX (K–6 or 2,4,6-trinitro-2,4,6-triazacyclohexanone (CAS 115029–35–1);

(21) TAGN (Triaminoguanidinenitrate) (CAS 4000–16–2);

(22) TATB (Triaminotrinitrobenzene) (CAS 3058–38–6) (see paragraph (g)(7) of this category);

(23) TEDDZ (3,3,7,7-tetrabis(difluoroamine) octahydro-1,5-dinitro-1,5-diazocine;

(24) Tetrazoles, as follows:

(i) NTAT (nitrotriazol aminotetrazole);

(ii) NTNT (1-N-(2-nitrotriazolo)-4-nitrotetrazole);

(25) Tetryl (trinitrophenylmethylnitramine) (CAS 479–45–8);

(26) TNAD (1,4,5,8-tetranitro-1,4,5,8-tetraazadecalin) (CAS 135877-16–6)(see paragraph (g)(6) of this category);

(27) TNAZ (1,1,3-trinitroazetidine) (CAS 97645–24–4) (see paragraph (g)(2) of this category);

(28) TNGU (SORGUYL or tetranitroglycoluril) (CAS 55510–03–7);

(29) TNP (1,4,5,8-tetranitro-pyridazino [4,5-d] pyridazine) (CAS 229176–04–9);

(30) Triazines, as follows:

(i) DNAM (2-oxy-4,6-dinitroamino-s-triazine) (CAS 19899–80–0);

(ii) NNHT (2-nitroimino-5-nitro-hexahydro-1,3,5 triazine) (CAS 130400–13–4);

(31) Triazoles, as follows:

(i) 5-azido-2-nitrotriazole;

(ii) ADHTDN (4-amino-3,5-dihydrazino-1,2,4-triazole dinitramide)(CAS 1614–08–0);

(iii) ADNT (1-amino-3,5-dinitro-1,2,4-triazole);

(iv) BDNTA ([Bis-dinitrotriazole]amine);

(v) DBT (3,3′-dinitro-5,5-bi-1,2,4-triazole) (CAS 30003–46–4);

(vi) DNBT (dinitrobistriazole) (CAS 70890–46–9);

(vii) NTDNA (2-nitrotriazole 5-dinitramide) (CAS 75393–84–9);

(viii) NTDNT (1-N-(2-nitrotriazolo) 3,5-dinitro-triazole);

(ix) PDNT (1-picryl-3,5-dinitrotriazole);

(x) TACOT (tetranitrobenzotriazolobenzotriazole) (CAS 25243–36–1);

(32) Any explosive not listed elsewhere in paragraph (a) of this category with a detonation velocity exceeding 8,700m/s at maximum density or a detonation pressure exceeding 34 Gpa (340 kbar).

(33) Other organic explosives not listed elsewhere in paragraph (a) of this category yielding detonation pressures of 25 Gpa (250 kbar) or more that will remain stable at temperatures of 523K (250 °C) or higher for periods of 5 minutes or longer;

(34) Diaminotrinitrobenzene (DATB) (CAS 1630–08–6);

(35) Any other explosive not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

*(b) Propellants:

(1) Any United Nations (UN) Class 1.1 solid propellant with a theoretical specific impulse (under standard conditions) of more than 250 seconds for non-metallized, or 270 seconds for metallized compositions;

(2) Any UN Class 1.3 solid propellant with a theoretical specific impulse (under standard conditions) of more than 230 seconds for non-halogenized, or 250 seconds for non-metallized compositions;

(3) Propellants having a force constant of more than 1,200 kJ/Kg;

(4) Propellants that can sustain a steady-state burning rate more than 38mm/s under standard conditions (as measured in the form of an inhibited single strand) of 6.89 Mpa (68.9 bar) pressure and 294K (21 °C);

(5) Elastomer modified cast double based propellants with extensibility at maximum stress greater than 5% at 233 K (−40 C);

(6) Any propellant containing substances listed in Category V;

(7) Any other propellant not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

(c) Pyrotechnics, fuels and related substances, and mixtures thereof:

(1) Alane (aluminum hydride)(CAS 7784–21–6);

(2) Carboranes; decaborane (CAS 17702–41–9); pentaborane and derivatives thereof;

(3) Hydrazine and derivatives:

(i) Hydrazine (CAS 302–01–2) in concentrations of 70% or more (not hydrazine mixtures specially formulated for corrosion control);

(ii) Monomethyl hydrazine (CAS 60–34–4);

(iii) Symmetrical dimethyl hydrazine (CAS 540–73–8);

(iv) Unsymmetrical dimethyl hydrazine (CAS 57–14–7);

(4) Liquid fuels specifically formulated for use by articles covered by Categories IV, VI, and VIII;

(5) Spherical aluminum powder (CAS 7429–90–5) in particle sizes of 60 micrometers or less manufactured from material with an aluminum content of 99% or more;

(6) Metal fuels in particle form whether spherical, atomized, spheroidal, flaked or ground, manufactured from material consisting of 99% or more of any of the following:

(i) Metals and mixtures thereof:

(A) Beryllium (CAS 7440–41–7) in particle sizes of less than 60 micrometers;

(B) Iron powder (CAS 7439–89–6) with particle size of 3 micrometers or less produced by reduction of iron oxide with hydrogen;

(ii) Mixtures, which contain any of the following:

(A) Boron (CAS 7440–42–8) or boron carbide (CAS 12069–32–8) fuels of 85% purity or higher and particle sizes of less than 60 micrometers;

(B) Zirconium (CAS 7440–67–7), magnesium (CAS 7439–95–4) or alloys of these in particle sizes of less than 60 micrometers;

(iii) Explosives and fuels containing the metals or alloys listed in paragraphs (c)(6)(i) and (c)(6)(ii) of this category whether or not the metals or alloys are encapsulated in aluminum, magnesium, zirconium, or beryllium;

(7) Pyrotechnics and pyrophoric materials specifically formulated for military purposes to enhance or control the production of radiated energy in any part of the IR spectrum.

(8) Titanium subhydride (TiHn) of stoichiometry equivalent to n = 0.65–1.68;

(9) Military materials containing thickeners for hydrocarbon fuels specially formulated for use in flame throwers or incendiary munitions; metal stearates or palmates (also known as octol); and M1, M2 and M3 thickeners;

(10) Any other pyrotechnic, fuel and related substance and mixture thereof not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

(d) Oxidizers, to include:

(1) ADN (ammonium dinitramide or SR–12) (CAS 140456–78–6);

(2) AP (ammonium perchlorate) (CAS 7790–98–9);

(3) BDNPN (bis,2,2-dinitropropylnitrate) (CAS 28464–24–6);

(4) DNAD (1,3-dinitro-1,3-diazetidine) (CAS 78246–06–7);

(5) HAN (Hydroxylammonium nitrate) (CAS 13465–08–2);

(6) HAP (hydroxylammonium perchlorate) (CAS 15588–62–2);

(7) HNF (Hydrazinium nitroformate) (CAS 20773–28–8);

(8) Hydrazine nitrate (CAS 37836–27–4);

(9) Hydrazine perchlorate (CAS 27978–54–7);

(10) Liquid oxidizers comprised of or containing inhibited red fuming nitric acid (IRFNA) (CAS 8007–58–7) or oxygen difluoride;

(11) Perchlorates, chlorates, and chromates composited with powdered metal or other high energy fuel components controlled by this category;

(12) Any other oxidizer not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

*(e) Binders, and mixtures thereof:

(1) AMMO (azidomethylmethyloxetane and its polymers) (CAS 90683–29–7) (see paragraph (g)(1) of this category);

(2) BAMO (bisazidomethyloxetane and its polymers) (CAS 17607–20–4) (see paragraph (g)(1)of this category);

(3) BTTN (butanetrioltrinitrate) (CAS 6659–60–5) (see paragraph (g)(8) of this category);

(4) FAMAO (3-difluoroaminomethyl-3-azidomethyl oxetane) and its polymers;

(5) FEFO (bis-(2-fluoro-2,2-dinitroethyl)formal) (CAS 17003–79–1);

(6) GAP (glycidylazide polymer) (CAS 143178–24–9) and its derivatives;

(7) HTPB (hydroxyl terminated polybutadiene) with a hydroxyl functionality equal to or greater than 2.2 and less than or equal to 2.4, a hydroxyl value of less than 0.77 meq/g, and a viscosity at 30 °C of less than 47 poise (CAS 69102–90–5);

(8) NENAS (nitratoethylnitramine compounds) (CAS 17096–47–8, 85068-73–1 and 82486–82–6);

(9) Poly-NIMMO (poly nitratomethylmethyoxetane, poly-NMMO, (poly[3-nitratomethyl-3-methyl oxetane]) (CAS 84051–81–0);

(10) Energetic monomers, plasticizers and polymers containing nitro, azido nitrate, nitraza or difluoromaino groups specially formulated for military use;

(11) TVOPA 1,2,3-Tris [1,2-bis(difluoroamino) ethoxy]propane; tris vinoxy propane adduct; (CAS 53159–39–0);

(12) Polynitrorthocarbonates;

(13) FPF–1 (poly-2,2,3,3,4,4-hexafluoro pentane-1,5-diolformal) (CAS 376–90–9);

(14) FPF–3 (poly-2,4,4,5,5,6,6-heptafluoro-2-trifluoromethyl-3-oxaheptane-1,7-diolformal);

(15) PGN (Polyglycidylnitrate or poly(nitratomethyl oxirane); poly-GLYN); (CAS 27814–48–8);

(16) N-methyl-p-nitroaniline;

(17) Low (less than 10,000) molecular weight, alcohol-functionalized, poly(epichlorohydrin); poly(epichlorohydrindiol); and triol;

(18) Bis(2,2-dinitropropyl) formal and acetal;

(19) Any other binder and mixture thereof not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

(f) Additives:

(1) Basic copper salicylate (CAS 62320–94–9);

(2) BHEGA (Bis-(2-hydroxyethyl)glycolamide) (CAS 17409–41–5);

(3) Ferrocene Derivatives:

(i) Butacene (CAS 125856–62–4);

(ii) Catocene (2,2-Bis-ethylferrocenyl propane) (CAS 37206–42–1);

(iii) Ferrocene carboxylic acids;

(iv) n-butyl-ferrocene (CAS 31904–29–7);

(4) Lead beta-resorcylate (CAS 20936–32–7);

(5) Lead citrate (CAS 14450–60–3);

(6) Lead-copper chelates of beta-resorcylate or salicylates (CAS 68411–07–4);

(7) Lead maleate (CAS 19136–34–6);

(8) Lead salicylate (CAS 15748–73–9);

(9) Lead stannate (CAS 12036–31–6);

(10) MAPO (tris-1-(2-methyl)aziridinyl phosphine oxide) (CAS 57–39–6); BOBBA–8 (bis(2-methyl aziridinyl) 2-(2-hydroxypropanoxy) propylamino phosphine oxide); and other MAPO derivatives;

(11) Methyl BAPO (Bis(2-methyl aziridinyl) methylamino phosphine oxide) (CAS 85068–72–0);

(12) 3-Nitraza-1,5 pentane diisocyanate (CAS 7406–61–9);

(13) Organo-metallic coupling agents, specifically:

(i) Neopentyl[diallyl]oxy, tri [dioctyl] phosphatotitanate (CAS 103850–22–2); also known as titanium IV, 2,2[bis 2-propenolatomethyl, butanolato, tris (dioctyl) phosphato] (CAS 110438–25–0), or LICA 12 (CAS 103850–22–2);

(ii) Titanium IV, [(2-propenolato-1) methyl, n-propanolatomethyl] butanolato-1, tris(dioctyl)pyrophosphate, or KR3538;

(iii) Titanium IV, [2-propenolato-1)methyl, propanolatomethyl] butanolato-1, tris(dioctyl) phosphate;

(14) Polyfunctional aziridine amides with isophthalic, trimesic (BITA or butylene imine trimesamide), isocyanuric, or trimethyladipic backbone structures and 2-methyl or 2-ethyl substitutions on the aziridine ring and its polymers;

(15) Superfine iron oxide (Fe_2O_3 hematite) with a specific surface area more than 250 m^2/g and an average particle size of 0.003 [micro]m or less (CAS 1309–37–1);

(16) TEPAN (tetraethylenepentaamineacrylonitrile) (CAS 68412–45–3); cyanoethylated polyamines and their salts;

(17) TEPANOL (Tetraethylenepentaamineacrylonitrileglycidol) (CAS 110445–33–5); cyanoethylated polyamines adducted with glycidol and their salts;

(18) TPB (triphenyl bismuth) (CAS 603–33–8);

(19) PCDE (Polycyanodifluoroaminoethyleneoxide);

(20) BNO (Butadienenitrileoxide);

(21) Any other additive not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.

(g) Precursors, as follows:

(1) BCMO (bischloromethyloxetane) (CAS 142173–26–0) (see paragraphs (e)(1) and (2) of this category);

(2) Dinitroazetidine-t-butyl salt (CAS 125735–38–8) (see paragraph (a)(27) of this category);

(3) HBIW (hexabenzylhexaazaisowurtzitane) (CAS 124782–15–6) (see paragraph (a)(4) of this category);

(4) TAIW (tetraacetyldibenzylhexaazaisowurtzitane) (see paragraph (a)(4) of this category);

(5) TAT (1, 3, 5, 7-tetraacetyl-1, 3, 5, 7-tetraaza-cyclooctane) (CAS 41378–98–7) (see paragraph (a)(12) of this category);

(6) Tetraazadecalin (CAS 5409–42–7) (see paragraph (a)(26) of this category);

(7) 1,3,5-trichorobenzene (CAS 108–70–3) (see paragraph (a)(22) of this category);

(8) 1,2,4-trihydroxybutane (1,2,4-butanetriol) (CAS 3068–00–6) (see paragraph (e)(3) of this category);

(h) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles numerated in paragraphs (a) through (g) of this category. (See §125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(i) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter.

(1) Category V contains explosives, energetic materials, propellants and pyrotechnics and specially formulated fuels for aircraft, missile and naval applications. Explosives are solid, liquid or gaseous substances or mixtures of substances, which, in their primary, booster or main charges in warheads, demolition or other military applications, are required to detonate.

(2) Paragraph (c)(6)(ii)(A) of this category does not control boron and boron carbide enriched with boron-10 (20% or more of total boron-10 content.

(3) The resulting product of the combination of any controlled or non-controlled substance compounded or mixed with any item controlled by this subchapter is also subject to the controls of this category.

NOTE 1: To assist the exporter, an item has been categorized by the most common use.

Also, a reference has been provided to the related controlled precursors (e.g., see paragraph (a)(12) of this category). Regardless of where the item has been placed in the category, all exports are subject to the controls of this subchapter.

NOTE 2: Chemical Abstract Service (CAS) registry numbers do not cover all the substances and mixtures controlled by this category. The numbers are provided as examples to assist the government agencies in the license review process and the exporter when completing their license application and export documentation.

CATEGORY VI—SURFACE VESSELS OF WAR AND SPECIAL NAVAL EQUIPMENT

*(a) Warships and other combatant vessels (*see* § 121.15 of this subchapter).

(b) Other vessels not controlled in paragraph (a) of this category (*see* § 121.15 of this subchapter).

(c) Developmental vessels, and specially designed parts, components, accessories, and attachments therefor, funded by the Department of Defense via contract or other funding authorization.

NOTE 1 TO PARAGRAPH (C): This paragraph does not control vessels, and specially designed parts, components, accessories, and attachments therefor, (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination (*see* § 120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (C): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

NOTE 3 TO PARAGRAPH (C): This provision is applicable to those contracts and funding authorizations that are dated July 8, 2014, or later.

(d) [Reserved]

*(e) Naval nuclear propulsion plants and prototypes, and special facilities for construction, support, and maintenance therefor (*see* § 123.20 of this subchapter).

(f) Vessel and naval equipment, parts, components, accessories, attachments, associated equipment, and systems, as follows:

(1) Hulls or superstructures, including support structures therefor, that:

(i) Are specially designed for any vessels controlled in paragraph (a) of this category;

(ii) Have armor, active protection systems, or developmental armor systems; or

(iii) Are specially designed to survive 12.5% or greater damage across the length as measured between perpendiculars;

(2) Systems that manage, store, create, distribute, conserve, and transfer energy, and specially designed parts and components therefor, that have:

(i) Storage exceeding 30MJ;

(ii) A discharge rate less than 3 seconds; and

(iii) A cycle time under 45 seconds;

(3) Shipborne auxiliary systems for chemical, biological, radiological, and nuclear (CBRN) compartmentalization, over-pressurization and filtration systems, and specially designed parts and components therefor;

*(4) Control and monitoring systems for autonomous unmanned vessels capable of onboard, autonomous perception and decision-making necessary for the vessel to navigate while avoiding fixed and moving hazards, and obeying rules-of-the road without human intervention;

*(5) Any machinery, device, component, or equipment, including production, testing and inspection equipment, and tooling, specially designed for plants or facilities controlled in paragraph (e) of this section (*see* § 123.20 of this subchapter);

(6) Parts, components, accessories, attachments, and equipment specially designed for integration of articles controlled by USML Categories II, IV, or XVIII or catapults for launching aircraft or arresting gear for recovering aircraft (MT for launcher mechanisms specially designed for rockets, space launch vehicles, or missiles capable of achieving a range greater than or equal to 300 km);

NOTE TO PARAGRAPH (F)(6): ''Range'' is the maximum distance that the specified rocket system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for rocket systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For rocket systems, the range will be determined using the trajectory that maximizes range, assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

(7) Shipborne active protection systems (*i.e.,* defensive systems that actively detect and track incoming threats and launch a ballistic, explosive, energy, or electromagnetic countermeasure(s) to neutralize the threat prior to contact with a vessel) and specially designed parts and components therefor;

(8) Minesweeping and mine hunting equipment (including mine countermeasures equipment deployed by aircraft), and specially designed parts and components therefor; or

*(9) Any part, component, accessory, attachment, equipment, or system that:

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information. ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

NOTE 1 TO PARAGRAPH (F): Parts, components, accessories, attachments, associated equipment, and systems specially designed for vessels enumerated in this category but not listed in paragraph (f) are subject to the EAR under ECCN 8A609.

NOTE 2 TO PARAGRAPH (F): For controls related to ship signature management, *see* USML Category XIII.

(g) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category and classified technical data directly related to items controlled in ECCNs 8A609, 8B609, 8C609, and 8D609 and defense services using the classified technical data. (MT for technical data and defense services related to articles designated as such.)

(*See* §125.4 of this subchapter for exemptions.)

(h)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

CATEGORY VII—GROUND VEHICLES

*(a) Armored combat ground vehicles (*see* §121.4 of this subchapter) as follows:

(1) Tanks; or

(2) Infantry fighting vehicles.

*(b) Ground vehicles (not enumerated in paragraph (a) of this category) and trailers that are armed or are specially designed to serve as a firing or launch platform (*see* §121.4 of this subchapter) (MT if specially designed for rockets, space launch vehicles, missiles, drones, or unmanned aerial vehicles capable of delivering a payload of at least 500 kg to a range of at least 300 km).

(c) Ground vehicles and trailers equipped with any mission systems controlled under this subchapter (MT if specially designed for rockets, space launch vehicles, missiles, drones, or unmanned aerial vehicles capable of delivering a payload of at least 500 kg to a range of at least 300 km) (*see* §121.4 of this subchapter).

NOTE TO PARAGRAPHS (B) AND (C): ''Payload'' is the total mass that can be carried or delivered by the specified rocket, space launch vehicle, missile, drone, or unmanned aerial vehicle that is not used to maintain flight. For definition of ''range'' as it pertains to aircraft systems, *see* note to paragraph (a) USML Category VIII. For definition of ''range'' as it pertains to rocket systems, *see* note to paragraph (f)(6) of USML Category VI.

(d) [Reserved]

*(e) Armored support ground vehicles (*see* §121.4 of this subchapter).

(f) [Reserved]

(g) Ground vehicle parts, components, accessories, attachments, associated equipment, and systems as follows:

(1) Armored hulls, armored turrets, and turret rings;

(2) Active protection systems (*i.e.*, defensive systems that actively detect and track incoming threats and launch a ballistic, explosive, energy, or electromagnetic countermeasure(s) to neutralize the threat prior to contact with a vehicle) and specially designed parts and components therefor;

(3) Composite armor parts and components specially designed for the vehicles in this category;

(4) Spaced armor components and parts, including slat armor parts and components specially designed for the vehicles in this category;

(5) Reactive armor parts and components;

(6) Electromagnetic armor parts and components, including pulsed power specially designed parts and components therefor;

NOTE TO PARAGRAPHS (G)(3)–(6): *See* USML Category XIII(m)(1)–(4) for interpretations which explain and amplify terms used in these paragraphs.

(7) Built in test equipment (BITE) to evaluate the condition of weapons or other mission systems for vehicles identified in this category, excluding equipment that provides diagnostics solely for a subsystem or component involved in the basic operation of the vehicle;

(8) Gun mount, stabilization, turret drive, and automatic elevating systems, and specially designed parts and components therefor;

(9) Self-launching bridge components rated class 60 or above for deployment by vehicles in this category;

(10) Suspension components as follows:

(i) Rotary shock absorbers specially designed for the vehicles weighing more than 30 tons in this category; or

(ii) Torsion bars specially designed for the vehicles weighing more than 50 tons in this category;

(11) Kits specially designed to convert a vehicle in this category into either an unmanned or a driver-optional vehicle. For a kit to be controlled by this paragraph, it must, at a minimum, include equipment for:

(i) Remote or autonomous steering;

(ii) Acceleration and braking; and

(iii) A control system;

(12) Fire control computers, mission computers, vehicle management computers, integrated core processers, stores management systems, armaments control processors, vehicle-weapon interface units and computers;

(13) Test or calibration equipment for the mission systems of the vehicles in this category, except those enumerated elsewhere; or

*(14) Any part, component, accessory, attachment, equipment, or system that (MT for those articles designated as such):

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

NOTE TO PARAGRAPH (G): Parts, components, accessories, attachments, associated equipment, and systems specially designed for vehicles in this category but not listed in paragraph (g) are subject to the EAR under ECCN 0A606.

(h) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (g) of this category and classified technical data directly related to items controlled in ECCNs 0A606, 0B606, 0C606, and 0D606 and defense services using the classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(i)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

CATEGORY VIII—AIRCRAFT AND RELATED ARTICLES

(a) Aircraft (*see* §121.3 of this subchapter) as follows:

*(1) Bombers;

*(2) Fighters, fighter bombers, and fixed-wing attack aircraft;

*(3) Turbofan- or turbojet-powered trainers used to train pilots for fighter, attack, or bomber aircraft;

*(4) Attack helicopters;

*(5) Unarmed military unmanned aerial vehicles (UAVs) (MT if the UAV has a range equal to or greater than 300km);

*(6) Armed unmanned aerial vehicles (UAVs) (MT if the UAV has a range equal to or greater than 300km);

*(7) Military intelligence, surveillance, and reconnaissance aircraft;

*(8) Electronic warfare, airborne warning and control aircraft;

(9) Air refueling aircraft and strategic airlift aircraft;

(10) Target drones (MT if the drone has a range equal to or greater than 300km);

(11) Aircraft incorporating any mission system controlled under this subchapter;

(12) Aircraft capable of being refueled in flight including hover-in-flight refueling (HIFR); or

*(13) Optionally Piloted Vehicles (OPV) (MT if the OPV has a range equal to or greater than 300km).

NOTE TO PARAGRAPH (a): ''Range'' is the maximum distance that the specified aircraft system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for aircraft systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For aircraft systems, the range will be determined for a one-way distance using the most fuel-efficient flight profile (e.g., cruise speed and altitude), assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

(b)–(c) [Reserved]

(d) Ship-based launching and recovery equipment specially designed for defense articles described in paragraph (a) of this category and land-based variants thereof (MT if the ship-based launching and recovery equipment is for an unmanned aerial vehicle, drone, or missile that has a range equal to or greater than 300 km).

NOTE TO PARAGRAPH (d): Fixed land-based arresting gear is not included in this paragraph. For the definition of ''range,'' *see* note to paragraph (a) of this category.

*(e) Inertial navigation systems (INS), aided or hybrid inertial navigation systems, Inertial Measurement Units (IMUs), and Attitude and Heading Reference Systems

(AHRS) specially designed for aircraft controlled in this category or controlled in ECCN 9A610 and all specially designed components, parts, and accessories therefor (MT if the INS, IMU, or AHRS is for an unmanned aerial vehicle, drone, or missile that has a ''range'' equal to or greater than 300 km). For other inertial reference systems and related components refer to USML Category XII(d).

(f) Developmental aircraft funded by the Department of Defense via contract or other funding authorization, and specially designed parts, components, accessories, and attachments therefor.

NOTE 1 TO PARAGRAPH (f): Paragraph (f) does not control aircraft and specially designed parts, components, accessories, and attachments therefor (a) in production; (b) determined to be subject to the EAR via a commodity jurisdiction determination (*see* § 120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (f): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

NOTE 3 TO PARAGRAPH (f): This provision is applicable to those contracts or other funding authorizations that are dated April 16, 2014, or later.

(g) [Reserved]

(h) Aircraft parts, components, accessories, attachments, associated equipment and systems, as follows:

(1) Parts, components, accessories, attachments, and equipment specially designed for the following U.S.-origin aircraft: the B–1B, B–2, F–15SE, F/A–18 E/F/G, F–22, F–35 and future variants thereof; or the F–117 or U.S. Government technology demonstrators. Parts, components, accessories, attachments, and equipment of the F–15SE and F/A–18 E/F/G that are common to earlier models of these aircraft, unless listed in paragraph (h) of this category, are subject to the EAR;

NOTE TO PARAGRAPH (h)(1): Specially designed (*see* § 120.4(b)(3)(ii) of this subchapter) does not control parts, components, accessories, and attachments that are common to aircraft enumerated in paragraph (a) of this category but not identified in paragraph (h)(1), and those identified in paragraph (h)(1). For example, a part common to only the F–14 and F–35 is not specially designed for purposes of the ITAR. A part common to only the F–22 and F–35—two aircraft models identified in paragraph (h)(1)—is specially designed.

(2) Face gear gearboxes, split-torque gearboxes, variable speed gearboxes, synchronization shafts, interconnecting drive shafts, or rotorcraft gearboxes with internal pitch line velocities exceeding 20,000 feet per minute and able to operate 30 minutes with loss of lubrication, and specially designed parts and components therefor;

(3) Tail boom, stabilator and automatic rotor blade folding systems, and specially designed parts and components therefor;

(4) Wing folding systems and specially designed parts and components therefor;

(5) Tail hooks and arresting gear, and specially designed parts and components therefor;

(6) Bomb racks, missile launchers, missile rails, weapon pylons, pylon-to-launcher adapters, unmanned aerial vehicle (UAV) launching systems, external stores support systems for ordnance or weapons, and specially designed parts and components therefor (MT if the bomb rack, missile launcher, missile rail, weapon pylon, pylon-to-launcher adapter, UAV launching system, or external stores support system is for a UAV, drone, or missile that has a ''range'' equal to or greater than 300 km);

(7) Damage or failure-adaptive flight control systems specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(8) Threat-adaptive autonomous flight control systems;

(9) Non-surface-based flight control systems and effectors (e.g., thrust vectoring from gas ports other than main engine thrust vector);

(10) Radar altimeters with output power management or signal modulation (*i.e.*, frequency hopping, chirping, direct sequence-spectrum spreading) LPI (low probability of intercept) capabilities (MT if for an unmanned aerial vehicle, drone, or missile that has a ''range'' equal to or greater than 300 km);

(11) Air-to-air refueling systems and hover-in-flight refueling (HIFR) systems, and specially designed parts and components therefor;

(12) Unmanned aerial vehicle (UAV) flight control systems and vehicle management systems with swarming capability (*i.e.*, UAVs interact with each other to avoid collisions and stay together, or, if weaponized, coordinate targeting) (MT if for a UAV, drone or missile that has a ''range'' equal to or greater than 300 km);

(13) Lithium-ion batteries that provide greater than 28 VDC nominal;

(14) Lift fans, clutches, and roll posts for short take-off, vertical landing (STOVL) aircraft and specially designed parts and components for such lift fans and roll posts;

(15) Integrated helmets incorporating optical sights or slewing devices, which include the ability to aim, launch, track, or manage munitions (e.g., Helmet Mounted Cueing

Systems, Joint Helmet Mounted Cueing Systems (JHMCS), Helmet Mounted Displays, Display and Sight Helmets (DASH));

(16) Fire control computers, stores management systems, armaments control processors, aircraft-weapon interface units and computers (e.g., AGM–88 HARM Aircraft Launcher Interface Computer (ALIC));

(17) Mission computers, vehicle management computers, and integrated core processers specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(18) Drive systems and flight control systems specially designed to function after impact of a 7.62mm or larger projectile;

(19) Thrust reversers specially designed to be deployed in flight for aircraft controlled in this category or controlled in ECCN 9A610;

*(20) Any part, component, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) is being developed using classified information (*see* §120.10(a)(2) of this subchapter).

''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization;

(21) Printed circuit boards or patterned multichip modules for which the layout is specially designed for defense articles in this category;

(22) Radomes or electromagnetic antenna windows specially designed for aircraft or UAVs that:

(i) incorporate radio frequency selective surfaces;

(ii) operate in multiple or more non-adjacent radar bands;

(iii) incorporate a structure that is specially designed to provide ballistic protection from bullets, shrapnel, or blast;

(iv) have a melting point greater than 1,300 °C and maintain a dielectric constant less than 6 at temperatures greater than 500 °C;

(v) are manufactured from ceramic materials with a dielectric constant less than 6 at any frequency from 100 MHz to 100 GHz;

(vi) maintain structural integrity at stagnation pressures greater than 6,000 pounds per square foot; or

(vii) withstand a combined thermal shock greater than 4.184×10^6 J/m^2 accompanied by a peak overpressure of greater than 50 kPa (MT for radomes meeting this criteria);

(23) Fuel cells specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(24) Thermal engines specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(25) Thermal batteries specially designed for aircraft controlled in this category or controlled in ECCN 9A610 (MT if the thermal battery is for an unmanned aerial vehicle, drone, or missile that has a ''range'' equal to or greater than 300 km); or

(26) Thermionic generators specially designed for aircraft controlled in this category or controlled in ECCN 9A610.

(i) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category and classified technical data directly related to items controlled in ECCNs 9A610, 9B610, 9C610, and 9D610 and defense services using classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(j)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

NOTE: Inertial navigation systems, aided or hybrid inertial navigation systems, Inertial Measurement Units, and Attitude and Heading Reference Systems in paragraph (e) and parts, components, accessories, and attachments in paragraphs (h)(2)–(5), (7), (13), (14), (17)–(19), and (21)–(26) are licensed by the Department of Commerce when incorporated in a military aircraft subject to the EAR and classified under ECCN 9A610. Replacement systems, parts, components, accessories and attachments are subject to the controls of the ITAR.

CATEGORY IX—MILITARY TRAINING EQUIPMENT AND TRAINING

(a) Training equipment specifically designed, modified, configured or adapted for military purposes, including but not limited to weapons system trainers, radar trainers, gunnery training devices, antisubmarine warfare trainers, target equipment, armament training units, pilot-less aircraft trainers, navigation trainers and human-rated centrifuges.

(b) Simulation devices for the items covered by this subchapter.

(c) Tooling and equipment specifically designed or modified for the production of articles controlled by this category.

(d) Components, parts, accessories, attachments, and associated equipment specifically designed, modified, configured, or adapted

for the articles in paragraphs (a), (b) and (c) of this category.

(e) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.

(f) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) The weapons systems trainers in paragraph (a) of this category include individual crew stations and system specific trainers;

(2) The articles in this category include any end item, components, accessory, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category;

(3) The defense services and related technical data in paragraph (f) of this category include software and associated databases that can be used to simulate trainers, battle management, test scenarios/models, and weapons effects. In any instance when the military training transferred to a foreign person does not use articles controlled by the U.S. Munitions List, the training may nevertheless be a defense service that requires authorization in accordance with this subchapter. See e.g., § 120.9 and § 124.1 of this subchapter for additional information on military training.

CATEGORY X—PROTECTIVE PERSONNEL EQUIPMENT AND SHELTERS

(a) Protective personnel equipment specifically designed, developed, configured, adapted, modified, or equipped for military applications. This includes but is not limited to:

(1) Body armor;

(2) Clothing to protect against or reduce detection by radar, infrared (IR) or other sensors at wavelengths greater than 900 nanometers, and the specially treated or formulated dyes, coatings, and fabrics used in its design, manufacture, and production;

(3) Anti-Gravity suits (G-suits);

(4) Pressure suits capable of operating at altitudes above 55,000 feet sea level;

(5) Atmosphere diving suits designed, developed, modified, configured, or adapted for use in rescue operations involving submarines controlled by this subchapter;

(6) Helmets specially designed, developed, modified, configured, or adapted to be compatible with military communication hardware or optical sights or slewing devices;

(7) Goggles, glasses, or visors designed to protect against lasers or thermal flashes discharged by an article subject to this subchapter.

(b) Permanent or transportable shelters specifically designed and modified to protect against the effect of articles covered by this subchapter as follows:

(1) Ballistic shock or impact;

(2) Nuclear, biological, or chemical contamination.

(c) Tooling and equipment specifically designed or modified for the production of articles controlled by this category.

(d) Components, parts, accessories, attachments, and associated equipment specifically designed, modified, configured, or adapted for use with the articles in paragraphs (a) through (c) of this category.

(e) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.

(f) The following interpretations explain and amplify the terms used in this category and throughout this subchapter: (1) The body armor covered by this category does not include Type 1, Type 2, Type 2a, or Type 3a as defined by the National Institute of Justice Classification;

(2) The articles in this category include any end item, components, accessory, attachment, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category;

(3) Pressure suits in paragraph (a) (4) of this category include full and partial suits used to simulate normal atmospheric pressure conditions at high altitude.

CATEGORY XI—MILITARY ELECTRONICS

(a) Electronic equipment not included in Category XII of the U.S. Munitions List which is specifically designed, modified or configured for military application. This equipment includes but is not limited to:

*(1) Underwater sound equipment to include active and passive detection, identification, tracking, and weapons control equipment.

*(2) Underwater acoustic active and passive countermeasures and counter-countermeasures.

(3) Radar systems, with capabilities such as:

*(i) Search,

*(ii) Acquisition,

*(iii) Tracking,

*(iv) Moving target indication,

*(v) Imaging radar systems,

(vi) Any ground air traffic control radar which is specifically designed or modified for military application.

*(4) Electronic combat equipment, such as:

(i) Active and passive countermeasures,

(ii) Active and passive counter-countermeasures, and

(iii) Radios (including transceivers) specifically designed or modified to interfere with other communication devices or transmissions.

*(5) Command, control and communications systems to include radios

(transceivers), navigation, and identification equipment.

(6) Computers specifically designed or developed for military application and any computer specifically modified for use with any defense article in any category of the U.S. Munitions List.

(7) Any experimental or developmental electronic equipment specifically designed or modified for military application or specifically designed or modified for use with a military system.

*(b) Electronic systems or equipment specifically designed, modified, or configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems or equipment designed or modified to counteract electronic surveillance or monitoring. A system meeting this definition is controlled under this subchapter even in instances where any individual pieces of equipment constituting the system may be subject to the controls of another U.S. Government agency. Such systems or equipment described above include, but are not limited to, those:

(1) Designed or modified to use cryptographic techniques to generate the spreading code for spread spectrum or hopping code for frequency agility. This does not include fixed code techniques for spread spectrum.

(2) Designed or modified using burst techniques (e.g., time compression techniques) for intelligence, security or military purposes.

(3) Designed or modified for the purpose of information security to suppress the compromising emanations of information-bearing signals. This covers TEMPEST suppression technology and equipment meeting or designed to meet government TEMPEST standards. This definition is not intended to include equipment designed to meet Federal Communications Commission (FCC) commercial electro-magnetic interference standards or equipment designed for health and safety.

(c) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for use with the equipment in paragraphs (a) and (b) of this category, except for such items as are in normal commercial use.

(d) Technical data (as defined in §120.10) and defense services (as defined in §120.9) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (See §125.4 for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

CATEGORY XII—FIRE CONTROL, RANGE FINDER, OPTICAL AND GUIDANCE AND CONTROL EQUIPMENT

*(a) Fire control systems; gun and missile tracking and guidance systems; gun range, position, height finders, spotting instruments and laying equipment; aiming devices (electronic, optic, and acoustic); bomb sights, bombing computers, military television sighting and viewing units, and periscopes for the articles of this section.

*(b) Lasers specifically designed, modified or configured for military application including those used in military communication devices, target designators and range finders, target detection systems, and directed energy weapons.

*(c) Infrared focal plane array detectors specifically designed, modified, or configured for military use; image intensification and other night sighting equipment or systems specifically designed, modified or configured for military use; second generation and above military image intensification tubes (defined below) specifically designed, developed, modified, or configured for military use, and infrared, visible and ultraviolet devices specifically designed, developed, modified, or configured for military application. Military second and third generation image intensification tubes and military infrared focal plane arrays identified in this subparagraph are licensed by the Department of Commerce (ECCN 6A002A and 6A003A)) when part of a commercial system (*i.e.*, those systems originally designed for commercial use). This does not include any military system comprised of non-military specification components. Replacement tubes or focal plane arrays identified in this paragraph being exported for commercial systems are subject to the controls of the ITAR.

NOTE: *Special definition*. For purposes of this subparagraph, *second and third generation image intensification tubes* are defined as having: A peak response within the 0.4 to 1.05 micron wavelength range and incorporating a microchannel plate for electron image amplification having a hole pitch (center-to-center spacing) of less than 25 microns and having either:

(a) An S–20, S–25 or multialkali photocathode; or

(b) A GaAs, GaInAs, or other compound semiconductor photocathode.

*(d) Inertial platforms and sensors for weapons or weapon systems; guidance, control and stabilization systems except for those systems covered in Category VIII; astro-compasses and star trackers and military accelerometers and gyros. For aircraft inertial reference systems and related components refer to Category VIII.

(e) Components, parts, accessories, attachments and associated equipment specifically

designed or modified for the articles in paragraphs (a) through (d) of this category, except for such items as are in normal commercial use.

(f) Technical data (as defined in §120.10) and defense services (as defined in §120.9) directly related to the defense articles enumerated in paragraphs (a) through (e) of this category. (See §125.4 for exemptions.) Technical data directly related to manufacture and production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

CATEGORY XIII— MATERIALS AND MISCELLANEOUS ARTICLES

(a) Cameras and specialized processing equipment therefor, photointerpretation, stereoscopic plotting, and photogrammetry equipment which are specifically designed, developed, modified, adapted, or configured for military purposes, and components specifically designed or modified therefor.

(b) Information security or information assurance systems and equipment, cryptographic devices, software, and components, as follows:

(1) Military or intelligence cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components, and software (including their cryptographic interfaces) capable of maintaining secrecy or confidentiality of information or information systems, including equipment or software for tracking, telemetry, and control (TT&C) encryption and decryption;

(2) Military or intelligence cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components, and software (including their cryptographic interfaces) capable of generating spreading or hopping codes for spread spectrum systems or equipment;

(3) Military or intelligence cryptanalytic systems, equipment, assemblies, modules, integrated circuits, components and software;

(4) Military or intelligence systems, equipment, assemblies, modules, integrated circuits, components, or software (including all previous or derived versions) authorized to control access to or transfer data between different security domains as listed on the Unified Cross Domain Management Office (UCDMO) Control List (UCL); or

(5) Ancillary equipment specially designed for the articles in paragraphs (b)(1)–(b)(4) of this category.

(c) [Reserved]

(d) Materials, as follows:

*(1) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) specially designed for the articles in USML Category IV (MT if usable for nozzles, re-entry vehicles, nose tips, or nozzle flaps usable in rockets, space launch vehicles (SLVs), or missiles capable of achieving a range greater than or equal to 300 km); or

(2) Carbon/carbon billets and preforms that are reinforced with continuous unidirectional fibers, tows, tapes, or woven cloths in three or more dimensional planes (MT if designed for rocket, SLV, or missile systems and usable in rockets, SLVs, or missiles capable of achieving a range greater than or equal to 300 km).

NOTE TO PARAGRAPH (D): ''Range'' is the maximum distance that the specified rocket system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for rocket systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For rocket systems, the range will be determined using the trajectory that maximizes range, assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

NOTE TO PARAGRAPH (D)(2): This paragraph does not control carbon/carbon billets and preforms where reinforcement in the third dimension is limited to interlocking of adjacent layers only.

(e) Armor (e.g., organic, ceramic, metallic) and armor materials, as follows:

(1) Spaced armor with E_m greater than 1.4 and meeting NIJ Level III or better;

(2) Transparent armor having E_m greater than or equal to 1.3 or having E_m less than 1.3 and meeting and exceeding NIJ Level III standards with areal density less than or equal to 40 pounds per square foot;

(3) Transparent ceramic plate greater than ¼ inch-thick and larger than 8 inches x 8 inches, excluding glass, for transparent armor;

(4) Non-transparent ceramic plate or blanks, greater than ¼ inches thick and larger than 8 inches x 8 inches for transparent armor. This includes spinel and aluminum oxynitride (ALON);

(5) Composite armor with E_m greater than 1.4 and meeting or exceeding NIJ Level III;

(6) Metal laminate armor with E_m greater than 1.4 and meeting or exceeding NIJ Level III; or

(7) Developmental armor funded by the Department of Defense via contract or other funding authorization.

NOTE 1 TO PARAGRAPH (E)(7): This paragraph does not control armor (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination

(*see* § 120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (E)(7): Note 1 does not apply to defense articles enumerated on the USML, whether in production or development.

NOTE 3 TO PARAGRAPH (E)(7): This provision is applicable to those contracts and funding authorizations that are dated July 8, 2014, or later.

*(f) Any article enumerated in this category that (MT for those articles designated as such):

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

*(g) Concealment and deception equipment, as follows (MT for applications usable for rockets, SLVs, missiles, drones, or unmanned aerial vehicles (UAVs) capable of achieving a range greater than or equal to 300 km and their subsystems. *See* note to paragraph (d) of this category):

(1) Polymers loaded with carbonyl iron powder, ferrites, iron whiskers, fibers, flakes, or other magnetic additives having a surface resistivity of less than 5000 ohms/square and greater than 10 ohms/square with electrical isotropy of less than 5%;

(2) Multi-layer camouflage systems specially designed to reduce detection of platforms or equipment in the infrared or ultraviolet frequency spectrums;

(3) High temperature (greater than 300 °F operation) ceramic or magnetic radar absorbing material (RAM) specially designed for use on defense articles or military items subject to the EAR; or

(4) Broadband (greater than 30% bandwidth) lightweight (less than 2 lbs/sq ft) magnetic radar absorbing material (RAM) specially designed for use on defense articles or military items subject to the EAR.

(h) Energy conversion devices not otherwise enumerated in this subchapter, as follows:

(1) Fuel cells specially designed for platforms or soldier systems specified in this subchapter;

(2) Thermal engines specially designed for platforms or soldier systems specified in this subchapter;

(3) Thermal batteries (MT if designed or modified for rockets, SLVs, missiles, drones, or UAVs capable of achieving a range equal to or greater than 300 km. *See* note to paragraph (d) of this category); or

NOTE TO PARAGRAPH (H)(3): Thermal batteries are single use batteries that contain a solid non-conducting inorganic salt as the electrolyte. These batteries incorporate a pyrolitic material that, when ignited, melts the electrolyte and activates the battery.

(4) Thermionic generators specially designed for platforms or soldier systems enumerated in this subchapter.

*(i) Signature reduction software, and technical data as follows (MT for software specially designed for reduced observables, for applications usable for rockets, SLVs, missiles, drones, or UAVs capable of achieving a range (*see* note to paragraph (d) of this category) greater than or equal to 300 km, and their subsystems, including software specially designed for analysis of signature reduction; MT for technical data for the development, production, or use of equipment, materials, or software designated as such, including databases specially designed for analysis of signature reduction):

(1) Software associated with the measurement or modification of system signatures for defense articles to reduce detectability or observability;

(2) Software for design of low-observable platforms;

(3) Software for design, analysis, prediction, or optimization of signature management solutions for defense articles;

(4) Infrared signature measurement or prediction software for defense articles or radar cross section measurement or prediction software;

(5) Signature management technical data, including codes and algorithms for defense articles to reduce detectability or observability;

(6) Signature control design methodology (*see* § 125.4(c)(4) of this subchapter) for defense articles to reduce detectability or observability;

(7) Technical data for use of micro-encapsulation or micro-spheres to reduce infrared, radar, or visual detection of platforms or equipment;

(8) Multi-layer camouflage system technical data for reducing detection of platforms or equipment;

(9) Multi-spectral surface treatment technical data for modifying infrared, visual or radio frequency signatures of platforms or equipment;

(10) Technical data for modifying visual, electro-optical, radiofrequency, electric, magnetic, electromagnetic, or wake signatures (e.g., low probability of intercept (LPI) techniques, methods or applications) of defense platforms or equipment through shaping, active, or passive techniques; or

(11) Technical data for modifying acoustic signatures of defense platforms or equipment

through shaping, active, or passive techniques.

(j) Equipment, materials, coatings, and treatments not elsewhere specified, as follows:

(1) Specially treated or formulated dyes, coatings, and fabrics used in the design, manufacture, or production of personnel protective clothing, equipment, or face paints designed to protect against or reduce detection by radar, infrared, or other sensors at wavelengths greater than 900 nanometers (*see* USML Category X(a)(2)); or

*(2) Equipment, materials, coatings, and treatments that are specially designed to modify the electro-optical, radiofrequency, infrared, electric, laser, magnetic, electromagnetic, acoustic, electro-static, or wake signatures of defense articles or 600 series items subject to the EAR through control of absorption, reflection, or emission to reduce detectability or observability (MT for applications usable for rockets, SLVs, missiles, drones, or UAVs capable of achieving a range greater than or equal to 300 km, and their subsystems. *See* note to paragraph (d) of this category).

*(k) Tooling and equipment, as follows:

(1) Tooling and equipment specially designed for production of low observable (LO) components; or

(2) Portable platform signature field repair validation equipment (e.g., portable optical interrogator that validates integrity of a repair to a signature reduction structure).

(l) Technical data (*see* §120.10 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h), (j), and (k) of this category and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in this category. (*See* also §123.20 of this subchapter.) (MT for technical data and defense services related to articles designated as such.)

(m) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) Composite armor is defined as having more than one layer of different materials or a matrix.

(2) Spaced armors are metallic or non-metallic armors that incorporate an air space or obliquity or discontinuous material path effects as part of the defeat mechanism.

(3) Reactive armor employs explosives, propellants, or other materials between plates for the purpose of enhancing plate motion during a ballistic event or otherwise defeating the penetrator.

(4) Electromagnetic armor (EMA) employs electricity to defeat threats such as shaped charges.

(5) Materials used in composite armor could include layers of metals, plastics, elastomers, fibers, glass, ceramics, ceramic-glass reinforced plastic laminates, encapsulated ceramics in a metallic or non-metallic matrix, functionally gradient ceramic-metal materials, or ceramic balls in a cast metal matrix.

(6) For this category, a material is considered transparent if it allows 75% or greater transmission of light, corrected for index of refraction, in the visible spectrum through a 1 mm thick nominal sample.

(7) The material controlled in paragraph (e)(4) of this category has not been treated to reach the 75% transmission level referenced in (m)(6) of this category.

(8) Metal laminate armors are two or more layers of metallic materials which are mechanically or adhesively bonded together to form an armor system.

(9) E_m is the line-of-sight target mass effectiveness ratio and provides a measure of the tested armor's performance to that of rolled homogenous armor, where E_m is defined as follows:

$$Em = \frac{\rho_{RHA}\left(P_o - P_r\right)}{AD_{Target}}$$

Where:

ρ_{RHA} = density of RHA, (7.85 g/cm^3)

Po = Baseline Penetration of RHA, (mm)

Pr = Residual Line of Sight Penetration, either positive or negative (mm RHA equivalent)

AD_{TARGET} = Line-of-Sight Areal Density of Target (kg/m^2)

If witness plate is penetrated, P_r is the distance from the projectile to the front edge of the witness plate. If not penetrated, P_r is negative and is the distance from the back edge of the target to the projectile.

(10) NIJ is the National Institute of Justice and Level III refers to the requirements specified in NIJ standard 0108.01 Ballistic Resistant Protective Materials.

(n)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

CATEGORY XIV—TOXICOLOGICAL AGENTS, INCLUDING CHEMICAL AGENTS, BIOLOGICAL AGENTS, AND ASSOCIATED EQUIPMENT

*(a) Chemical agents, to include:

(1) Nerve agents:

(i) O-Alkyl (equal to or less than C_{10}, including cycloalkyl) alkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphonofluoridates, such as: Sarin (GB): O-Isopropyl methylphosphonofluoridate (CAS 107–44–8) (CWC Schedule 1A); and Soman (GD): O-Pinacolyl methylphosphonofluoridate (CAS 96–64–0) (CWC Schedule 1A);

(ii) O-Alkyl (equal to or less than C_{10}, including cycloalkyl) N,N-dialkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphoramidocyanidates, such as: Tabun (GA): O-Ethyl N, N-dimethylphosphoramidocyanidate (CAS 77–81–6) (CWC Schedule 1A);

(iii) O-Alkyl (H or equal to or less than C_{10}, including cycloalkyl) S–2-dialkyl (Methyl, Ethyl, n-Propyl or Isopropyl)aminoethyl alkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphonothiolates and corresponding alkylated and protonated salts, such as: VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate (CAS 50782–69–9) (CWC Schedule 1A);

(2) Amiton: O,O-Diethyl S-[2(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts (CAS 78–53–5) (CWC Schedule 2A);

(3) Vesicant agents:

(i) Sulfur mustards, such as: 2-Chloroethylchloromethylsulfide (CAS 2625–76–5) (CWC Schedule 1A); Bis(2-chloroethyl)sulfide (CAS 505–60–2) (CWC Schedule 1A); Bis(2-chloroethylthio)methane (CAS 63839–13–6) (CWC Schedule 1A); 1,2-bis (2-chloroethylthio)ethane (CAS 3563–36–8) (CWC Schedule 1A); 1,3-bis (2-chloroethylthio)-n-propane (CAS 63905–10–2) (CWC Schedule 1A); 1,4-bis (2-chloroethylthio)-n-butane (CWC Schedule 1A); 1,5-bis (2-chloroethylthio)-n-pentane (CWC Schedule 1A); Bis (2-chloroethylthiomethyl)ether (CWC Schedule 1A); Bis (2-chloroethylthioethyl)ether (CAS 63918–89–8) (CWC Schedule 1A);

(ii) Lewisites, such as: 2-chlorovinyldichloroarsine (CAS 541–25–3) (CWC Schedule 1A); Tris (2-chlorovinyl) arsine (CAS 40334–70–1) (CWC Schedule 1A); Bis (2-chlorovinyl) chloroarsine (CAS 40334–69–8) (CWC Schedule 1A);

(iii) Nitrogen mustards, such as: HN1: bis (2-chloroethyl) ethylamine (CAS 538–07–8) (CWC Schedule 1A); HN2: bis (2-chloroethyl) methylamine (CAS 51–75–2) (CWC Schedule 1A); HN3: tris (2-chloroethyl)amine (CAS 555–77–1) (CWC Schedule 1A);

(iv) Ethyldichloroarsine (ED);

(v) Methyldichloroarsine (MD);

(4) Incapacitating agents, such as:

(i) 3-Quinuclindinyl benzilate (BZ) (CAS 6581–06–2) (CWC Schedule 2A);

(ii) Diphenylchloroarsine (DA) (CAS 712–48–1);

(iii) Diphenylcyanoarsine (DC);

*(b) Biological agents and biologically derived substances specifically developed, configured, adapted, or modified for the purpose of increasing their capability to produce casualties in humans or livestock, degrade equipment or damage crops.

*(c) Chemical agent binary precursors and key precursors, as follows:

(1) Alkyl (Methyl, Ethyl, n-Propyl or Isopropyl) phosphonyl difluorides, such as: DF: Methyl Phosphonyldifluoride (CAS 676–99–3) (CWC Schedule 1B); Methylphosphinyldifluoride;

(2) O-Alkyl (H or equal to or less than C_{10}, including cycloalkyl) O–2-dialkyl (methyl, ethyl, n-Propyl or isopropyl)aminoethyl alkyl (methyl, ethyl, N-propyl or isopropyl)phosphonite and corresponding alkylated and protonated salts, such as: QL: O-Ethyl-2-di-isopropylaminoethyl methylphosphonite (CAS 57856–11–8) (CWC Schedule 1B);

(3) Chlorosarin: O-Isopropyl methylphosphonochloridate (CAS 1445–76–7) (CWC Schedule 1B);

(4) Chlorosoman: O-Pinakolyl methylphosphonochloridate (CAS 7040–57–5) (CWC Schedule 1B);

(5) DC: Methlyphosphonyl dichloride (CAS 676–97–1) (CWC Schedule 2B); Methylphosphinyldichloride;

(d) Tear gases and riot control agents including:

(1) Adamsite (Diphenylamine chloroarsine or DM) (CAS 578–94–9);

(2) CA (Bromobenzyl cyanide) (CAS 5798–79–8);

(3) CN (Phenylacyl chloride or w-Chloroacetophenone) (CAS 532–27-4);

(4) CR (Dibenz-(b,f)-1,4-oxazephine) (CAS 257–07–8);

(5) CS (o-Chlorobenzylidenemalononitrile or o-Chlorobenzalmalononitrile) (CAS 2698–41–1);

(6) Dibromodimethyl ether (CAS 4497–29–4);

(7) Dichlorodimethyl ether (ClCi) (CAS 542–88–1);

(8) Ethyldibromoarsine (CAS 683–43–2);

(9) Bromo acetone;

(10) Bromo methylethylketone;

(11) Iodo acetone;

(12) Phenylcarbylamine chloride;

(13) Ethyl iodoacetate;

(e) Defoliants, as follows:

(1) Agent Orange (2,4,5–Trichlorophenoxyacetic acid mixed with 2,4-dichlorophenoxyacetic acid);

(2) LNF (Butyl 2-chloro-4-fluorophenoxyacetate)

*(f) Equipment and its components, parts, accessories, and attachments specifically designed or modified for military operations and compatibility with military equipment as follows:

(1) The dissemination, dispersion or testing of the chemical agents, biological agents, tear gases and riot control agents, and defoliants listed in paragraphs (a), (b), (d), and (e), respectively, of this category;

(2) The detection, identification, warning or monitoring of the chemical agents and biological agents listed in paragraph (a) and (b) of this category;

(3) Sample collection and processing of the chemical agents and biological agents listed in paragraph (a) and (b) of this category;

(4) Individual protection against the chemical and biological agents listed in paragraphs (a) and (b) of this category.

(5) Collective protection against the chemical agents and biological agents listed in paragraph (a) and (b) of this category.

(6) Decontamination or remediation of the chemical agents and biological agents listed in paragraph (a) and (b) of this category.

(g) Antibodies, polynucleoides, biopolymers or biocatalysts specifically designed or modified for use with articles controlled in paragraph (f) of this category.

(h) Medical countermeasures, to include pre- and post-treatments, vaccines, antidotes and medical diagnostics, specifically designed or modified for use with the chemical agents listed in paragraph (a) of this category and vaccines with the sole purpose of protecting against biological agents identified in paragraph (b) of this category. Examples include: barrier creams specifically designed to be applied to skin and personal equipment to protect against vesicant agents controlled in paragraph (a) of this category; atropine auto injectors specifically designed to counter nerve agent poisoning.

(i) Modeling or simulation tools specifically designed or modified for chemical or biological weapons design, development or employment. The concept of modeling and simulation includes software covered by paragraph (m) of this category specifically designed to reveal susceptibility or vulnerability to biological agents or materials listed in paragraph (b) of this category.

(j) Test facilities specifically designed or modified for the certification and qualification of articles controlled in paragraph (f) of this category.

(k) Equipment, components, parts, accessories, and attachments, exclusive of incinerators (including those which have specially designed waste supply systems and special handling facilities), specifically designed or modified for destruction of the chemical agents in paragraph (a) or the biological agents in paragraph (b) of this category. This destruction equipment includes facilities specifically designed or modified for destruction operations.

(l) Tooling and equipment specifically designed or modified for the production of articles controlled by paragraph (f) of this category.

(m) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) related to the defense articles enumerated in paragraphs (a) through (l) of this category. (See §125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this Category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

(n) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter.

(1) A chemical agent in category XIV(a) is a substance having military application, which by its ordinary and direct chemical action, produces a powerful physiological effect.

(2) The biological agents or biologically derived substances in paragraph (b) of this category are those agents and substances capable of producing casualties in humans or livestock, degrading equipment or damaging crops and which have been modified for the specific purpose of increasing such effects. Examples of such modifications include increasing resistance to UV radiation or improving dissemination characteristics. This does not include modifications made only for civil applications (e.g., medical or environmental use).

(3) The destruction equipment controlled by this category related to biological agents in paragraph (b) is that equipment specifically designed to destroy only the agents identified in paragraph (b) of this category.

(4)(i) The individual protection against the chemical and biological agents controlled by this category includes military protective clothing and masks, but not those items designed for domestic preparedness (e.g., civil defense). Domestic preparedness devices for individual protection that integrate components and parts identified in this subparagraph are licensed by the Department of Commerce when such components are:

(A) Integral to the device;

(B) inseparable from the device; and,

(C) incapable of replacement without compromising the effectiveness of the device.

(ii) Components and parts identified in this subparagraph exported for integration into domestic preparedness devices for individual protection are subject to the controls of the ITAR;

(5) Technical data and defense services in paragraph (l) include libraries, databases and algorithms specifically designed or modified for use with articles controlled in paragraph (f) of this category.

(6) The tooling and equipment covered by paragraph (l) of this category includes molds used to produce protective masks, overboots, and gloves controlled by paragraph (f) and leak detection equipment specifically designed to test filters controlled by paragraph (f) of this category.

(7) The resulting product of the combination of any controlled or non-controlled substance compounded or mixed with any item controlled by this subchapter is also subject to the controls of this category.

NOTE 1: This Category does not control formulations containing 1% or less CN or CS or individually packaged tear gases or riot control agents for personal self-defense purposes.

NOTE 2: Categories XIV(a) and (d) do not include the following:

(1) Cyanogen chloride;
(2) Hydrocyanic acid;
(3) Chlorine;
(4) Carbonyl chloride (Phosgene);
(5) Ethyl bromoacetate;
(6) Xylyl bromide;
(7) Benzyl bromide;
(8) Benzyl iodide;
(9) Chloro acetone;
(10) Chloropicrin (trichloronitromethane);
(11) Fluorine;
(12) Liquid pepper.

NOTE 3: Chemical Abstract Service (CAS) registry numbers do not cover all the substances and mixtures controlled by this category. The numbers are provided as examples to assist the government agencies in the license review process and the exporter when completing their license application and export documentation.

NOTE 4: With respect to U.S. obligations under the Chemical Weapons Convention (CWC), refer to Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710 through 722). As appropriate, the CWC schedule is provided to assist the exporter.

NOTE 5: Pharmacological formulations containing nitrogen mustards and certain reference standards for these drugs are not considered to be chemical agents and are licensed by the Department of Commerce when:

(1) The drug is in the form of a final medical product; or

(2) The reference standard contains salts of HN2 [bis(2-chloroethyl) methylamine], the quantity to be shipped is 150 milligrams or less, and individual shipments do not exceed twelve per calendar year per end user.

Technical data for the production of HN1 [bis(2-chloroethyl)ethylamine]; HN2 [bis(2-chloroethyl)methylamine], HN3 [tris(2-chloroethyl)amine]; or salts of these, such as tris (2-chloroethyl)amine hydrochloride, remains controlled under this Category.

CATEGORY XV—SPACECRAFT SYSTEMS AND ASSOCIATED EQUIPMENT

*(a) Spacecraft, including communications satellites, remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental and multi-mission satellites.

*NOTE TO PARAGRAPH (a): Commercial communications satellites, scientific satellites, research satellites and experimental satellites are designated as SME only when the equipment is intended for use by the armed forces of any foreign country.

(b) Ground control stations for telemetry, tracking and control of spacecraft or satellites, or employing any of the cryptographic items controlled under category XIII of this subchapter.

(c) Global Positioning System (GPS) receiving equipment specifically designed, modified or configured for military use; or GPS receiving equipment with any of the following characteristics:

(1) Designed for encryption or decryption (e.g., Y-Code) of GPS precise positioning service (PPS) signals;

(2) Designed for producing navigation results above 60,000 feet altitude and at 1,000 knots velocity or greater;

(3) Specifically designed or modified for use with a null steering antenna or including a null steering antenna designed to reduce or avoid jamming signals;

(4) Designed or modified for use with unmanned air vehicle systems capable of delivering at least a 500 kg payload to a range of at least 300 km.

NOTE: GPS receivers designed or modified for use with military unmanned air vehicle systems with less capability are considered to be specifically designed, modified or configured for military use and therefore covered under this paragraph (d)(4).)

Any GPS equipment not meeting this definition is subject to the jurisdiction of the Department of Commerce (DOC). Manufacturers or exporters of equipment under DOC jurisdiction are advised that the U.S. Government does not assure the availability of the GPS P-Code for civil navigation. It is the policy of the Department of Defense (DOD) that GPS receivers using P-Code without clarification as to whether or not those receivers were designed or modified to use Y-Code will be presumed to be Y-Code capable and covered under this paragraph. The DOD policy further requires that a notice be attached to all P-Code receivers presented for export. The notice must state the following: ''ADVISORY NOTICE: This receiver uses the GPS P-Code signal, which by U.S. policy, may be switched off without notice.''

(d) Radiation-hardened microelectronic circuits that meet or exceed all five of the following characteristics:

(1) A total dose of 5×10^5 Rads (Si);

(2) A dose rate upset threshold of 5×10^8 Rads (Si)/sec;

(3) A neutron dose of 1×10^{14} n/cm^2 (1 MeV equivalent);

(4) A single event upset rate of 1×10^{-10} errors/bit-day or less, for the CREME96 geosynchronous orbit, Solar Minimum Environment;

(5) Single event latch-up free and having a dose rate latch-up threshold of 5×10^8 Rads (Si).

(e) All specifically designed or modified systems or subsystems, components, parts, accessories, attachments, and associated equipment for the articles in this category, including the articles identified in section 1516 of Public Law 105–261: satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines (see also Categories IV and V in this section).

NOTE: This coverage by the U.S. Munitions List does not include the following unless specifically designed or modified for military application (see §120.3 of this subchapter): (For controls on these items see the Export Administration Regulations, Commerce Control List (15 CFR Parts 730 through 799).)

(1) Space qualified travelling wave tubes (also known as helix tubes or TWTs), microwave solid state amplifiers, microwave assemblies, and travelling wave tube amplifiers operating at frequencies equal to or less than 31GHz.

(2) Space qualified photovoltaic arrays having silicon cells or having single, dual, triple junction solar cells that have gallium arsenide as one of the junctions.

(3) Space qualified tape recorders.

(4) Atomic frequency standards that are not space qualified.

(5) Space qualified data recorders.

(6) Space qualified telecommunications systems, equipment and components not designed or modified for satellite uses.

(7) Technology required for the development or production of telecommunications equipment specifically designed for non-satellite uses.

(8) Space qualified focal plane arrays having more than 2048 elements per array and having a peak response in the wavelength range exceeding 300nm but not exceeding 900nm.

(9) Space qualified laser radar or Light Detection and Ranging (LIDAR) equipment.

(f) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the articles enumerated in paragraphs (a) through (e) of this category, as well as detailed design, development, manufacturing or production data for all spacecraft and specifically designed or modified components for all spacecraft systems. This paragraph includes all technical data, without exception, for all launch support activities (e.g., technical data provided to the launch provider on form, fit, function, mass, electrical, mechanical, dynamic, environmental, telemetry, safety, facility, launch pad access, and launch parameters, as well as interfaces for mating and parameters for launch.) (See §124.1 for the requirements for technical assistance agreements before defense services may be furnished even when all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter.) Technical data directly related to the manufacture or production of any article enumerated elsewhere in this category that is designated as Significant Military Equipment (SME) shall itself be designated SME. Further, technical data directly related to the manufacture or production of all spacecraft, notwithstanding the nature of the intended end use (e.g., even where the hardware is not SME), is designated SME.

NOTE TO PARAGRAPH (f): The special export controls contained in §124.15 of this subchapter are always required before a U.S. person may participate in a launch failure investigation or analysis and before the export of any article or defense service in this category for launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization or a major non-NATO ally of the United States. Such special export controls also may be imposed with respect to any destination as deemed appropriate in furtherance of the security and foreign policy of the United States.

CATEGORY XVI—NUCLEAR WEAPONS, DESIGN AND TESTING RELATED ITEMS

*(a) Any article, material, equipment, or device which is specifically designed or modified for use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. (See §123.20 of this subchapter and Department of Commerce Export Administration Regulations, 15 CFR 742.3 and 744.2).

*(b) Any article, material, equipment, or device which is specifically designed or modified for use in the devising, carrying out, or evaluating of nuclear weapons tests or any other nuclear explosions (including for modeling or simulating the employment of nuclear weapons or the integrated operational use of nuclear weapons), except such items as are in normal commercial use for other purposes.

*(c) Nuclear radiation detection and measurement devices specifically designed or modified for military applications.

(d) All specifically designed or modified components and parts, accessories, attachments, and associated equipment for the articles in this category.

(e) Technical data (as defined in § 120.10 of this subchapter), and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category. (See also, § 123.20 of this subchapter.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

CATEGORY XVII—CLASSIFIED ARTICLES, TECHNICAL DATA, AND DEFENSE SERVICES NOT OTHERWISE ENUMERATED

*(a) All articles, and technical data (*see* § 120.10 of this subchapter) and defense services (*see* § 120.9 of this subchapter) relating thereto, that are classified in the interests of national security and that are not otherwise enumerated on the U.S. Munitions List.

CATEGORY XVIII—DIRECTED ENERGY WEAPONS

*(a) Directed energy weapon systems specifically designed or modified for military applications (e.g., destruction, degradation or rendering mission-abort of a target). These include, but are not limited to:

(1) Laser systems, including continuous wave or pulsed laser systems, specifically designed or modified to cause blindness;

(2) Lasers of sufficient continuous wave or pulsed power to effect destruction similar to the manner of conventional ammunition;

(3) Particle beam systems;

(4) Particle accelerators that project a charged or neutral particle beam with destructive power;

(5) High power radio-frequency (RF) systems;

(6) High pulsed power or high average power radio frequency beam transmitters that produce fields sufficiently intense to disable electronic circuitry at distant targets;

(7) Prime power generation, energy storage, switching, power conditioning, thermal management or fuel-handling equipment;

(8) Target acquisition or tracking systems;

(9) Systems capable or assessing target damage, destruction or mission-abort;

(10) Beam-handling, propagation or pointing equipment;

(11) Equipment with rapid beam slew capability for rapid multiple target operations;

(12) Negative ion beam funneling equipment; and,

(13) Equipment for controlling and slewing a high-energy ion beam.

*(b) Equipment specifically designed or modified for the detection or identification of, or defense against, articles controlled in paragraph (a) of this category.

(c) Tooling and equipment specifically designed or modified for the production of defense articles controlled by this category.

(d) Test and evaluation equipment and test models specifically designed or modified for the defense articles controlled by this category. This includes, but is not limited to, diagnostic instrumentation and physical test models.

(e) Components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in paragraphs (a) through (d) of this category.

(f) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (e) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(g) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) The components, parts, accessories, attachments and associated equipment include, but are not limited to adaptive optics and phase conjugators components, space-qualified accelerator components, targets and specifically designed target diagnostics, current injectors for negative hydrogen ion beams, and space-qualified foils for neutralizing negative hydrogen isotope beams.

(2) The particle beam systems in paragraph (a)(3) of this category include devices embodying particle beam and electromagnetic pulse technology and associated components and subassemblies (e.g., ion beam current injectors, particle accelerators for neutral or charged particles, beam handling and projection equipment, beam steering, fire control, and pointing equipment, test and diagnostic instruments, and targets) which are specifically designed or modified for directed energy weapon applications.

(3) The articles controlled in this category include any end item, component, accessory, attachment, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category.

(4) The articles specifically designed or modified for military application controlled in this category include any articles specifically developed, configured, or adapted for military application.

CATEGORY XIX—GAS TURBINE ENGINES AND ASSOCIATED EQUIPMENT

*(a) Turbofan and Turbojet engines (including technology demonstrators) capable of 15,000 lbf (66.7 kN) of thrust or greater that have any of the following:

(1) with or specially designed for thrust augmentation (afterburner);

(2) thrust or exhaust nozzle vectoring;

(3) parts or components controlled in paragraph (f)(6) of this category;

(4) specially designed for sustained 30 second inverted flight or negative g maneuver; or

(5) specially designed for high power extraction (greater than 50 percent of engine thrust at altitude) at altitudes greater than 50,000 feet.

*(b) Turboshaft and Turboprop engines (including technology demonstrators) capable of 1500 mechanical shp (1119 kW) or greater and are specially designed with oil sump sealing when the engine is in the vertical position.

*(c) Engines (including technology demonstrators) specially designed for armed or military unmanned aerial vehicle systems, cruise missiles, or target drones (MT if for an engine used in an unmanned aerial vehicle, drone, or missile that has a ''range'' equal to or greater than 300 km).

*(d) GE38, AGT1500, CTS800, TF40B, T55, TF60, and T700 engines.

*(e) Digital engine control systems (e.g., Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)) specially designed for gas turbine engines controlled in this category (MT if the digital engine control system is for an unmanned aerial vehicle, drone, or missile that has a range equal to or greater than 300 km).

NOTE TO PARAGRAPH (e): Digital electronic control systems autonomously control the engine throughout its whole operating range from demanded engine start until demanded engine shut-down, in both normal and fault conditions. For the definition of ''range,'' *see* note to paragraph (a) of USML Category VIII.

(f) Parts, components, accessories, attachments, associated equipment, and systems as follows:

(1) Parts, components, accessories, attachments, and equipment specially designed for the following U.S.-origin engines (and military variants thereof): AE1107C, F101, F107, F112, F118, F119, F120, F135, F136, F414, F415, J402, GE38, TF40B, and TF60;

*(2) Hot section components (*i.e.*, combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles) specially designed for gas turbine engines controlled in this category;

(3) Uncooled turbine blades, vanes, disks, and tip shrouds specially designed for gas turbine engines controlled in this category;

(4) Combustor cowls, diffusers, domes, and shells specially designed for gas turbine engines controlled in this category;

(5) Engine monitoring systems (*i.e.*, prognostics, diagnostics, and health) specially designed for gas turbine engines and components controlled in this category;

*(6) Any part, component, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) is being developed using classified information (*see* §120.10(a)(2) of this subchapter).

''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization; or

(7) Printed circuit boards or patterned multichip modules for which the layout is specially designed for defense articles in this category.

(g) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category and classified technical data directly related to items controlled in ECCNs 9A619, 9B619, 9C619, and 9D619 and defense services using the classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(h)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

CATEGORY XX—SUBMERSIBLE VESSELS AND RELATED ARTICLES

(a) Submersible and semi-submersible vessels (*see* §121.14 of this subchapter) that are:

*(1) Submarines;

(2) Mine countermeasure vehicles;

(3) Anti-submarine warfare vehicles;

(4) Armed;

(5) Swimmer delivery vehicles specially designed for the deployment, recovery, or support of swimmers or divers from submarines;

(6) Vessels equipped with any mission systems controlled under this subchapter; or

(7) Developmental vessels funded by the Department of Defense via contract or other funding authorization.

NOTE 1 TO PARAGRAPH (A)(7): This paragraph does not control vessels, and specially designed parts, components, accessories, attachments, and associated equipment therefor, (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination (*see* §120.4 of this subchapter) or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (A)(7): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

NOTE 3 TO PARAGRAPH (A)(7): This provision is applicable to those contracts and funding authorizations that are dated July 8, 2014, or later.

*(b) Engines, electric motors, and propulsion plants as follows:

(1) Naval nuclear propulsion plants and prototypes, and special facilities for construction, support, and maintenance therefor (*see* §123.20 of this subchapter);

(2) Electric motors specially designed for submarines that have the following:

(i) Power output of more than 0.75 MW (1,000 hp);

(ii) Quick reversing;

(iii) Liquid cooled; and

(iv) Totally enclosed.

(c) Parts, components, accessories, attachments, and associated equipment, including production, testing, and inspection equipment and tooling, specially designed for any of the articles in paragraphs (a) and (b) of this category (MT for launcher mechanisms specially designed for rockets, space launch vehicles, or missiles capable of achieving a range greater than or equal to 300 km).

NOTE TO PARAGRAPH (C): ''Range'' is the maximum distance that the specified rocket system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for rocket systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For rocket systems, the range will be determined using the trajectory that maximizes range, assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

(d) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (MT for technical data and defense services related to articles designated as such.) (*See* §125.4 of this subchapter for exemptions.)

(e)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

CATEGORY XXI—ARTICLES, TECHNICAL DATA, AND DEFENSE SERVICES NOT OTHERWISE ENUMERATED

*(a) Any article not enumerated on the U.S. Munitions List may be included in this category until such time as the appropriate U.S. Munitions List category is amended. The decision on whether any article may be included in this category, and the designation of the defense article as not Significant Military Equipment (*see* §120.7 of this subchapter), shall be made by the Director, Office of Defense Trade Controls Policy.

(b) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles covered in paragraph (a) of this category.

[58 FR 39287, July 22, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §121.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

EFFECTIVE DATE NOTE: At 79 FR 39, Jan. 2, 2014, §121.1 was amended by revising U.S. Munitions List Categories IV, V, IX, X, and XVI, effective July 1, 2014. For the convenience of the user, the revised text is set forth as follows:

§121.1 General. The United States Munitions List.

* * * * *

CATEGORY IV—LAUNCH VEHICLES, GUIDED MISSILES, BALLISTIC MISSILES, ROCKETS, TORPEDOES, BOMBS, AND MINES

*(a) Rockets, space launch vehicles (SLVs), missiles, bombs, torpedoes, depth charges, mines, and grenades, as follows:

(1) Rockets, SLVs, and missiles capable of delivering at least a 500-kg payload to a range of at least 300 km (MT);

(2) Rockets, SLVs, and missiles capable of delivering less than a 500-kg payload to a range of at least 300 km (MT);

(3) Man-portable air defense systems (MANPADS);

(4) Anti-tank missiles and rockets;

(5) Rockets, SLVs, and missiles not meeting the criteria of paragraphs (a)(1) through (a)(4) of this category;

(6) Bombs;

(7) Torpedoes;

(8) Depth charges;

(9) Anti-personnel, anti-vehicle, or anti-armor land mines (e.g., area denial devices);

(10) Anti-helicopter mines;

(11) Naval mines; or

(12) Fragmentation and high explosive hand grenades.

NOTE 1 TO PARAGRAPH (A): ''Range'' is the maximum distance that the specified rocket system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for rocket systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For rocket systems, the range will be determined using the trajectory that maximizes range, assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

NOTE 2 TO PARAGRAPH (A): ''Payload'' is the total mass that can be carried or delivered by the specified rocket, SLV, or missile that is not used to maintain flight.

NOTE 3 TO PARAGRAPH (A): This paragraph does not control model and high power rockets (as defined in National Fire Protection Association Code 1122) and kits thereof made of paper, wood, fiberglass, or plastic containing no substantial metal parts and designed to be flown with hobby rocket motors that are certified for consumer use. Such rockets must not contain active controls (e.g., RF, GPS).

NOTE 4 TO PARAGRAPH (A): ''Mine'' means a munition placed under, on, or near the ground or other surface area and designed to be exploded by the presence, proximity, or contact of a person or vehicle.

*(b) Launchers for rockets, SLVs, and missiles, as follows:

(1) Fixed launch sites and mobile launcher mechanisms for any system enumerated in paragraphs (a)(1) and (a)(2) of this category (e.g., launch tables, TOW missile, MANPADS) (MT); or

(2) Fixed launch sites and mobile launcher mechanisms for any system enumerated in paragraphs (a)(3) through (a)(5) of this category (e.g., launch tables, TOW missile, MANPADS).

NOTE 1 TO PARAGRAPH (B): For controls on non-SLV launcher mechanisms for use on aircraft, *see* USML Category VIII(h).

NOTE 2 TO PARAGRAPH (B): For controls on launcher mechanisms that are integrated onto a vessel or ground vehicle, *see* USML Categories VI and VII, respectively.

NOTE 3 TO PARAGRAPH (B): This paragraph does not control parts and accessories (e.g., igniters, launch stands) specially designed for consumer use with model and high power rockets (as defined in National Fire Protection Association Code 1122) and kits thereof made of paper, wood, fiberglass, or plastic containing no substantial metal parts and designed to be flown with hobby rocket motors that are certified for consumer use.

(c) Apparatus and devices specially designed for the handling, control, activation, monitoring, detection, protection, discharge, or detonation of the articles enumerated in paragraphs (a) and (b) of this category (MT for those systems enumerated in paragraphs (a)(1), (a)(2), and (b)(1) of this category).

NOTE 1 TO PARAGRAPH (C): This paragraph includes specialized handling equipment (transporters, cranes, and lifts) specially designed to handle articles enumerated in paragraphs (a) and (b) of this category for preparation and launch from fixed and mobile sites. The equipment in this paragraph also includes specially designed robots, robot controllers, and robot end-effectors, and liquid propellant tanks specially designed for the storage or handling of the propellants controlled in USML Category V, CCL ECCNs 1C011, 1C111, and 1C608, or other liquid propellants used in the systems enumerated in paragraphs (a)(1), (a)(2), or (a)(5) of this category.

NOTE 2 TO PARAGRAPH (C): Aircraft Missile Protection Systems (AMPS) are controlled in USML Category XI.

*(d) Rocket, SLV, and missile power plants, as follows:

(1) Except as enumerated in paragraph (d)(2) or (d)(3) of this category, individual rocket stages for the articles enumerated in paragraph (a)(1), (a)(2), or (a)(5) of this category (MT for those stages usable in systems enumerated in paragraphs (a)(1) and (a)(2) of this category);

(2) Solid propellant rocket motors, hybrid or gel rocket motors, or liquid propellant rocket engines having a total impulse capacity equal to or greater than 1.1×10^6 N·s (MT);

(3) Solid propellant rocket motors, hybrid or gel rocket motors, or liquid propellant rocket engines having a total impulse capacity equal to or greater than 8.41×10^5 N·s, but less than 1.1×10^6 N·s (MT);

(4) Combined cycle, pulsejet, ramjet, or scramjet engines (MT);

(5) Air-breathing engines that operate above Mach 4 not enumerated in paragraph (d)(4) of this category;

(6) Pressure gain combustion-based propulsion systems not enumerated in paragraphs (d)(4) and (d)(5) of this category; or

(7) Rocket, SLV, and missile engines and motors, not otherwise enumerated in paragraphs (d)(1) through (d)(6) of this category or USML Category XIX.

NOTE TO PARAGRAPH (D): This paragraph does not control model and high power rocket motors, containing no more than 5 pounds of propellant, that are certified for U.S. consumer use as described in National Fire Protection Association Code 1125.

(e)–(f) [Reserved]

*(g) Non-nuclear warheads for rockets, bombs, and missiles (e.g., explosive, kinetic, EMP, thermobaric, shape charge, and fuel air explosive (FAE)).

(h) Systems, subsystems, parts, components, accessories, attachments, or associated equipment, as follows:

(1) Flight control and guidance systems (including guidance sets) specially designed for articles enumerated in paragraph (a) of this category (MT for those articles enumerated in paragraphs (a)(1) and (a)(2) of this category);

NOTE TO PARAGRAPH (H)(1): A guidance set integrates the process of measuring and computing a vehicle's position and velocity (*i.e.*, navigation) with that of computing and sending commands to the vehicle's flight control systems to correct the trajectory.

(2) Seeker systems specially designed for articles enumerated in paragraph (a) of this category (e.g., radiofrequency, infrared) (MT for articles enumerated in paragraphs (a)(1) and (a)(2) of this category);

(3) Kinetic kill vehicles and specially designed parts and components therefor;

(4) Missile or rocket thrust vector control systems (MT for those thrust vector control systems usable in articles enumerated in paragraph (a)(1) of this category);

(5) MANPADS grip stocks and specially designed parts and components therefor;

(6) Rocket or missile nozzles and nozzle throats, and specially designed parts and components therefor (MT for those nozzles and nozzle throats usable in systems enumerated in paragraphs (a)(1) and (a)(2) of this category);

(7) Rocket or missile nose tips, nose fairings, or aerospikes, and specially designed parts and components therefor (MT for those articles enumerated in paragraphs (a)(1) and (a)(2) of this category);

(8) Re-entry vehicle or warhead heat shields (MT for those re-entry vehicles and heat shields usable in systems enumerated in paragraph (a)(1) of this category);

(9) Missile and rocket safing, arming, fuzing, and firing (SAFF) components (to include target detection and proximity sensing devices), and specially designed parts therefor (MT for those SAFF components usable in systems enumerated in paragraph (a)(1) of this category);

(10) Self-destruct systems specially designed for articles enumerated in paragraph (a) of this category (MT for those articles enumerated in paragraphs (a)(1) and (a)(2) of this category);

(11) Separation mechanisms, staging mechanisms, and interstages useable for articles enumerated in paragraph (a) of this category, and specially designed parts and components therefor (MT for those separation mechanisms, staging mechanisms, and interstages usable in systems enumerated in paragraph (a)(1) of this category);

(12) Post-boost vehicles (PBV) (MT);

(13) Engine or motor mounts specially designed for articles enumerated in paragraphs (a) and (b) of this category (MT for those articles enumerated in paragraphs (a)(1), (a)(2), and (b)(1) of this category);

(14) Combustion chambers specially designed for articles enumerated in paragraphs (a) and (d) of this category and specially designed parts and components therefor (MT for those articles enumerated in paragraphs (a)(1), (a)(2), (b)(1), and (d)(1) through (d)(5) of this category);

(15) Injectors specially designed for articles controlled in this category (MT for those injectors specially designed which are usable in systems enumerated in paragraph (a)(1) of this category);

(16) Solid rocket motor or liquid engine igniters;

(17) Re-entry vehicles and specially designed parts and components therefor not elsewhere specified in this category (MT);

NOTE TO PARAGRAPH (H)(17): This paragraph does not control spacecraft. For controls on spacecraft, *see* USML Category XV and, if not described therein, then CCL ECCN 9A515.

(18) Specially designed parts and components for articles controlled in paragraph (g) not elsewhere specified in this category;

(19) Penetration aids and specially designed parts and components therefor (e.g., physical or electronic countermeasure suites, re-entry vehicle replicas or decoys, or submunitions);

(20) Rocket motor cases and specially designed parts and components therefor (e.g., flanges, flange seals, end domes) (MT for those rocket motor cases usable in systems enumerated in paragraphs (a)(1) and (a)(2) of this category and for specially designed parts and components for hybrid rocket motors enumerated in paragraphs (d)(2) and (d)(3) of this category);

(21) Solid rocket motor liners and rocket motor insulation (MT for those solid rocket motor liners usable in systems enumerated in paragraph (a)(1) of this category or specially designed for systems enumerated in paragraph (a)(2) of this category; and rocket

motor insulation usable in systems enumerated in paragraphs (a)(1) and (a)(2) of this category);

(22) Radomes, sensor windows, and antenna windows specially designed for articles enumerated in paragraph (a) of this category (MT for those radomes usable in systems enumerated in paragraph (a)(1) of this category and for any radomes, sensor windows, or antenna windows manufactured as composite structures or laminates specially designed for use in the systems and components enumerated in paragraph (a)(1), (a)(2), (d)(1), (h)(8), (h)(9), (h)(17), or (h)(25) of this category);

(23) Rocket or missile payload fairings;

(24) Rocket or missile launch canisters (MT for those rocket or missile launch canisters designed or modified for systems enumerated in paragraphs (a)(1) and (a)(2) of this category);

(25) Fuzes specially designed for articles enumerated in paragraph (a) of this category (e.g., proximity, contact, electronic, dispenser proximity, airburst, variable time delay, or multi-option) (MT for those fuzes usable in systems enumerated in paragraph (a)(1) of this category);

(26) Rocket or missile liquid propellant tanks (MT for those rocket or missile liquid propellant tanks usable in systems enumerated in paragraph (a)(1) of this category);

(27) Rocket or missile altimeters specially designed for use in articles enumerated in paragraph (a)(1) of this category (MT);

(28) Pneumatic, hydraulic, mechanical, electro-optical, or electromechanical flight control systems (including fly-by-wire systems) and attitude control equipment specially designed for use in the rockets or missiles enumerated in paragraph (a)(1) of this category (MT for these systems which have been designed or modified for those enumerated in paragraph (a)(1) of this category);

(29) Umbilical and interstage electrical connectors specially designed for use in the rockets or missiles enumerated in paragraph (a)(1) or (a)(2) of this category (MT); or

NOTE TO PARAGRAPH (H)(29): This paragraph also includes electrical connectors installed between the systems specified in paragraph (a)(1) or (a)(2) of this category and their payload.

*(30) Any part, component, accessory, attachment, equipment, or system that (MT for those articles designated as such):

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

NOTE TO PARAGRAPH (H)(30): ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

(i) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category and classified technical data directly related to items controlled in ECCNs 0A604, 0B604, 0D604, 9A604, 9B604, or 9D604 and defense services using the classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(j)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

NOTE TO CATEGORY IV: If a Missile Technology Control Regime Category I item is included in a system, that system will also be considered as a Category I item, except when the incorporated item cannot be separated, removed, or duplicated.

CATEGORY V—EXPLOSIVES AND ENERGETIC MATERIALS, PROPELLANTS, INCENDIARY AGENTS, AND THEIR CONSTITUENTS

*(a) Explosives, and mixtures thereof, as follows:

(1) ADNBF (aminodinitrobenzofuroxan or 7-Amino 4,6-dinitrobenzofurazane-1-oxide) (CAS 97096–78–1);

(2) BNCP (cis-bis(5-nitrotetrazolato) tetra amine-cobalt (III) perchlorate) (CAS 117412–28–9);

(3) CL–14 (diaminodinitrobenzofuroxan or 5,7-diamino-4,6-dinitrobenzofurazane-1-oxide) (CAS 117907–74–1);

(4) CL–20 (HNIW or Hexanitrohexaazaisowurtzitane) (CAS 135285–90–4); clathrates of CL–20 (MT for CL–20);

(5) CP (2-(5-cyanotetrazolato) penta aminecobalt (III) perchlorate) (CAS 70247–32–4);

(6) DADE (1,1-diamino-2,2-dinitroethylene, FOX–7);

(7) DATB (Diaminotrinitrobenzene) (CAS 1630–08–6);

(8) DDFP (1,4-dinitrodifurazanopiperazine);

(9) DDPO (2,6-diamino-3,5-dinitropyrazine-1-oxide, PZO) (CAS 194486–77–6);

(10) DIPAM (3,3′-Diamino-2,2′,4,4′,6,6′-hexanitrobiphenyl or dipicramide) (CAS 17215–44–0);

(11) DNAN (2,4-Dinitroanisole) (CAS 119–27–7);

(12) DNGU (DINGU or dinitroglycoluril) (CAS 55510–04–8);

(13) Furazans, as follows:
(i) DAAOF (DAAF, DAAFox, or diaminoazoxyfurazan);
(ii) DAAzF (diaminoazofurazan) (CAS 78644–90–3);
(iii) ANF (Furazanamine, 4-nitro- or 3-Amino-4-nitrofurazan; or 4-Nitro-1,2,5-oxadiazol-3-amine; or 4-Nitro-3-furazanamine; CAS 66328–69–6); or
(iv) ANAzF (Aminonitroazofurazan or 1,2,5-Oxadiazol-3-amine, 4-[2-(4-nitro-1,2,5-oxadiazol-3-yl) diazenyl]; or 1,2,5-Oxadiazol-3-amine, 4-[(4-nitro-1,2,5-oxadiazol-3-yl)azo]-(9CI); or Furazanamine, 4-[(nitrofurananyl)azo]-; or 4-[(4-Nitro-1,2,5-oxadiazol-3-yl)azo]-1,2,5-oxadiazol-3-amine) (CAS 155438–11–2);
(14) GUDN (Guanylurea dinitramide) FOX–12 (CAS 217464–38–5);
(15) HMX and derivatives, as follows:
(i) HMX (Cyclotetramethylenetetranitramine; octahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazine; 1,3,5,7-tetranitro-1,3,5,7-tetraza-cyclooctane; octogen, octogene) (CAS 2691–41–0) (MT);
(ii) Difluoroaminated analogs of HMX; or
(iii) K–55 (2,4,6,8-tetranitro-2,4,6,8-tetraazabicyclo [3,3,0]-octanone-3, tetranitrosemiglycouril, or keto-bicyclic HMX) (CAS 130256–72–3);
(16) HNAD (hexanitroadamantane) (CAS 143850–71–9);
(17) HNS (hexanitrostilbene) (CAS 20062–22–0);
(18) Imidazoles, as follows:
(i) BNNII (Octohydro-2,5-bis(nitroimino) imidazo [4,5-d]imidazole);
(ii) DNI (2,4-dinitroimidazole) (CAS 5213–49–0);
(iii) FDIA (1-fluoro-2,4-dinitroimidazole);
(iv) NTDNIA (N-(2-nitrotriazolo)-2,4-dinitro-imidazole); or
(v) PTIA (1-picryl-2,4,5-trinitroimidazole);
(19) NTNMH (1-(2-nitrotriazolo)-2-dinitromethylene hydrazine);
(20) NTO (ONTA or 3-nitro-1,2,4-triazol-5-one) (CAS 932–64–9);
(21) Polynitrocubanes with more than four nitro groups;
(22) PYX (2,6-Bis(picrylamino)-3,5-dinitropyridine) (CAS 38082–89–2);
(23) RDX and derivatives, as follows:
(i) RDX (cyclotrimethylenetrinitramine), cyclonite, T4, hexahydro-1,3,5-trinitro-1,3,5-triazine, 1,3,5-trinitro-1,3,5-triaza-cyclohexane, hexogen, or hexogene) (CAS 121–82–4) (MT);
(ii) Keto-RDX (K–6 or 2,4,6-trinitro-2,4,6-triazacyclohexanone) (CAS 115029–35–1); or
(iii) Difluoraminated derivative of RDX; 1,3-Dinitro-5,5-bis(difluoramino)1,3-diazahexane (CAS No. 193021–34–0);
(24) TAGN (Triaminoguanidinenitrate) (CAS 4000–16–2);
(25) TATB (Triaminotrinitrobenzene) (CAS 3058–38–6);
(26) TEDDZ (3,3,7,7-tetrakis(difluoroamine) octahydro-1,5-dinitro-1,5-diazocine;
(27) Tetrazines, as follows:
(i) BTAT (Bis(2,2,2-trinitroethyl)-3,6-diaminotetrazine); or
(ii) LAX–112 (3,6-diamino-1,2,4,5-tetrazine-1,4-dioxide);
(28) Tetrazoles, as follows:
(i) NTAT (nitrotriazolaminotetrazole); or
(ii) NTNT (1-N-(2-nitrotriazolo)-4-nitrotetrazole);
(29) Tetryl (trinitrophenylmethylnitramine) (CAS 479–45–8);
(30) TEX (4,10-Dinitro-2,6,8,12-tetraoxa-4,10-diazaisowurtzitane);
(31) TNAD (1,4,5,8-tetranitro-1,4,5,8-tetraazadecalin) (CAS 135877–16–6);
(32) TNAZ (1,3,3-trinitroazetidine) (CAS 97645–24–4);
(33) TNGU (SORGUYL or tetranitroglycoluril) (CAS 55510–03–7);
(34) TNP (1,4,5,8-tetranitro-pyridazino [4,5-d] pyridazine) (CAS 229176–04–9);
(35) Triazines, as follows:
(i) DNAM (2-oxy-4,6-dinitroamino-s-triazine) (CAS 19899–80–0); or
(ii) NNHT (2-nitroimino-5-nitro-hexahydro-1,3,5 triazine) (CAS 130400–13–4);
(36) Triazoles, as follows:
(i) 5-azido-2-nitrotriazole;
(ii) ADHTDN (4-amino-3,5-dihydrazino-1,2,4-triazole dinitramide) (CAS 1614–08–0);
(iii) ADNT (1-amino-3,5-dinitro-1,2,4-triazole);
(iv) BDNTA (Bis(dinitrotriazole)amine);
(v) DBT (3,3′-dinitro-5,5-bi-1,2,4-triazole) (CAS 30003–46–4);
(vi) DNBT (dinitrobistriazole) (CAS 70890–46–9);
(vii) NTDNT (1–N-(2-nitrotriazolo) 3,5-dinitro-triazole);
(viii) PDNT (1-picryl-3,5-dinitrotriazole); or
(ix) TACOT (tetranitrobenzotriazolobenzotriazole) (CAS 25243–36–1);
(37) Energetic ionic materials melting between 70 and °degrees C and with detonation velocity exceeding 6800 m/s or detonation pressure exceeding 18 GPa (180 kbar); or
(38) Explosives, not otherwise enumerated in this paragraph or on the CCL in ECCN 1C608, with a detonation velocity exceeding 8700 m/s at maximum density or a detonation pressure exceeding 34 Gpa (340 kbar).
*(b) Propellants, as follows (MT for composite and composite modified double-base propellants):
(1) Any solid propellant with a theoretical specific impulse (*see* paragraph (k)(4) of this category) greater than:
(i) 240 seconds for non-metallized, non-halogenated propellant;
(ii) 250 seconds for non-metallized, halogenated propellant; or
(iii) 260 seconds for metallized propellant;

(2) Propellants having a force constant of more than 1,200 kJ/Kg;

(3) Propellants that can sustain a steady-state burning rate more than 38 mm/s under standard conditions (as measured in the form of an inhibited single strand) of 6.89 Mpa (68.9 bar) pressure and 294K (21 °C);

(4) Elastomer-modified cast double-based propellants with extensibility at maximum stress greater than 5% at 233 K (−40 °C); or

(5) Other composite and composite modified double-base propellants.

(c) Pyrotechnics, fuels and related substances, and mixtures thereof, as follows:

(1) Alane (aluminum hydride) (CAS 7784–21–6);

(2) Carboranes; decaborane (CAS 17702–41–9); pentaborane and derivatives thereof (MT);

(3) Liquid high energy density fuels, as follows (MT):

(i) Mixed fuels that incorporate both solid and liquid fuels, such as boron slurry, having a mass-based energy density of 40 MJ/kg or greater; or

(ii) Other high energy density fuels and fuel additives (e.g., cubane, ionic solutions, JP–7, JP–10) having a volume-based energy density of 37.5 GJ per cubic meter or greater, measured at 20 °C and one atmosphere (101.325 kPa) pressure;

NOTE TO PARAGRAPH (C)(3)(II): JP–4, JP–8, fossil refined fuels or biofuels, or fuels for engines certified for use in civil aviation are not included.

(4) Metal fuels, and fuel or pyrotechnic mixtures in particle form whether spherical, atomized, spheroidal, flaked, or ground, manufactured from material consisting of 99% or more of any of the following:

(i) Metals, and mixtures thereof, as follows:

(A) Beryllium (CAS 7440–41–7) in particle sizes of less than 60 micrometers (MT); or

(B) Iron powder (CAS 7439–89–6) with particle size of 3 micrometers or less produced by reduction of iron oxide with hydrogen;

(ii) Fuel mixtures or pyrotechnic mixtures, which contain any of the following:

(A) Boron (CAS 7440–42–8) or boron carbide (CAS 12069–32–8) fuels of 85% purity or higher and particle sizes of less than 60 micrometers; or

(B) Zirconium (CAS 7440–67–7), magnesium (CAS 7439–95–4), or alloys of these in particle sizes of less than 60 micrometers;

(iii) Explosives and fuels containing the metals or alloys listed in paragraphs (c)(4)(i) and (c)(4)(ii) of this category whether or not the metals or alloys are encapsulated in aluminum, magnesium, zirconium, or beryllium;

(5) Fuel, pyrotechnic, or energetic mixtures having any nanosized aluminum, beryllium, boron, zirconium, magnesium, or titanium, as follows:

(i) Having particle size less than 200 nm in any direction; and

(ii) Having 60% or higher purity;

(6) Pyrotechnic and pyrophoric materials, as follows:

(i) Pyrotechnic or pyrophoric materials specifically formulated to enhance or control the production of radiated energy in any part of the IR spectrum; or

(ii) Mixtures of magnesium, polytetrafluoroethylene and the copolymer vinylidene difluoride and hexafluoropropylene (MT);

(7) Titanium subhydride (TiHn) of stoichiometry equivalent to n = 0.65–1.68; or

(8) Hydrocarbon fuels specially formulated for use in flame throwers or incendiary munitions containing metal stearates (e.g., octal) or palmitates, and M1, M2, and M3 thickeners.

(d) Oxidizers, as follows:

(1) ADN (ammonium dinitramide or SR–12) (CAS 140456–78–6) (MT);

(2) AP (ammonium perchlorate) (CAS 7790–98–9) (MT);

(3) BDNPN (bis(2,2-dinitropropyl)nitrate) (CAS 28464–24–6);

(4) DNAD (1,3-dinitro-1,3-diazetidine) (CAS 78246–06–7);

(5) HAN (Hydroxylammonium nitrate) (CAS 13465–08–2);

(6) HAP (hydroxylammonium perchlorate) (CAS 15588–62–2);

(7) HNF (Hydrazinium nitroformate) (CAS 20773–28–8) (MT);

(8) Hydrazine nitrate (CAS 37836–27–4) (MT);

(9) Hydrazine perchlorate (CAS 27978–54–7) (MT);

(10) Inhibited red fuming nitric acid (IRFNA) (CAS 8007–58–7) and liquid oxidizers comprised of or containing IRFNA or oxygen difluoride (MT for liquid oxidizers comprised of IRFNA); or

(11) Perchlorates, chlorates, and chromates composited with powdered metal or other high energy fuel components controlled under this category (MT).

*(e) Binders, and mixtures thereof, as follows:

(1) AMMO (azidomethylmethyloxetane and its polymers) (CAS 90683–29–7);

(2) BAMO (bis(azidomethyl)oxetane and its polymers) (CAS 17607–20–4);

(3) BTTN (butanetriol trinitrate) (CAS 6659–60–5) (MT);

(4) FAMAO (3-difluoroaminomethyl-3-azidomethyloxetane) and its polymers;

(5) FEFO (bis(2-fluoro-2,2-dinitroethyl)formal) (CAS 17003–79–1);

(6) GAP (glycidyl azide polymer) (CAS 143178–24–9) and its derivatives (MT for GAP);

(7) HTPB (hydroxyl-terminated polybutadiene) with a hydroxyl functionality equal to or greater than 2.2 and less than or equal to 2.4, a hydroxyl value of less than 0.77 meq/g, and a viscosity at 30 °C of less than 47 poise (CAS 69102–90–5) (MT);

(8) 4,5 diazidomethyl-2-methyl-1,2,3-triazole (iso-DAMTR) (MT);

(9) NENAS (nitratoethylnitramine compounds), as follows:

(i) N-Methyl 2-nitratoethylnitramine (Methyl-NENA) (CAS 17096–47–8) (MT);

(ii) N-Ethyl 2-nitratoethylnitramine (Ethyl-NENA) (CAS 85068–73–1) (MT);

(iii) N-Propyl 2-nitratoethylnitramine (CAS 82486–83–7);

(iv) N-Butyl-2-nitratoethylnitramine (BuNENA) (CAS 82486–82–6); or

(v) N-Pentyl 2-nitratoethylnitramine (CAS 85954–06–9);

(10) Poly-NIMMO (poly nitratomethylmethyoxetane, poly-NMMO, (poly[3-nitratomethyl-3-methyl oxetane]) (CAS 84051–81–0);

(11) PNO (Poly(3-nitratooxetane));

(12) TVOPA 1,2,3-Tris [1,2-bis(difluoroamino)ethoxy]propane; tris vinoxy propane adduct (CAS 53159–39–0);

(13) Polynitrorthocarbonates;

(14) FPF–1 (poly-2,2,3,3,4,4-hexafluoro pentane-1,5-diolformal) (CAS 376–90–9);

(15) FPF–3 (poly-2,4,4,5,5,6,6-heptafluoro-2-trifluoromethyl-3-oxaheptane-1,7-diolformal);

(16) PGN (Polyglycidyl nitrate or poly(nitratomethyloxirane); poly-GLYN); (CAS 27814–48–8);

(17) N-methyl-p-nitroaniline (MT);

(18) Low (less than 10,000) molecular weight, alcohol-functionalized, poly(epichlorohydrin); poly(epichlorohydrindiol); and triol; or

(19) Dinitropropyl based plasticizers, as follows (MT):

(i) BDNPA (bis (2,2-dinitropropyl) acetal) (CAS 5108–69–0); or

(ii) BDNPF (bis (2,2-dinitropropyl) formal) (CAS 5917–61–3).

(f) Additives, as follows:

(1) Basic copper salicylate (CAS 62320–94–9);

(2) BHEGA (Bis-(2-hydroxyethyl)glycolamide) (CAS 17409–41–5);

(3) BNO (Butadienenitrile oxide);

(4) Ferrocene derivatives, as follows (MT):

(i) Butacene (CAS 125856–62–4);

(ii) Catocene (2,2-Bis-ethylferrocenylpropane) (CAS 37206–42–1);

(iii) Ferrocene carboxylic acids and ferrocene carboxylic acid esters;

(iv) n-butylferrocene (CAS 31904–29–7);

(v) Ethylferrocene (CAS 1273–89–8);

(vi) Propylferrocene;

(vii) Pentylferrocene (CAS 1274–00–6);

(viii) Dicyclopentylferrocene;

(ix) Dicyclohexylferrocene;

(x) Diethylferrocene (CAS 173–97–8);

(xi) Dipropylferrocene;

(xii) Dibutylferrocene (CAS 1274–08–4);

(xiii) Dihexylferrocene (CAS 93894–59–8);

(xiv) Acetylferrocene (CAS 1271–55–2)/1,1′-diacetyl ferrocene (CAS 1273–94–5); or

(xv) Other ferrocene derivatives that do not contain a six carbon aromatic functional group attached to the ferrocene molecule (MT if usable as rocket propellant burning rate modifier);

(5) Lead beta-resorcylate (CAS 20936–32–7);

(6) Lead citrate (CAS 14450–60–3);

(7) Lead-copper chelates of beta-resorcylate or salicylates (CAS 68411–07–4);

(8) Lead maleate (CAS 19136–34–6);

(9) Lead salicylate (CAS 15748–73–9);

(10) Lead stannate (CAS 12036–31–6);

(11) MAPO (tris-1-(2-methyl) aziridinylphosphine oxide) (CAS 57–39–6); BOBBA–8 (bis(2-methyl aziridinyl)-2-(2-hydroxypropanoxy) propylamino phosphine oxide); and other MAPO derivatives (MT for MAPO);

(12) Methyl BAPO (Bis(2-methyl aziridinyl)methylaminophosphine oxide) (CAS 85068–72–0);

(13) 3-Nitraza-1,5-pentane diisocyanate (CAS 7406–61–9);

(14) Organo-metallic coupling agents, as follows:

(i) Neopentyl[diallyl]oxy, tri [dioctyl] phosphatotitanate (CAS 103850–22–2); also known as titanium IV, 2,2[bis 2-propenolatomethyl, butanolato, tris (dioctyl) phosphato] (CAS 110438–25–0), or LICA 12 (CAS 103850–22–2);

(ii) Titanium IV, [(2-propenolato-1) methyl, n-propanolatomethyl] butanolato-1, tris(dioctyl)pyrophosphate, or KR3538; or

(iii) Titanium IV, [(2-propenolato-1)methyl, propanolatomethyl] butanolato-1, tris(dioctyl) phosphate;

(15) PCDE (Polycyanodifluoroaminoethylene oxide);

(16) Certain bonding agents, as follows (MT):

(i) 1,1R,1S-trimesoyl-tris(2-ethylaziridine) (HX–868, BITA) (CAS 7722–73–8); or

(ii) Polyfunctional aziridine amides with isophthalic, trimesic, isocyanuric, or trimethyladipic backbone also having a 2-methyl or 2-ethyl aziridine group;

NOTE TO PARAGRAPH (F)(16)(II): Included are (1) 1,1H-Isophthaloyl-bis(2-methylaziridine) (HX–752) (CAS 7652–64–4); (2) 2,4,6-tris(2-ethyl-1-aziridinyl)-1,3,5-triazine (HX–874) (CAS 18924–91–9); and (3) 1,1′-trimethyladipoylbis(2-ethylaziridine) (HX–877) (CAS 71463–62–2).

(17) Superfine iron oxide (Fe_2O_3, hematite) with a specific surface area more than 250 m^2/g and an average particle size of 0.003 micrometers or less (CAS 1309–37–1);

(18) TEPAN (HX–879) (tetraethylenepentaamineacrylonitrile) (CAS 68412–45–3); cyanoethylated polyamines and their salts (MT for TEPAN (HX–879));

(19) TEPANOL (HX–878) (tetraethylenepentaamineacrylonitrileglycidol) (CAS 110445–33–5); cyanoethylated polyamines adducted with glycidol and their salts (MT for TEPANOL (HX–878));

(20) TPB (triphenyl bismuth) (CAS 603–33–8) (MT); or

(21) Tris (ethoxyphenyl) bismuth (TEPB) (CAS 90591–48–3).

(g) Precursors, as follows:

(1) BCMO (bischloromethyloxetane) (CAS 142173–26–0);

(2) DADN (1,5-diacetyl-3,7-dinitro-1, 3, 5, 7-tetraazacyclooctane);

(3) Dinitroazetidine-t-butyl salt (CAS 125735–38–8);

(4) CL–20 precursors (any molecule containing hexaazaisowurtzitane) (e.g., HBIW (hexabenzylhexaazaisowurtzitane), TAIW (tetraacetyldibenzylhexa-azaisowurtzitane));

(5) TAT (1, 3, 5, 7-tetraacetyl-1, 3, 5, 7-tetraazacyclooctane) (CAS 41378–98–7);

(6) Tetraazadecalin (CAS 5409–42–7);

(7) 1,3,5-trichlorobenzene (CAS 108–70–3); or

(8) 1,2,4-trihydroxybutane (1,2,4-butanetriol) (CAS 3068–00–6).

*(h) Any explosive, propellant, pyrotechnic, fuel, oxidizer, binder, additive, or precursor that (MT for articles designated as such):

(1) Is classified; or

(2) Is being developed using classified information (*see* §120.10(a)(2) of this subchapter).

NOTE TO PARAGRAPH (H): ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

(i) Developmental explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors therefor funded by the Department of Defense via contract or other funding authorization.

NOTE 1 TO PARAGRAPH (I): This paragraph does not control explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors therefor (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination (*see* §120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (I): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

NOTE 3 TO PARAGRAPH (I): This paragraph is applicable only to those contracts and funding authorizations that are dated January 5, 2015, or later.

(j) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles numerated in paragraphs (a) through (i) of this category (*see* also §123.20 of this subchapter) (MT for articles designated as such).

(k) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter:

(1) USML Category V contains explosives, energetic materials, propellants, and pyrotechnics and specially formulated fuels for aircraft, missile, and naval applications. Explosives are solid, liquid, or gaseous substances or mixtures of substances, which, in their primary, booster, or main charges in warheads, demolition, or other military applications, are required to detonate.

(2) The resulting product of the combination or conversion of any substance controlled by this category into an item not controlled will no longer be controlled by this category provided the controlled item cannot easily be recovered through dissolution, melting, sieving, etc. As an example, beryllium converted to a near net shape using hot isostatic processes will result in an uncontrolled part. A cured thermoset containing beryllium powder is not controlled unless meeting an explosive or propellant control. The mixture of beryllium powder in a cured thermoset shape is not controlled by this category. The mixture of controlled beryllium powder mixed with a typical propellant binder will remain controlled by this category. The addition of dry silica powder to dry beryllium powder will remain controlled.

(3) Paragraph (c)(4)(ii)(A) of this category does not apply to boron and boron carbide enriched with boron-10 (20% or more of total boron-10 content).

(4) Theoretical specific impulse (Isp) is calculated using standard conditions (1000 psi chamber pressure expanded to 14.7 psi) and measured in units of pound-force-seconds per pound-mass (lbf-s/lbm) or simplified to seconds (s). Calculations will be based on shifting equilibrium.

(5) Particle size is the mean particle diameter on a weight basis. Best industrial practices will be used in determining particle size and the controls may not be undermined by addition of larger or smaller sized material to shift the mean diameter.

(l)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

NOTE 1 TO USML CATEGORY V: To assist the exporter, an item has been categorized by the most common use. Also, where appropriate, references have been provided to the related controlled precursors.

NOTE 2 TO USML CATEGORY V: Chemical Abstract Service (CAS) registry numbers do not cover all the substances and mixtures controlled by this category. The numbers are provided as examples to assist government agencies in the license review process and

exporters when completing their license application and export documentation.

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CATEGORY IX—MILITARY TRAINING EQUIPMENT

(a) Training equipment, as follows:

(1) Ground, surface, submersible, space, or towed airborne targets that:

(i) Have an infrared, radar, acoustic, magnetic, or thermal signature that mimic a specific defense article, specific other item, or specific person; or

(ii) Are instrumented to provide hit/miss performance information for defense articles controlled in this subchapter;

NOTE TO PARAGRAPH (A)(1): Target drones are controlled in USML Category VIII(a).

(2) Devices that are mockups of articles enumerated in this subchapter used for maintenance training or disposal training for ordnance enumerated in this subchapter;

NOTE TO PARAGRAPH (A)(2): This paragraph does not control mockups that do not reveal technical data (*see* ITAR §120.10 of this subchapter) and do not contain parts, components, accessories, or attachments controlled in this subchapter.

(3) Air combat maneuvering instrumentation and ground stations therefor;

(4) Physiological flight trainers for fighter aircraft or attack helicopters;

(5) Radar trainers specially designed for training on radar controlled by USML Category XI;

(6) Training devices specially designed to be attached to a crew station, mission system, or weapon of an article controlled in this subchapter;

NOTE TO PARAGRAPH (A)(6): This paragraph includes stimulators that are built-in or add-on devices that cause the actual equipment to act as a trainer.

(7) Anti-submarine warfare trainers;

(8) Missile launch trainers;

(9) Radar target generators;

(10) Infrared scene generators; or

*(11) Any training device that:

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information. ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

NOTE TO PARAGRAPH (A): Training equipment does not include combat games without item signatures or tactics, techniques, and procedures covered by this subchapter.

(b) Simulators, as follows:

(1) System specific simulators that replicate the operation of an individual crew station, a mission system, or a weapon of an end-item that is controlled in this subchapter;

(2)–(3) [Reserved]

(4) Software and associated databases not elsewhere enumerated in this subchapter that can be used to model or simulate the following:

(i) Trainers enumerated in paragraph (a) of this category;

(ii) Battle management;

(iii) Military test scenarios/models; or

(iv) Effects of weapons enumerated in this subchapter; or

*(5) Simulators that:

(i) Are classified;

(ii) Contain classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Are being developed using classified information.

NOTE TO PARAGRAPH (B)(5): ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

(c)–(d) [Reserved]

(e) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) and (b) of this category.

NOTE TO PARAGRAPH (E): This paragraph includes defense services (*see* §120.9 of this subchapter) directly related to the software and associated databases enumerated in paragraph (b)(4) of this category even if no defense articles are used or transferred.

(f)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

NOTE TO USML CATEGORY IX: Parts, components, accessories, or attachments of a simulator in this category that are common to the simulated system or simulated end-item are controlled under the same USML category or CCL ECCN as the parts, components, accessories, and attachments of the simulated system or simulated end-item.

CATEGORY X—PERSONAL PROTECTIVE EQUIPMENT

(a) Personal protective equipment, as follows:

(1) Body armor providing a protection level equal to or greater than NIJ Type IV;

NOTE 1 TO PARAGRAPH (A)(1): For body armor providing a level of protection of Type I, Type II, Type IIA, Type IIIA, or Type III, *see* ECCNs 1A005 and 1A613.

NOTE 2 TO PARAGRAPH (A)(1): *See* USML Category XIII(e) for controls on related materials.

(2) Personal protective clothing, equipment, or face paints specially designed to protect against or reduce detection by radar, IR, or other sensors at wavelengths greater than 900 nanometers;

NOTE TO PARAGRAPH (A)(2): *See* USML Category XIII(j) for controls on related materials.

(3)–(4) [Reserved]

(5) Integrated helmets, not specified in USML Category VIII(h)(15) or USML Category XII, incorporating optical sights or slewing devices, which include the ability to aim, launch, track, or manage munitions;

(6) Helmets and helmet shells providing a protection level equal to or greater than NIJ Type IV;

(7) Goggles, spectacles, visors, vision blocks, canopies, or filters for optical sights or viewers, employing other than common broadband absorptive dyes or UV inhibitors as a means of protection (e.g., narrow band filters/dyes or broadband limiters/coatings with high visible transparency), having an optical density greater than 3, and that protect against:

(i) Multiple visible (in-band) laser wavelengths;

(ii) Thermal flashes associated with nuclear detonations; or

(iii) Near infrared or ultraviolet (out-of-band) laser wavelengths; or

NOTE 1 TO PARAGRAPH (A)(7): *See* paragraphs (d)(2) and (3) of this category for controls on related parts, components, and materials.

NOTE 2 TO PARAGRAPH (A)(7): *See* USML Category XII for sensor protection equipment.

(8) Developmental personal protective equipment and specially designed parts, components, accessories, and attachments therefor, developed for the U.S. Department of Defense via contract or other funding authorization.

NOTE 1 TO PARAGRAPH (A)(8): This paragraph does not control personal protective equipment and specially designed parts, components, accessories, and attachments (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination (*see* §120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

NOTE 2 TO PARAGRAPH (A)(8): Note 1 does not apply to defense articles enumerated on the USML, whether in production or development.

NOTE 3 TO PARAGRAPH (A)(8): This paragraph is applicable only to those contracts and funding authorizations that are dated January 5, 2015, or later.

(b)–(c) [Reserved]

(d) Parts, components, assemblies, accessories, attachments, and associated equipment for the personal protective equipment controlled in this category, as follows:

(1) Ceramic or composite plates that provide protection equal to or greater than NIJ Type IV;

(2) Lenses, substrates, or filters ''specially designed'' for the articles covered in paragraph (a)(7) of this category;

(3) Materials and coatings specially designed for the articles covered in paragraph (a)(7) of this category with optical density greater than 3, as follows:

(i) Narrowband absorbing dyes;

(ii) Broadband optical switches or limiters (*i.e.*, nonlinear material, tunable or switchable agile filters, optical power limiters, near infrared interference based filters); or

(iii) Narrowband interference based notch filters (*i.e.*, multi-layer dielectric coatings, rugate, holograms or hybrid (*i.e.*, interference with dye)) protecting against multiple laser wavelength and having high visible band transparency; or

*(4) Any component, part, accessory, attachment, equipment, or system that:

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

NOTE TO PARAGRAPH (D)(4): ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international government.

NOTE TO PARAGRAPHS (A) AND (D): *See* National Institute of Justice Classification, NIJ Standard-0101.06, or national equivalents, for a description of level of protection for armor.

(e) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.

(f)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data

subject to the EAR (*see* § 123.1(b) of this subchapter).

* * * * *

CATEGORY XVI—NUCLEAR WEAPONS RELATED ARTICLES

(a) [Reserved]

*(b) Modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans.

(c) [Reserved]

(d) Parts, components, accessories, attachments, associated equipment, and production, testing, and inspection equipment and tooling, specially designed for the articles in paragraph (b) of this category.

(e) Technical data (*see* § 120.10 of this subchapter) and defense services (*see* § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraph (b) of this category. (*See* § 123.20 of this subchapter for nuclear related controls.)

(f)–(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* § 120.42 of this subchapter) used in or with defense articles controlled in this category.

NOTE TO PARAGRAPH (X): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* § 123.1(b) of this subchapter).

* * * * *

§ 121.2 Interpretations of the U.S. Munitions List.

The following interpretations explain and amplify the terms used in § 121.1 of this subchapter. These interpretations have the same force as if they were a part of the U.S. Munitions List category to which they refer.

[78 FR 22758, Apr. 16, 2013; 78 FR 61755, Oct. 3, 2013]

§ 121.3 Aircraft.

(a) In USML Category VIII, except as described in paragraph (b) below, ''aircraft'' means aircraft that:

(1) Are U.S.-origin aircraft that bear an original military designation of A, B, E, F, K, M, P, R, or S;

(2) Are foreign-origin aircraft specially designed to provide functions equivalent to those of the aircraft listed in paragraph (a)(1) of this section;

(3) Are armed or are specially designed to be used as a platform to deliver munitions or otherwise destroy targets (e.g., firing lasers, launching rockets, firing missiles, dropping bombs, or strafing);

(4) Are strategic airlift aircraft with a roll-on/roll-off ramp and capable of airlifting payloads over 35,000 lbs to ranges over 2,000 nm without being refueled in-flight into short or unimproved airfields;

(5) Are capable of being refueled in-flight;

(6) Incorporate any mission system controlled under this subchapter. ''Mission system'' is defined as a system (*see* § 121.8(g) of this subchapter) that is a defense article that performs specific military functions beyond airworthiness, such as by providing military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities; or

(7) Are Optionally Piloted Vehicles (OPV) (*i.e.*, aircraft specially designed to operate with and without a pilot physically located in the aircraft).

(b) Aircraft specially designed for military applications that are not identified in paragraph (a) of this section are subject to the EAR and classified as ECCN 9A610, including any unarmed military aircraft, regardless of origin or designation, manufactured prior to 1956 and unmodified since manufacture. Modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are considered ''unmodified'' for the purposes of this paragraph.

[78 FR 22758, Apr. 16, 2013; 78 FR 61755, Oct. 3, 2013]

§ 121.4 Ground vehicles.

(a) In USML Category VII, ''ground vehicles'' are those, whether manned or unmanned, that:

(1) Are armed or are specially designed to be used as a platform to deliver munitions or otherwise destroy or incapacitate targets (e.g., firing lasers, launching rockets, firing missiles, firing mortars, firing artillery rounds, or firing other ammunition greater than .50 caliber);

(2) Are armored support vehicles capable of off-road or amphibious use specially designed to transport or deploy personnel or materiel, or to move with other vehicles over land in close support of combat vehicles or troops (e.g., personnel carriers, resupply vehicles, combat engineer vehicles, recovery vehicles, reconnaissance vehicles, bridge launching vehicles, ambulances, and command and control vehicles); or

(3) Incorporate any ''mission systems'' controlled under this subchapter. ''Mission systems'' are defined as ''systems'' (*see* § 121.8(g) of this subchapter) that are defense articles that perform specific military functions, such as by providing military communication, target designation, surveillance, target detection, or sensor capabilities.

NOTE 1 TO PARAGRAPH (A): Armored ground vehicles are (i) ground vehicles that have integrated, fully armored hulls or cabs, or (ii) ground vehicles on which add-on armor has been installed to provide ballistic protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better. Armored vehicles do not include those that are merely capable of being equipped with add-on armor.

NOTE 2 TO PARAGRAPH (A): Ground vehicles include any vehicle meeting the definitions or control parameters regardless of the surface (e.g., highway, off-road, rail) upon which the vehicle is designed to operate.

(b) Ground vehicles specially designed for military applications that are not identified in paragraph (a) of this section are subject to the EAR under ECCN 0A606, including any unarmed ground vehicles, regardless of origin or designation, manufactured prior to 1956 and unmodified since 1955. Modifications made to incorporate safety features required by law, are cosmetic (e.g., different paint, repositioning of bolt holes), or that add parts or components otherwise available prior to 1956 are considered ''unmodified'' for the purposes of this paragraph. ECCN 0A606 also includes unarmed vehicles derived from otherwise EAR99 civilian vehicles that have been modified or otherwise fitted with materials to provide ballistic protection, including protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better and that do not have reactive or electromagnetic armor.

[78 FR 40932, July 8, 2013]

§ 121.5 Apparatus and devices under Category IV(c).

Category IV includes but is not limited to the following: Fuzes and components specifically designed, modified or configured for items listed in that category, bomb racks and shackles, bomb shackle release units, bomb ejectors, torpedo tubes, torpedo and guided missile boosters, guidance systems equipment and parts, launching racks and projectors, pistols (exploders), ignitors, fuze arming devices, intervalometers, thermal batteries, hardened missile launching facilities, guided missile launchers and specialized handling equipment, including transporters, cranes and lifts designed to handle articles in paragraphs (a) and (b) of this category for preparation and launch from fixed and mobile sites. The equipment in this category includes robots, robot controllers and robot end-effectors specially designed or modified for military applications.

EFFECTIVE DATE NOTE: At 79 FR 46, Jan. 2, 2014, § 121.5 was removed and reserved, effective July 1, 2014.

§§ 121.6–121.7 [Reserved]

§ 121.8 End-items, components, accessories, attachments, parts, firmware, software, and systems.

(a) An *end-item* is an assembled article ready for its intended use. Only ammunition, fuel or another energy source is required to place it in an operating state.

(b) A *component* is an item which is useful only when used in conjunction with an end-item. A major component includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. (EXAMPLE: Airframes, tail sections, transmissions, tank treads, hulls, etc.) A minor component includes any assembled element of a major component.

(c) *Accessories* and *attachments* are associated equipment for any component, end-item or system, and which are not necessary for their operation, but

which enhance their usefulness or effectiveness. (EXAMPLES: Military riflescopes, special paints, etc.)

(d) A *part* is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. (EXAMPLES: Rivets, wire, bolts, etc.)

(e) Firmware and any related unique support tools (such as computers, linkers, editors, test case generators, diagnostic checkers, library of functions and system test diagnostics) specifically designed for equipment or systems covered under any category of the U.S. Munitions List are considered as part of the end-item or component. *Firmware* includes but is not limited to circuits into which software has been programmed.

(f) *Software* includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems and support software for design, implementation, test, operation, diagnosis and repair. A person who intends to export software only should, unless it is specifically enumerated in § 121.1 (e.g., XIII(b)), apply for a technical data license pursuant to part 125 of this subchapter.

(g) A *system* is a combination of end-items, parts, components, accessories, attachments, firmware, or software that operate together to perform a specialized military function.

[58 FR 39287, July 22, 1993, as amended at 78 FR 22758, Apr. 16, 2013]

EFFECTIVE DATE NOTE: At 79 FR 46, Jan. 2, 2014, § 121.8 was revised, effective July 1, 2014. For the convenience of the user, the revised text is set forth as follows:

§ 121.8 End-items, components, accessories, attachments, parts, firmware, software, systems, and equipment.

(a) An *end-item* is a system, equipment, or an assembled article ready for its intended use. Only ammunition or fuel or other energy source is required to place it in an operating state.

(b) A *component* is an item which is useful only when used in conjunction with an end-item. A major component includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. A minor component includes any assembled element of a major component.

(c) *Accessories* and *attachments* are associated articles for any component, equipment, system, or end-item, and which are not necessary for its operation, but which enhance its usefulness or effectiveness.

(d) A *part* is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of designed use.

(e) *Firmware* and any related unique support tools (such as computers, linkers, editors, test case generators, diagnostic checkers, library of functions, and system test diagnostics) directly related to equipment or systems covered under any category of the U.S. Munitions List are considered as part of the end-item or component. Firmware includes but is not limited to circuits into which software has been programmed.

(f) *Software* includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems, and support software for design, implementation, test, operation, diagnosis and repair. A person who intends to export software only should, unless it is specifically enumerated in § 121.1 of this subchapter (e.g., USML Category XIII(b)), apply for a technical data license pursuant to part 125 of this subchapter.

(g) A *system* is a combination of parts, components, accessories, attachments, firmware, software, equipment, or end-items that operate together to perform a function.

NOTE TO PARAGRAPH (G): The industrial standards established by INCOSE and NASA provide examples for when commodities and software operate together to perform a function as a system. References to these standards are included in this note to provide examples for when commodities or software operate together to perform a function as a system. See the INCOSE standards for what constitutes a system at: *http://g2sebok.incose.org/app/mss/asset.cfm?ID=INCOSE%20G2SEBOK%202.00&ST=F*, and in INCOSE SE Handbook v3.1 2007; ISO/IEC 15288:2008. See the NASA standards for examples of what constitutes a system in NASA SE Handbook SP–2007–6105 Rev 1.

(h) *Equipment* is a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a function of, as, or for an end-item or system. Equipment may be a subset of an end-item based on the characteristics of the equipment. Equipment that meets the definition of an end-item is an end-item. Equipment that does not meet the definition of an end-item is a component, accessory, attachment, firmware, or software.

§ 121.9 [Reserved]

§ 121.10 Forgings, castings, and machined bodies.

The U.S. Munitions List controls as defense articles those forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles.

[78 FR 22758, Apr. 16, 2013]

§ 121.11 Military demolition blocks and blasting caps.

Military demolition blocks and blasting caps referred to in Category IV(a) do not include the following articles:

(a) Electric squibs.

(b) No. 6 and No. 8 blasting caps, including electric ones.

(c) Delay electric blasting caps (including No. 6 and No. 8 millisecond ones).

(d) Seismograph electric blasting caps (including SSS, Static-Master, Vibrocap SR, and SEISMO SR).

(e) Oil well perforating devices.

EFFECTIVE DATE NOTE: At 79 FR 46, Jan. 2, 2014, § 121.11 was removed and reserved, effective July 1, 2014.

§§ 121.12–121.13 [Reserved]

§ 121.14 Submersible vessels.

(a) In USML Category XX, submersible and semi-submersible vessels are those, manned or unmanned, tethered or untethered, that:

(1) Are submarines specially designed for military use;

(2) Are armed or are specially designed to be used as a platform to deliver munitions or otherwise destroy or incapacitate targets (e.g., firing torpedoes, launching rockets, firing missiles, deploying mines, deploying countermeasures) or deploy military payloads;

(3) Are specially designed for the deployment, recovery, or support of swimmers or divers from submarines;

(4) Are integrated with nuclear propulsion systems;

(5) Incorporate any ''mission systems'' controlled under this subchapter. ''Mission systems'' are defined as ''systems'' (*see* § 121.8(g) of this subchapter) that are defense articles that perform specific military functions such as by providing military communication, electronic warfare, target designation, surveillance, target detection, or sensor capabilities; or

(6) Are developmental vessels funded or contracted by the Department of Defense.

(b) Submersible and semi-submersible vessels that are not identified in paragraph (a) of this section are subject to the EAR under Category 8.

[78 FR 40932, July 8, 2013]

§ 121.15 Surface vessels of war.

(a) In USML Category VI, ''surface vessels of war'' are those, manned or unmanned, that:

(1) Are warships or other combatant vessels (battleships, aircraft carriers, destroyers, frigates, cruisers, corvettes, littoral combat ships, mine sweepers, mine hunters, mine countermeasure ships, dock landing ships, amphibious assault ships), or Coast Guard Cutters (with or equivalent to those with U.S. designations WHEC, WMEC, WMSL, or WPB for the purpose of this subchapter);

(2) Are foreign-origin vessels specially designed to provide functions equivalent to those of the vessels listed in paragraph (a)(1) of this section;

(3) Are high-speed air cushion vessels for transporting cargo and personnel, ship-to-shore and across a beach, with a payload over 25 tons;

(4) Are surface vessels integrated with nuclear propulsion plants or specially designed to support naval nuclear propulsion plants;

(5) Are armed or are specially designed to be used as a platform to deliver munitions or otherwise destroy or incapacitate targets (e.g., firing lasers, launching torpedoes, rockets, or missiles, or firing munitions greater than .50 caliber); or

(6) Incorporate any mission systems controlled under this subchapter. ''Mission systems'' are defined as ''systems'' (*see* § 121.8(g) of this subchapter) that are defense articles that perform specific military functions such as by providing military communication, electronic warfare, target designation,

surveillance, target detection, or sensor capabilities.

(b) Vessels specially designed for military use that are not identified in paragraph (a) of this section are subject to the EAR under ECCN 8A609, including any demilitarized vessels, regardless of origin or designation, manufactured prior to 1950 and unmodified since 1949. Modifications made to incorporate safety features required by law, are cosmetic (e.g., different paint), or that add parts or components otherwise available prior to 1950 are considered ''unmodified'' for the purposes of this paragraph.

[78 FR 40932, July 8, 2013]

§ 121.16 Missile Technology Control Regime Annex.

Some of the items on the Missile Technology Control Regime Annex are controlled by both the Department of Commerce on the Commodity Control List and by the Department of State on the United States Munitions List. To the extent an article is on the United States Munitions List, a reference appears in parentheses listing the U.S. Munitions List category in which it appears. The following items constitute all items on the Missile Technology Control Regime Annex which are covered by the U.S. Munitions List:

ITEM 1—CATEGORY I

Complete rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets (see § 121.1, Cat. IV(a) and (b))) and unmanned air vehicle systems (including cruise missile systems, see § 121.1, Cat. VIII (a), target drones and reconnaissance drones (see § 121.1, Cat. VIII (a))) capable of delivering at least a 500 kg payload to a range of at least 300 km.

ITEM 2—CATEGORY I

Complete subsystems usable in the systems in Item 1 as follows:

(a) Individual rocket stages (see § 121.1, Cat. IV(h));

(b) Reentry vehicles (see § 121.1, Cat. IV(g)), and equipment designed or modified therefor, as follows, except as provided in Note (1) below for those designed for non-weapon payloads;

(1) Heat shields and components thereof fabricated of ceramic or ablative materials (see § 121.1, Cat. IV(f));

(2) Heat sinks and components thereof fabricated of light-weight, high heat capacity materials;

(3) Electronic equipment specially designed for reentry vehicles (see § 121.1, Cat. XI(a)(7));

(c) Solid or liquid propellant rocket engines, having a total impulse capacity of 1.1×10 N-sec (2.5×10 lb-sec) or greater (see § 121.1, Cat. IV, (h)).

(d) ''Guidance sets'' capable of achieving system accuracy of 3.33 percent or less of the range (e.g., a CEP of 1 j,. or less at a range of 300 km), except as provided in Note (1) below for those designed for missiles with a range under 300 km or manned aircraft (see § 121.1, Cat. XII(d));

(e) Thrust vector control sub-systems, except as provided in Note (1) below for those designed for rocket systems that do not exceed the range/payload capability of Item 1 (see § 121.1, Cat. IV);

(f) Warhead safing, arming, fuzing, and firing mechanisms, except as provided in Note (1) below for those designed for systems other than those in Item 1 (see § 121.1, Cat. IV(h)).

NOTES TO ITEM 2

(1) The exceptions in (b), (d), (e), and (f) above may be treated as Category II if the subsystem is exported subject to end use statements and quantity limits appropriate for the excepted end use stated above.

(2) CEP (circle of equal probability) is a measure of accuracy, and defined as the radius of the circle centered at the target, at a specific range, in which 50 percent of the payloads impact.

(3) A ''guidance set'' integrates the process of measuring and computing a vehicle's position and velocity (*i.e.*, navigation) with that of computing and sending commands to the vehicle's flight control systems to correct the trajectory.

(4) Examples of methods of achieving thrust vector control which are covered by (e) include:

(i) Flexible nozzle;

(ii) Fluid or secondary gas injection;

(iii) Movable engine or nozzle; Deflection of exhaust gas stream (jet vanes or probes); or

(v) Use of thrust tabs.

ITEM 3—CATEGORY II

Propulsion components and equipment usable in the systems in Item 1, as follows:

(a) Lightweight turbojet and turbofan engines (including) turbocompound engines) that are small and fuel efficient (see § 121.1, both Cat. IV(h) and VIII(b));

(b) Ramjet/Scramjet/pulse jet/combined cycle engines, including devices to regulate combustion, and specially designed components therefor (see § 121.1, both Cat. IV(h) and Cat. VIII(b));

(c) Rocket motor cases, ''interior lining'', ''insulation'' and nozzles therefor (see § 121.1, Cat. IV(h) and Cat. V(c));

(d) Staging mechanisms, separation mechanisms, and interstages therefor (see §121.1, Cat. IV(c) and (h));

(e) Liquid and slurry propellant (including oxidizers) control systems, and specially designed components therefor, designed or modified to operate in vibration environments of more than 100 g RMS between 20 Hz and,000 Hz (see §121.1, Cat. IV(c) and (h));

(f) Hybrid rocket motors and specially designed components therefor (see §121.1, Cat. IV(h)).

NOTES TO ITEM 3

(1) Item 3(a) engines may be exported as part of a manned aircraft or in quantities appropriate for replacement parts for manned aircraft.

(2) In Item 3(C), ''interior lining'' suited for the bond interface between the solid propellant and the case or insulating liner is usually a liquid polymer based dispersion of refractory or insulating materials, e.g., carbon filled HTPB or other polymer with added curing agents to be sprayed or screeded over a case interior (see §121.1, Cat. V(c)).

(3) In Item 3(c), ''insulation'' intended to be applied to the components of a rocket motor, *i.e.*, the case, nozzle inlets, case closures, includes cured or semi-cured compounded rubber sheet stock containing an insulating or refractory material. It may also be incorporated as stress relief boots or flaps.

(4) The only servo valves and pumps covered in (e) above, are the following:

(i) Servo valves designed for flow rates of 24 liters per minute or greater, at an absolute pressure of 7,000 kPa (1,000 psi) or greater, that have an actuator response time of less than 100 msec;

(ii) Pumps, for liquid propellants, with shaft speeds equal to or greater than 8,000 RPM or with discharge pressures equal to or greater than 7,000 kPa (1,000 psi).

(5) Item 3(e) systems and components may be exports as part of a satellite.

ITEM 4—CATEGORY II

Propellants and constituent chemicals for propellants as follows:

(a) Propulsive substances:

(1) Hydrazine with a concentration of more than 70 percent and its derivatives including monomethylhydrazine (MMH);

(2) Unsymmetric dimethylhydrazine (UDHM);

(3) Ammonium perchlorate;

(4) Sphercical aluminum powder with particle of uniform diameter of less than 500×10^{-6}M (500 microns) and an aluminum content of 97 percent or greater;

(5) Metal fuels in particle sizes less than 500×10^{-6}M (500 microns), whether spherical, atomized, spheriodal, flaked or ground, consisting of 97 percent or more of any of the following: zirconium, beryllium, boron, magnesium, zinc, and alloys of these;

(6) Nitroamines (cyclotetramethylenetetranitramene (HMX), cyclotrimethylenetrinitramine (RDX);

(7) Percholrates, chlorates or chromates mixed with powdered metals or other high energy fuel components;

(8) Carboranes, decaboranes, pentaboranes and derivatives thereof;

(9) Liquid oxidizers, as follows:

(i) Nitrogen dioxide/dinitrogen tetroxide;

(ii) Inhibited Red Fuming Nitric Acid (IRFNA);

(iii) Compounds composed of fluorine and one or more of other halogens, oxygen or nitrogen.

(b) Polymeric substances:

(1) Hydroxyterminated polybutadiene (HTPB);

(2) Glycidylazide polymer (GAP).

(c) Other high energy density propellants such a Boron Slurry having an energy density of 40×10 joules/kg or greater.

(d) Other propellants additives and agents:

(1) Bonding agents as follows:

(i) Tris (1(2methyl)aziridinyl phosphine oxide (MAPO);

(ii) Trimesol 1(2)ethyl)aziridine (HX868, BITA);

(iii) ''Tepanol'' (HX878), reaction product of tetraethylenepentamine, acrylonitrile and glycidol;

(iv) ''Tepan'' (HX879), reaction product of tet enepentamine and acrylonitrile;

(v) Polyfunctional aziridene amides with isophthalic, trimesic, isocyanuric, or trimethyladipic backbone also having a 2methyl or 2ethyl aziridine group (HX752, HX872 and HX877).

(2) Curing agents and catalysts as follows:

(i) Triphenyl bismuth (TPB);

(ii) Burning rate modifiers as follows:

(iii) Catocene;

(iv) Nbutylferrocene;

(v) Other ferrocene derivatives.

(3) Nitrate esters and nitrato plasticizers as follows:

(i) 1,2,4butanetriol trinitrate (BTTN).

(4) Stabilizers as follows:

(i) Nmethylpnitroaniline.

ITEM 8—CATEGORY II

Structural materials usable in the systems in Item 1, as follows:

(a) Composite structures, laminates, and manufactures thereof, including resin impregnated fibre prepregs and metal coated fibre preforms therefor, specially designed for use in the systems in Item 1 and the subsystems in Item 2 made either with organix matrix or metal matrix utilizing fibrous or filamentary reinforcements having a specific tensile strength greater than 7.62×10^4 m (3×10^6 inches) and a specific modules greater than 3.18×10^6 m (1.25×10^8 inches), (see §121.1, Category IV (f), and Category XIII (d));

(b) Resaturated pyrolized (*i.e.*, carbon-carbon) materials designed for rocket systems, (see § 121.1 Category IV (f));

(c) Fine grain recrystallized bulk graphites (with a bulk density of at least 1.72 g/cc measured at 15 degrees C), pyrolytic, or fibrous reinforced graphites useable for rocket nozzles and reentry vehicle nose tips (see § 121.1, Category IV (f) and Category XIII;

(d) Ceramic composites materials (dielectric constant less than 6 at frequencies from 100 Hz to 10,000 MHz) for use in missile radomes, and bulk machinable silicon-carbide reinforced unfired ceramic useable for nose tips (see § 121.1, Category IV (f));

ITEM 9—CATEGORY II

Instrumentation, navigation and direction finding equipment and systems, and associated production and test equipment as follows; and specially designed components and software therefor:

(a) Integrated flight instrument systems, which include gyrostabilizers or automatic pilots and integration software therefor; designed or modified for use in the systems in Item 1 (See § 121.1, Category XII(d));

(b) Gyro-astro compasses and other devices which derive position or orientation by means of automatically tracking celestial bodies or satellites (see § 121.1, Category XV(d));

(c) Accelerometers with a threshold of 0.05 g or less, or a linearity error within 0.25 percent of full scale output, or both, which are designed for use in inertial navigation systems or in guidance systems of all types (see § 121.1, Category VIII(e) and Category XII (d));

(d) All types of gyros usable in the systems in Item 1, with a rated drift rate stability of less than 0.5 degree (1 sigma or rms) per hour in a 1 q environment (see § 121.1, Category VIII(e) and Category XII(d));

(e) Continuous output accelerometers or gyros of any type, specified to function at acceleration levels greater than 100 g (see § 121.1, Category XII(d));

(f) Inertial or other equipment using accelerometers described by subitems (c) and (e) above, and systems incorporating such equipment, and specially designed integration software therefor (see § 121.1, Category VIII (e) and Category XII(d));

NOTES TO ITEM 9

(1) Items (a) through (f) may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

(2) In subitem (d):

(i) Drift rate is defined as the time rate of output deviation from the desired output. It consists of random and systematic components and is expressed as an equivalent angular displacement per unit time with respect to inertial space.

(ii) Stability is defined as standard deviation (1 sigma) of the variation of a particular parameter from its calibrated value measured under stable temperature conditions. This can be expressed as a function of time.

ITEM 10—CATEGORY II

Flight control systems and ''technology'' as follows; designed or modified for the systems in Item 1.

(a) Hydraulic, mechanical, electro-optical, or electro-mechanical flight control systems (including fly-by-wire systems), (see § 121.1, Category IV (h));

(b) Attitude control equipment, (see § 121.1, Category IV, (c) and (h));

(c) Design technology for integration of air vehicle fuselage, propulsion system and lifting control surfaces to optimize aerodynamic performance throughout the flight regime of an unmanned air vehicle, (see § 121.1, Category VIII (k));

(d) Design technology for integration of the flight control, guidance, and propulsion data into a flight management system for optimization of rocket system trajectory, (see § 121.1, Category IV (i)).

NOTE TO ITEM 10

Items (a) and (b) may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

ITEM 11—CATEGORY II

Avionics equipment, ''technology'' and components as follows; designed or modified for use in the systems in Item 1, and specially designed software therefor:

(a) Radar and laser radar systems, including altimeters (see § 121.1, Category XI(a)(3));

(b) Passive sensors for determining bearings to specific electromagnetic sources (direction finding equipment) or terrain characteristics (see § 121.1, Category XI(b) and (d));

(c) Global Positioning System (GPS) or similar satellite receivers;

(1) Capable of providing navigation information under the following operational conditions:

(i) At speeds in excess of 515 m/sec (1,000 nautical miles/hours); and

(ii) At altitudes in excess of 18 km (60,000 feet), (see § 121.1, Category XV(d)(2); or

(2) Designed or modified for use with unmanned air vehicles covered by Item 1 (see § 121.1, Category XV(d)(4)).

(d) Electronic assemblies and components specifically designed for military use and operation at temperatures in excess of 125 degrees C, (see § 121.1, Category XI(a)(7)).

(e) Design technology for protection of avionics and electrical subsystems against electromagnetic pulse (EMP) and electromagnetic interference (EMI) hazards from external sources, as follows, (see §121.1, Category XI (b)).

(1) Design technology for shielding systems;

(2) Design technology for the configuration of hardened electrical circuits and subsystems;

(3) Determination of hardening criteria for the above.

NOTES TO ITEM 11

(1) Item 11 equipment may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

(2) Examples of equipment included in this Item:

(i) Terrain contour mapping equipment;

(ii) Scene mapping and correlation (both digital and analog) equipment;

(iii) Doppler navigation radar equipment;

(iv) Passive interferometer equipment;

(v) Imaging sensor equipment (both active and passive);

(3) In subitem (a), laser radar systems embody specialized transmission, scanning, receiving and signal processing techniques for utilization of lasers for echo ranging, direction finding and discrimination of targets by location, radial speed and body reflection characteristics.

ITEM 12—CATEGORY II

Launch support equipment, facilities and software for the systems in Item 1, as follows:

(a) Apparatus and devices designed or modified for the handling, control, activation and launching of the systems in Item 1, (see §121.1, Category IV(c));

(b) Vehicles designed or modified for the transport, handling, control, activation and launching of the systems in Item 1, (see §121.1, Category VII(d));

(c) Telemetering and telecontrol equipment usable for unmanned air vehicles or rocket systems, (see §121.1, Category XI(a));

(d) Precision tracking systems:

(1) Tracking systems which use a translb nv installed on the rocket system or unmanned air vehicle in conjunction with either surface or airborne references or navigation satellite systems to provide real-time measurements of in-flight position and velocity, (see §121.1, Category XI(a));

(2) Range instrumentation radars including associated optical/infrared trackers and the specially designed software therefor with all of the following capabilities (see §121.1, Category XI(a)(3)):

(i) angular resolution better than 3 milliradians (0.5 mils);

(ii) range of 30 km or greater with a range resolution better than 10 meters RMS;

(iii) velocity resolution better than 3 meters per second.

(3) Software which processes post-flight, recorded data, enabling determination of vehicle position throughout its flight path (see §121.1, Category IV(i)).

ITEM 13—CATEGORY II

Analog computers, digital computers, or digital differential analyzers designed or modified for use in the systems in Item 1 (see §121.1, Category XI (a)(6), having either of the following characteristics:

(a) Rated for continuous operation at temperature from below minus 45 degrees C to above plus 55 degrees C; or

(b) Designed as ruggedized or ''radiation hardened''.

NOTE TO ITEM 13

Item 13 equipment may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

ITEM 14—CATEGORY II

Analog-to-digital converters, usable in the system in Item 1, having either of the following characteristics:

(a) Designed to meet military specifications for ruggedized equipment (see §121.1, Category XI(d)); or,

(b) Designed or modified for military use (see §121.1, Category XI(d)); and being one of the following types:

(1) Analog-to-digital converter ''microcircuits,'' which are ''radiation hardened'' or have all of the following characteristics:

(i) Having a resolution of 8 bits or more;

(ii) Rated for operation in the temperature range from below minus 54 degrees C to above plus 125 degrees C; and

(iii) Hermetically sealed.

(2) Electrical input type analog-to-digital converter printed circuit boards or modules, with all of the following characteristics:

(i) Having a resolution of 8 bits or more;

(ii) Rated for operation in the temperature range from below minus 45 degrees C to above plus 55 degrees C; and

(iii) Incorporated ''microcircuits'' listed in (1), above.

ITEM 16—CATEGORY II

Specially designed software, or specially designed software with related specially designed hybrid (combined analog/digital) computers, for modeling, simulation, or design integration of the systems in Item 1 and Item 2 (see §121.1, Category IV(i) and Category XI(a)(6)).

NOTE TO ITEM 16

The modelling includes in particular the aerodynamic and thermodynamic analysis of the system.

ITEM 17—CATEGORY II

Materials, devices, and specially designed software for reduced observables such as radar reflectivity, ultraviolet/infrared signatures on acoustic signatures (*i.e.*, stealth technology), for applications usable for the systems in Item 1 or Item 2 (see § 121.1, Category XIII (e) and (k)), for example:

(a) Structural material and coatings specially designed for reduced radar reflectivity;

(b) Coatings, including paints, specially designed for reduced or tailored reflectivity or emissivity in the microwave, infrared or ultraviolet spectra, except when specially used for thermal control of satellites.

(c) Specially designed software or databases for analysis of signature reduction.

(d) Specially designed radar cross section measurement systems (see § 121.1, Category XI(a)(3)).

ITEM 18—CATEGORY II

Devices for use in protecting rocket systems and unmanned air vehicles against nuclear effects (e.g. Electromagnetic Pulse (EMP), X-rays, combined blast and thermal effects), and usable for the systems in Item 1, as follows (see § 121.1, Category IV (c) and (h)):

(a) ''Radiation Hardened'' ''microcircuits'' and detectors (see § 121.1, Category XI(c)(3) Note: This commodity has been formally proposed for movement to category XV(e)(2) in the near future).

(b) Radomes designed to withstand a combined thermal shock greater than 1000 cal/sq cm accompanied by a peak over pressure of greater than 50 kPa (7 pounds per square inch) (see § 121.1, Category IV(h)).

NOTE TO ITEM 18(a)

A detector is defined as a mechanical, electrical, optical or chemical device that automatically identifies and records, or registers a stimulus such as an environmental change in pressure or temperature, an electrical or electromagnetic signal or radiation from a radioactive material. The following pages were removed from the final ITAR for replacement by DDTC's updated version § 6(l) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(l)), as amended. In accordance with this provision, the list of MTCR Annex items shall constitute all items on the U.S. Munitions List in § 121.16.

[58 FR 39287, July 22, 1993, as amended at 71 FR 20539, Apr. 21, 2006]

PART 122—REGISTRATION OF MANUFACTURERS AND EXPORTERS

Sec.
122.1 Registration requirements.
122.2 Submission of registration statement.
122.3 Registration fees.
122.4 Notification of changes in information furnished by registrants.
122.5 Maintenance of records by registrants.

AUTHORITY: Sections 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39298, July 22, 1993, unless otherwise noted.

§ 122.1 Registration requirements.

(a) Any person who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles, or furnishing defense services, is required to register with the Directorate of Defense Trade Controls under § 122.2. For the purpose of this subchapter, engaging in such a business requires only one occasion of manufacturing or exporting or temporarily importing a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register. (*See* part 129 of this subchapter for requirements for registration of persons who engage in brokering activities.)

(b) *Exemptions.* The registration requirements of paragraph (a) of this section do not apply to:

(1) Officers and employees of the U.S. Government acting in an official capacity;

(2) Persons whose pertinent business activity is confined to the production of unclassified technical data only;

(3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended; or

(4) Persons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development.

NOTE TO PARAGRAPH (b): Persons who qualify for the exemptions in paragraphs (b)(2) or (b)(4) of this section remain subject to the requirements for licenses or other approvals for exports of defense articles and defense services and may not receive an export license or approval unless registered under § 122.2.

(c) *Purpose.* Registration is primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing and exporting activities. Registration does not confer any export rights or privileges. It is generally a precondition to the issuance of any license or other approval under this subchapter, unless an exception is granted by the Directorate of Defense Trade Controls.

[78 FR 52686, Aug. 26, 2013]

§ 122.2 Submission of registration statement.

(a) *General.* An intended registrant must submit a Statement of Registration (Department of State form DS–2032) to the Office of Defense Trade Controls Compliance by following the submission guidelines available on the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov*. The Statement of Registration must be signed by a U.S. person senior officer (e.g., chief executive officer, president, secretary, partner, member, treasurer, general counsel) who has been empowered by the intended registrant to sign such documents. The Statement of Registration may include subsidiaries and affiliates when more than 50 percent of the voting securities are owned by the registrant or the subsidiaries and affiliates are otherwise controlled by the registrant (*see* § 120.40 of this subchapter). The intended registrant also shall submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the U.S. The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) *Statement of Registration Certification.* The Statement of Registration of the intended registrant shall include a certification by an authorized senior officer of the following:

(1) Whether the intended registrant or its parent, subsidiary, or other affiliate listed in the Statement of Registration, or any of its chief executive officers, presidents, vice presidents, secretaries, partners, members, other senior officers or officials (e.g., comptroller, treasurer, general counsel), or any member of the board of directors of the intended registrant, or of any parent, subsidiary, or other affiliate listed in the Statement of Registration:

(i) Has ever been indicted or otherwise charged (e.g., charged by criminal information in lieu of indictment) for or has been convicted of violating any U.S. criminal statutes enumerated in § 120.27 of this subchapter or violating a foreign criminal law on exportation of defense articles where conviction of such law carries a minimum term of imprisonment of greater than 1 year; or

(ii) Is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government; and

(2) Whether the intended registrant is foreign owned or foreign controlled (*see* § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of the foreign person or persons who ultimately own or control the registrant. This requirement applies to a registrant who is a U.S. person and is owned or controlled by a foreign person. It also applies to a registrant who is a foreign person and is owned or controlled by a foreign person from the same country or a foreign person from another country.

[76 FR 45197, July 28, 2011, as amended at 76 FR 76036, Dec. 6, 2011; 78 FR 52686, Aug. 26, 2013]

§ 122.3 Registration fees.

(a) *Frequency of registration and fee.* A person who is required to register must do so on an annual basis by submitting a completed Statement of Registration (form DS–2032) and payment of a fee following the payment guidelines available on the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov*. For those renewing a registration, notice of the fee due for the next year's registration will be

sent to the registrant of record at least 60 days prior to its expiration date.

(b) *Expiration of registration.* A registrant must submit its request for registration renewal at least 30 days but no earlier than 60 days prior to the expiration date.

(c) *Lapse in registration.* A registrant who fails to renew a registration and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of manufacturing or exporting defense articles or defense services.

[58 FR 39298, July 22, 1993, as amended at 62 FR 27497, May 20, 1997; 69 FR 70889, Dec. 8, 2004; 70 FR 50959, Aug. 29, 2005; 73 FR 41259, July 18, 2008; 73 FR 55440, Sept. 25, 2008; 76 FR 45197, July 28, 2011; 78 FR 52687, Aug. 26, 2013]

§ 122.4 Notification of changes in information furnished by registrants.

(a) A registrant must, within five days of the event, provide to the Directorate of Defense Trade Controls a written notification, signed by a senior officer (e.g., chief executive officer, president, secretary, partner, member, treasurer, general counsel), if:

(1) Any of the persons referred to in § 122.2(b) is indicted or otherwise charged (e.g., by criminal information in lieu of indictment) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or violating a foreign criminal law on exportation of defense articles where conviction of such law carries a minimum term of imprisonment of greater than 1 year, or becomes ineligible to contract with, or to receive a license or other approval to export or temporarily import defense articles or defense services from any agency of the U.S. Government; or

(2) There is a change in the following information contained in the Statement of Registration:

(i) Registrant's name;

(ii) Registrant's address;

(iii) Registrant's legal organization structure;

(iv) Ownership or control;

(v) The establishment, acquisition, or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in manufacturing defense articles, exporting defense articles or defense services; or

(vi) Board of directors, senior officers, partners, or owners.

NOTE 1 TO PARAGRAPH (a): All other changes in the Statement of Registration must be provided as part of annual registration renewal.

NOTE 2 TO PARAGRAPH (a): For one year from the effective date of the rule, ''Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions,'' RIN 1400–AC37, the following changes must be provided as part of the annual registration renewal: Pursuant to § 129.3(d) of this subchapter, changes to combine an existing broker registration with an existing manufacturer/exporter registration; and pursuant to § 122.2(a) of this subchapter, changes to an existing registration to remove partially owned and not otherwise controlled subsidiaries or affiliates, which are not the subject of an internal reorganization, merger, acquisition, or divestiture.

(b) A registrant must notify the Directorate of Defense Trade Controls by registered mail at least 60 days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof. Such notice does not relieve the registrant from obtaining the approval required under this subchapter for the export of defense articles or defense services to a foreign person, including the approval required prior to disclosing technical data. Such notice provides the Directorate of Defense Trade Controls with the information necessary to determine whether the authority of § 38(g)(6) of the Arms Export Control Act regarding licenses or other approvals for certain sales or transfers of defense articles or data on the U.S. Munitions List should be invoked (see §§ 120.10 and 126.1(e) of this subchapter).

(c) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company shall advise the Directorate of Defense Trade Controls of the following:

(1) The new firm name and all previous firm names being disclosed;

(2) The registration number that will survive and those that are to be discontinued (if any);

(3) The license numbers of all approvals on which unshipped balances will be

shipped under the surviving registration number, since any license not the subject of notification will be considered invalid; and

(4) Amendments to agreements approved by the Directorate of Defense Trade Controls to change the name of a party to those agreements. The registrant must, within 60 days of this notification, provide to the Directorate of Defense Trade Controls a signed copy of an amendment to each agreement signed by the new U.S. entity, the former U.S. licensor and the foreign licensee. Any agreements not so amended will be considered invalid.

(d) Prior approval by the Directorate of Defense Trade Controls is required for any amendment making a substantive change.

[58 FR 39298, July 22, 1993, as amended at 71 FR 20540, Apr. 21, 2006; 78 FR 52687, Aug. 26, 2013]

§ 122.5 Maintenance of records by registrants.

(a) A person who is required to register must maintain records concerning the manufacture, acquisition and disposition (to include copies of all documentation on exports using exemptions and applications and licenses and their related documentation), of defense articles; of technical data; the provision of defense services; brokering activities; and information on political contributions, fees, or commissions furnished or obtained, as required by part 130 of this subchapter. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, ''legible'' and ''legibility'' mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. ''Readable'' and ''readability'' means the quality of a group of letters or numerals being recognized as complete words or numbers.) This information must be stored in such a manner that none of it may be altered once it is initially recorded without recording all changes, who made them, and when they were made. For processes or systems based on the storage of digital images, the process or system must afford accessibility to all digital images in the records being maintained. All records subject to this section must be maintained for a period of five years from the expiration of the license or other approval, to include exports using an exemption (*see* § 123.26 of this subchapter); or, from the date of the transaction (e.g., expired licenses or other approvals relevant to the export transaction using an exemption). The Deputy Assistant Secretary of State for Defense Trade Controls and the Director of the Office of Defense Trade Controls Licensing may prescribe a longer or shorter period in individual cases.

(b) Records maintained under this section shall be available at all times for inspection and copying by the Directorate of Defense Trade Controls or a person designated by the Directorate of Defense Trade Controls (e.g., the Diplomatic Security Service) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Upon such request, the person maintaining the records must furnish the records, the equipment, and if necessary, knowledgeable personnel for locating, reading, and reproducing any record that is required to be maintained in accordance with this section.

[70 FR 50959, Aug. 29, 2005, as amended at 79 FR 8084, Feb. 11, 2014]

PART 123—LICENSES FOR THE EXPORT AND TEMPORARY IMPORT OF DEFENSE ARTICLES

Sec.

123.1 Requirement for export or temporary import licenses.
123.2 Import jurisdiction.
123.3 Temporary import licenses.
123.4 Temporary import license exemptions.
123.5 Temporary export licenses.
123.6 Foreign trade zones and U.S. Customs and Border Protection bonded warehouses.
123.7 Exports to warehouses or distribution points outside the United States.
123.8 Special controls on vessels, aircraft and satellites covered by the U.S. Munitions List.
123.9 Country of ultimate destination and approval of reexports or retransfers.

123.10 Non-transfer and use assurances.
123.11 Movements of vessels and aircraft covered by the U.S. Munitions List outside the United States.
123.12 Shipments between U.S. possessions.
123.13 Domestic aircraft shipments via a foreign country.
123.14 Import certificate/delivery verification procedure.
123.15 Congressional certification pursuant to Section 36(c) of the Arms Export Control Act.
123.16 Exemptions of general applicability.
123.17 Exports of firearms, ammunition, and personal protective gear.
123.18 Firearms for personal use of members of the U.S. Armed Forces and civilian employees of the U.S. Government.
123.19 Canadian and Mexican border shipments.
123.20 Nuclear related controls.
123.21 Duration, renewal, and disposition of licenses.
123.22 Filing, retention, and return of export licenses and filing of export information.
123.23 Monetary value of shipments.
123.24 Shipments by U.S. Postal Service.
123.25 Amendments to licenses.
123.26 Recordkeeping for exemptions.
123.27 Special licensing regime for export to U.S. allies of commercial communications satellite components, systems, parts, accessories, attachments and associated technical data.

AUTHORITY: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261, 112 Stat. 1920; Sec. 1205(a), Pub. L. 107–228; Sec. 520, Pub. L. 112–55; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39299, July 22, 1993, unless otherwise noted.

§ 123.1 Requirement for export or temporary import licenses.

(a) Any person who intends to export or to import temporarily a defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export or temporary import, unless the export or temporary import qualifies for an exemption under the provisions of this subchapter. The applicant must be registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter prior to submitting an application. Applications for unclassified exports and temporary imports must be submitted electronically. Applications for classified exports and classified temporary imports must be submitted via paper. Further guidance is provided on the Internet Web site of the Directorate of Defense Trade Controls. The application forms for export or temporary import are as follows:

(1) Unclassified permanent exports must be made on Form DSP–5;

(2) Unclassified temporary exports must be made on Form DSP–73;

(3) Unclassified temporary imports must be made on Form DSP–61; or

(4) Classified exports or temporary imports must be made on Form DSP–85.

(b) Applications for Department of State export or temporary import licenses for proposed exports or temporary imports of defense articles, including technical data, may include commodities, software, and technical data subject to the EAR (*see* § 120.42 of this subchapter) if:

(1) The purchase documentation (e.g., purchase order, contract, letter of intent, or other appropriate documentation) includes both defense articles enumerated on the U.S. Munitions List and items on the Commerce Control List;

(2) The commodities, software, and technical data subject to the EAR are for end-use in or with the U.S. Munitions List defense article(s) proposed for export; and

(3) The license application separately enumerates the commodities, software, and technical data subject to the EAR in a U.S. Munitions List ''(x)'' paragraph entry.

(c) As a condition to the issuance of a license or other approval, the Directorate of Defense Trade Controls may require all pertinent documentation regarding the proposed transaction and proper completion of the application form as follows:

(1) Form DSP–5, DSP–61, DSP–73, and DSP–85 applications must have an entry in each block where space is provided for an entry. All requested information must be provided. Stating ''Not Applicable'' or ''See Attached'' is not acceptable. See the Directorate of Defense Trade Controls Internet Web site for additional guidance on the completion of a license application form;

(2) Attachments and supporting technical data or brochures should be submitted with the license application. All freight forwarders and U.S. consignors must be listed in the license application. See the Directorate of Defense Trade Controls Internet Web site for instructions and limitations on attaching documentation;

(3) Certification by an empowered official must accompany all application submissions (*see* §126.13 of this subchapter);

(4) An application for a license for the permanent export of defense articles sold commercially must be accompanied by purchase documentation (e.g., purchase order, contract, letter of intent, or other appropriate documentation). In cases involving the Foreign Military Sales program, a copy of the relevant Letter of Offer and Acceptance is required, unless the procedures of §126.4(c) or §126.6 of this subchapter are followed;

(5) Form DSP–83, duly executed, must accompany all license applications for the permanent export of significant military equipment, including classified defense articles or classified technical data (*see* §§123.10 and 125.3 of this subchapter); and

(6) A statement concerning the payment of political contributions, fees, and commissions must accompany a permanent export application if the export involves defense articles or defense services valued in an amount of $500,000 or more and is being sold commercially to or for the use of the armed forces of a foreign country or international organization (*see* part 130 of this subchapter).

(d) Provisions for furnishing the type of defense services described in §120.9(a) of this subchapter are contained in part 124 of this subchapter. Provisions for the export or temporary import of technical data and classified defense articles are contained in part 125 of this subchapter.

(e) A request for a license for the export of unclassified technical data (DSP–5) related to a classified defense article should specify any classified technical data or material that subsequently will be required for export in the event of a sale.

[58 FR 39299, July 22, 1993, as amended at 70 FR 50960, Aug. 29, 2005; 71 FR 20540, Apr. 21, 2006; 77 FR 22670, Apr. 17, 2012; 78 FR 22758, Apr. 16, 2013]

§ 123.2 Import jurisdiction.

The Department of State regulates the temporary import of defense articles. Permanent imports of defense articles into the United States are regulated by the Department of the Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives under the direction of the Attorney General (see 27 CFR parts 447, 478, 479, and 555).

[71 FR 20540, Apr. 21, 2006]

§ 123.3 Temporary import licenses.

(a) A license (DSP–61) issued by the Directorate of Defense Trade Controls is required for the temporary import and subsequent export of unclassified defense articles, unless exempted from this requirement pursuant to §123.4. This requirement applies to:

(1) Temporary imports of unclassified defense articles that are to be returned directly to the country from which they were shipped to the United States;

(2) Temporary imports of unclassified defense articles in transit to a third country;

(b) A bond may be required as appropriate (see part 125 of this subchapter for license requirements for technical data and classified defense articles.)

(c) A DSP–61 license may be obtained by a U.S. importer in satisfaction of §123.4(c)(4) of this subchapter. If a foreign exporter requires documentation for a permanent import, the U.S. importer must contact the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives for the appropriate documentation. A DSP–61 will not be approved to support permanent import requirements.

[58 FR 39299, July 22, 1993, as amended at 71 FR 20540, Apr. 21, 2006; 77 FR 22670, Apr. 17, 2012]

§ 123.4 Temporary import license exemptions.

(a) Port Directors of U.S. Customs and Border Protection shall permit the

temporary import (and subsequent export) without a license, for a period of up to 4 years, of unclassified U.S.-origin defense items (including any items manufactured abroad pursuant to U.S. Government approval) if the item temporarily imported:

(1) Is serviced (e.g., inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modifications, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item), and is subsequently returned to the country from which it was imported. Shipment may be made by the U.S. importer or a foreign government representative of the country from which the goods were imported; or

(2) Is to be enhanced, upgraded or incorporated into another item which has already been authorized by the Directorate of Defense Trade Controls for permanent export; or

(3) Is imported for the purpose of exhibition, demonstration or marketing in the United States and is subsequently returned to the country from which it was imported; or

(4) Has been rejected for permanent import by the Department of the Treasury and is being returned to the country from which it was shipped; or

(5) Is approved for such import under the U.S. Foreign Military Sales (FMS) program pursuant to an executed U.S. Department of Defense Letter of Offer and Acceptance (LOA).

NOTE: These Exceptions do not apply to shipments that transit the U.S. to or from Canada (see §123.19 and §126.5 of this subchapter for exceptions).

(b) Port Directors of U.S. Customs and Border Protection shall permit the temporary import (but not the subsequent export) without a license of unclassified defense articles that are to be incorporated into another article, or modified, enhanced, upgraded, altered, improved or serviced in any other manner that changes the basic performance or productivity of the article prior to being returned to the country from which they were shipped or prior to being shipped to a third country. A DSP–5 is required for the reexport of such unclassified defense articles after incorporation into another article, modification, enhancement, upgrading, alteration or improvement.

(c) *Requirements*. To use an exemption under §123.4 (a) or (b), the following criteria must be met:

(1) The importer must meet the eligibility requirements set forth in §120.1(c) of this subchapter;

(2) At the time of export, the ultimate consignee named on the Electronic Export Information (EEI) must be the same as the foreign consignee or end-user of record named at the time of import;

(3) A stated in §126.1 of this subchapter, the temporary import must not be from or on behalf of a proscribed country, area, or person listed in that section unless an exception has been granted in accordance with §126.3 of this subchapter; and

(4) The foreign exporter must not require documentation of U.S. Government approval of the temporary import. If the foreign exporter requires documentation for a temporary import that qualifies for an exemption under this subchapter, the U.S. importer will not be able to claim the exemption and is required to obtain a DSP–61 Application/License for Temporary Import of Unclassified Defense Articles.

(d) *Procedures*. To the satisfaction of the Port Directors of U.S. Customs and Border Protection, the importer and exporter must comply with the following procedures:

(1) At the time of temporary import—

(i) File and annotate the applicable U.S. Customs and Border Protection document (e.g., Form CF 3461, 7512, 7501, 7523 or 3311) to read: ''This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a) (identify subsection),'' and

(ii) Include, on the invoice or other appropriate documentation, a complete list and description of the defense article(s) being imported, including quantity and U.S. dollar value; and

(2) At the time of export, in accordance with the U.S. Customs and Border Protection procedures, the Directorate of Defense Trade Controls (DDTC) registered and eligible exporter, or an agent acting on the filer's behalf, must

electronically file the export information using the Automated Export System (AES), and identify 22 CFR 123.4 as the authority for the export and provide, as requested by U.S. Customs and Border Protection, the entry document number or a copy of the U.S. Customs and Border Protection document under which the article was imported.

[58 FR 39299, July 22, 1993, as amended at 64 FR 17533, Apr. 12, 1999; 68 FR 61101, Oct. 27, 2003; 70 FR 50960, Aug. 29, 2005; 77 FR 16597, Mar. 21, 2012; 77 FR 22670, Apr. 17, 2012;]

§ 123.5 Temporary export licenses.

(a) The Directorate of Defense Trade Controls may issue a license for the temporary export of unclassified defense articles (DSP–73). Such licenses are valid only if the article will be exported for a period of less than 4 years and will be returned to the United States and transfer of title will not occur during the period of temporary export. Accordingly, articles exported pursuant to a temporary export license may not be sold or otherwise permanently transferred to a foreign person while they are overseas under a temporary export license. A renewal of the license or other written approval must be obtained from the Directorate of Defense Trade Controls if the article is to remain outside the United States beyond the period for which the license is valid.

(b) *Requirements.* Defense articles authorized for temporary export under this section may be shipped only from a port in the United States where a Port Director of U.S. Customs and Border Protection is available, or from a U.S. Post Office (see 39 CFR part 20), as appropriate. The license for temporary export must be presented to the Port Director of U.S. Customs and Border Protection who, upon verification, will endorse the exit column on the reverse side of the license. In some instances of the temporary export of technical data (e.g., postal shipments), self-endorsement will be necessary (see § 123.22(b)). The endorsed license for temporary export is to be retained by the licensee. In the case of a military aircraft or vessel exported under its own power, the endorsed license must be carried on board such vessel or aircraft as evidence that it has been duly authorized by the Department of State to leave the United States temporarily.

(c) Any temporary export license for hardware that is used, regardless of whether the hardware was exported directly to the foreign destination or returned directly from the foreign destination, must be endorsed by the U.S. Customs and Border Protection in accordance with the procedures in § 123.22 of this subchapter.

[70 FR 50960, Aug. 29, 2005]

§ 123.6 Foreign trade zones and U.S. Customs and Border Protection bonded warehouses.

Foreign trade zones in the United States and U.S. Customs and Border Protection bonded warehouses are considered integral parts of the United States for the purpose of this subchapter. An export license is therefore not required for shipment between the United States and a foreign trade zone or a U.S. Customs and Border Protection bonded warehouse. In the case of classified defense articles, the provisions of the Department of Defense National Industrial Security Program Operating Manual will apply. An export license is required for all shipments of articles on the U.S. Munitions List from foreign trade zones and U.S. Customs and Border Protection bonded warehouses to foreign countries, regardless of how the articles reached the zone or warehouse.

[71 FR 20540, Apr. 21, 2006]

§ 123.7 Exports to warehouses or distribution points outside the United States.

Unless the exemption under § 123.16(b)(1) is used, a license is required to export defense articles to a warehouse or distribution point outside the United States for subsequent resale and will normally be granted only if an agreement has been approved pursuant to § 124.14 of this subchapter.

§ 123.8 Special controls on vessels, aircraft and satellites covered by the U.S. Munitions List.

(a) Transferring registration or control to a foreign person of any aircraft, vessel, or satellite on the U.S. Munitions List is an export for purposes of this subchapter and requires a license

or written approval from the Directorate of Defense Trade Controls. This requirement applies whether the aircraft, vessel, or satellite is physically located in the United States or abroad.

(b) The registration in a foreign country of any aircraft, vessel or satellite covered by the U.S. Munitions List which is not registered in the United States but which is located in the United States constitutes an export. A license or written approval from the Directorate of Defense Trade Controls is therefore required. Such transactions may also require the prior approval of the U.S. Department of Transportation's Maritime Administration, the Federal Aviation Administration or other agencies of the U.S. Government.

[71 FR 20540, Apr. 21, 2006]

§ 123.9 Country of ultimate destination and approval of reexports or retransfers.

(a) The country designated as the country of ultimate destination on an application for an export license, or in an Electronic Export Information filing where an exemption is claimed under this subchapter, must be the country of ultimate end-use. The written approval of the Directorate of Defense Trade Controls must be obtained before reselling, transferring, reexporting, retransferring, transshipping, or disposing of a defense article to any end-user, end-use, or destination other than as stated on the export license, or in the Electronic Export Information filing in cases where an exemption is claimed under this subchapter, except in accordance with the provisions of an exemption under this subchapter that explicitly authorizes the resell, transfer, reexport, retransfer, transshipment, or disposition of a defense article without such approval. Exporters must determine the specific end-user, end-use, and destination prior to submitting an application to the Directorate of Defense Trade Controls or claiming an exemption under this subchapter.

NOTE TO PARAGRAPH (a): In making the aforementioned determination, a person is expected to review all readily available information, including information readily available to the public generally as well as information readily available from other parties to the transaction.

(b) The exporter, U.S. or foreign, must inform the end-user and all consignees that the defense articles being exported are subject to U.S. export laws and regulations as follows:

(1) The exporter, U.S. or foreign, must incorporate the following statement as an integral part of the bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice whenever defense articles are to be exported, retransferred, or reexported pursuant to a license or other approval under this subchapter: ''These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user] under [license or other approval number or exemption citation]. They may not be resold, diverted, transferred, or otherwise be disposed of, to any other country or to any person other than the authorized end-user or consignee(s), either in their original form or after being incorporated into other end-items, without first obtaining approval from the U.S. Department of State or use of an applicable exemption.''; and

(2) When exporting items subject to the EAR (*see* §§ 120.42 and 123.1(b) of this subchapter) on a Department of State license or other approval, the U.S. exporter must provide to the end-user and consignees in the purchase documentation or other support documentation submitted with the Department of State license or other approval request the appropriate EAR classification information for each item exported pursuant to a U.S. Munitions List ''(x)'' paragraph. This includes the appropriate ECCN or EAR99 designation.

(c) Any U.S. person or foreign person requesting written approval from the Directorate of Defense Trade Controls for the reexport, retransfer, other disposition, or change in end-use, end-user, or destination of a defense article initially exported or transferred pursuant to a license or other written approval, or an exemption under this subchapter, must submit all the docu-

mentation required for a permanent export license (*see* § 123.1 of this subchapter) and shall also submit the following:

(1) The license number, written authorization, or exemption under which the defense article or defense service was previously authorized for export from the United States (NOTE: For exports under exemptions at § 126.16 or § 126.17 of this subchapter, the original end-use, program, project, or operation under which the item was exported must be identified.);

(2) A precise description, quantity, and value of the defense article or defense service;

(3) A description and identification of the new end-user, end-use, and destination; and

(4) With regard to any request for such approval relating to a defense article or defense service initially exported pursuant to an exemption contained in § 126.16 or § 126.17 of this subchapter, written request for the prior approval of the transaction from the Directorate of Defense Trade Controls must be submitted: By the original U.S. exporter, provided a written request is received from a member of the Australian Community, as identified in § 126.16 of this subchapter, or the United Kingdom Community, as identified in § 126.17 of this subchapter (where such a written request includes a written certification from the member of the Australian Community or the United Kingdom Community providing the information set forth in § 126.17 of this subchapter); or by a member of the Australian Community or the United Kingdom Community, where such request provides the information set forth in this section. All persons must continue to comply with statutory and regulatory requirements outside of this subchapter concerning the import of defense articles and defense services or the possession or transfer of defense articles, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 CFR parts 447, 478, and 479, which are unaffected by the Defense Trade Cooperation Treaty between the United States and the United Kingdom and continue to apply fully to defense articles and defense services subject to either of the aforementioned treaties and the exemptions contained in § 126.17 of this subchapter.

(d) [Reserved]

(e) Reexports or retransfers of U.S.-origin components incorporated into a foreign defense article to NATO, NATO agencies, a government of a NATO country, or the governments of Australia, Israel, Japan, New Zealand, or the Republic of Korea are authorized without the prior written approval of the Directorate of Defense Trade Controls, provided:

(1) The U.S.-origin components were previously authorized for export from the United States, either by a license, written authorization, or an exemption other than those described in either § 126.16 or § 126.17 of this subchapter;

(2) The U.S.-origin components are not significant military equipment, the items are not major defense equipment sold under contract in the amount of $25,000,000 ($25 million) or more; the articles are not defense articles or defense services sold under a contract in the amount of $100,000,000 ($100 million) or more; and are not identified in part 121 of this subchapter as Missile Technology Control Regime (MTCR) items; and

(3) The person reexporting the defense article provides written notification to the Directorate of Defense Trade Controls of the retransfer not later than 30 days following the reexport. The notification must state the articles being reexported and the recipient government.

(4) The original license or other approval of the Directorate of Defense Trade Controls did not include retransfer or reexport restrictions prohibiting use of this exemption.

[58 FR 39299, July 22, 1993, as amended at 71 FR 20541, Apr. 21, 2006; 73 FR 15885, Mar. 26, 2008; 73 FR 38343, Aug. 3, 2009; 77 FR 16597, Mar. 21, 2012; 78 FR 22759, Apr. 16, 2013; 78 FR 61755, Oct. 3, 2013]

§ 123.10 Non-transfer and use assurances.

(a) A nontransfer and use certificate (Form DSP–83) is required for the export of significant military equipment and classified articles, including classified technical data. A license will not be issued until a completed Form DSP–

83 has been received by the Directorate of Defense Trade Controls. This form is to be executed by the foreign consignee, foreign end-user, and the applicant. The certificate stipulates that, except as specifically authorized by prior written approval of the Department of State, the foreign consignee and foreign end-user will not reexport, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person.

(b) The Directorate of Defense Trade Controls may also require a DSP–83 for the export of any other defense articles, including technical data, or defense services.

(c) When a DSP–83 is required for an export of any defense article or defense service to a non-governmental foreign end-user, the Directorate of Defense Trade Controls may require as a condition of issuing the license that the appropriate authority of the government of the country of ultimate destination also execute the certificate.

[71 FR 20541, Apr. 21, 2006]

§ 123.11 Movements of vessels and aircraft covered by the U.S. Munitions List outside the United States.

(a) A license issued by the Directorate of Defense Trade Controls is required whenever a privately-owned aircraft or vessel on the U.S. Munitions List makes a voyage outside the United States.

(b) Exemption. An export license is not required when a vessel or aircraft referred to in paragraph (a) of this section departs from the United States and does not enter the territorial waters or airspace of a foreign country if no defense articles are carried as cargo. Such a vessel or aircraft may not enter the territorial waters or airspace of a foreign country before returning to the United States, or carry as cargo any defense article, without a temporary export license (Form DSP–73) from the Department of State. (See § 123.5.)

[58 FR 39299, July 22, 1993, as amended at 71 FR 20541, Apr. 21, 2006]

§ 123.12 Shipments between U.S. possessions.

An export license is not required for the shipment of defense articles between the United States, the Commonwealth of Puerto Rico, and U.S. possessions. A license is required, however, for the export of defense articles from these areas to foreign countries.

§ 123.13 Domestic aircraft shipments via a foreign country.

A license is not required for the shipment by air of a defense article from one location in the United States to another location in the United States via a foreign country. The pilot of the aircraft must, however, file a written statement with the Port Director of U.S. Customs and Border Protection at the port of exit in the United States. The original statement must be filed at the time of exit with the Port Director of U.S. Customs and Border Protection. A duplicate must be filed at the port of reentry with the Port Director of U.S. Customs and Border Protection, who will duly endorse it and transmit it to the Port Director of U.S. Customs and Border Protection at the port of exit. The statement will be as follows:

DOMESTIC SHIPMENT VIA A FOREIGN COUNTRY OF ARTICLES ON THE U.S. MUNITIONS LIST

Under penalty according to Federal law, the undersigned certifies and warrants that all the information in this document is true and correct, and that the equipment listed below is being shipped from (U.S. port of exit) via (foreign country) to (U.S. port of entry), which is the final destination in the United States.

Description of Equipment

Quantity _____

Equipment _____

Value _____

Signed _____

Endorsement: U.S. Customs and Border Protection Inspector.

Port of Exit _____

Date _____

Signed _____

Endorsement: U.S. Customs and Border Protection Inspector.

Port of Entry _____

Date _____

[70 FR 50961, Aug. 29, 2005]

§ 123.14 Import certificate/delivery verification procedure.

(a) The Import Certificate/Delivery Verification Procedure is designed to assure that a commodity imported into the territory of those countries participating in IC/DV procedures will not be diverted, transshipped, or reexported to another destination except in accordance with export control regulations of the importing country.

(b) *Exports.* The Directorate of Defense Trade Controls may require the IC/DV procedure on proposed exports of defense articles to non-government entities in those countries participating in IC/DV procedures. In such cases, U.S. exporters must submit both an export license application (the completed Form DSP–5) and the original Import Certificate, which must be provided and authenticated by the government of the importing country. This document verifies that the foreign importer complied with the import regulations of the government of the importing country and that the importer declared the intention not to divert, transship or reexport the material described therein without the prior approval of that government. After delivery of the commodities to the foreign consignee, the Directorate of Defense Trade Controls may also require U.S. exporters to furnish Delivery Verification documentation from the government of the importing country. This documentation verifies that the delivery was in accordance with the terms of the approved export license. Both the Import Certificate and the Delivery Verification must be furnished to the U.S. exporter by the foreign importer.

(c) *Triangular transactions.* When a transaction involves three or more countries that have adopted the IC/DV procedure, the governments of these countries may stamp a triangular symbol on the Import Certificate. This symbol is usually placed on the Import Certificate when the applicant for the Import Certificate (the importer) states either (1) that there is uncertainty whether the items covered by the Import Certificate will be imported into the country issuing the Import Certificate; (2) that he or she knows that the items will not be imported into the country issuing the Import Certificate; or (3) that, if the items are to be imported into the country issuing the Import Certificate, they will subsequently be reexported to another destination. All parties, including the ultimate consignee in the country of ultimate destination, must be shown on the completed Import Certificate.

[58 FR 39299, July 22, 1993, as amended at 71 FR 20541, Apr. 21, 2006]

§ 123.15 Congressional certification pursuant to Section 36(c) of the Arms Export Control Act.

(a) The Arms Export Control Act requires that a certification be provided to the Congress prior to the granting of any license or other approval for transactions, in the amounts described below, involving exports of any defense articles and defense services and for exports of major defense equipment, as defined in § 120.8 of this subchapter. Approvals may not be granted when the Congress has enacted a joint resolution prohibiting the export. Certification is required for any transaction involving:

(1) A license for the export of major defense equipment sold under a contract in the amount of $14,000,000 or more, or for defense articles and defense services sold under a contract in the amount of $50,000,000 or more, to any country that is not a member of the North Atlantic Treaty Organization (NATO), or Australia, Israel, Japan, New Zealand, or the Republic of Korea that does not authorize a new sales territory; or

(2) A license for export to a country that is a member country of NATO, or Australia, Israel, Japan, New Zealand, or the Republic of Korea, of major defense equipment sold under a contract in the amount of $25,000,000 or more, or for defense articles and defense services sold under a contract in the amount of $100,000,000 or more, and provided the transfer does not include any other countries; or

(3) A license for export of a firearm controlled under Category I of the United States Munitions List, of this subchapter, in an amount of $1,000,000 or more.

(b) Unless an emergency exists which requires the final export in the national security interests of the United States, approval may not be granted

for any transaction until at least 15 calendar days have elapsed after receipt by the Congress of the certification required by 22 U.S.C. 2776(c)(1) involving NATO, or Australia, Israel, Japan, New Zealand, or the Republic of Korea or at least 30 calendar days have elapsed for any other country; in the case of a license for an export of a commercial communications satellite for launch from, and by nationals of, the Russian Federation, Ukraine, or Kazakhstan, until at least 15 calendar days after the Congress receives such certification.

(c) Persons who intend to export defense articles and defense services pursuant to any exemption in this subchapter under the circumstances described in this section must provide written notification to the Directorate of Defense Trade Controls and include a signed contract and a DSP–83 signed by the applicant, the foreign consignee and the end-user.

[70 FR 34654, June 15, 2005, as amended at 73 FR 38343, Aug. 3, 2009; 77 FR 16598, Mar. 21, 2012]

§ 123.16 Exemptions of general applicability.

(a) The following exemptions apply to exports of unclassified defense articles for which no approval is needed from the Directorate of Defense Trade Controls. These exemptions do not apply to: Proscribed destinations under § 126.1 of this subchapter; exports for which Congressional notification is required (*see* § 123.15 of this subchapter); MTCR articles; Significant Military Equipment (SME); and may not be used by persons who are generally ineligible as described in § 120.1(c) of this subchapter. All shipments of defense articles, including but not limited to those to Australia, Canada, and the United Kingdom, require an Electronic Export Information (EEI) filing or notification letter. If the export of a defense article is exempt from licensing, the EEI filing must cite the exemption. Refer to § 123.22 of this subchapter for EEI filing and letter notification requirements.

(b) The following exports are exempt from the licensing requirements of this subchapter.

(1) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of defense hardware being exported in furtherance of a manufacturing license agreement, technical assistance agreement, distribution agreement or an arrangement for distribution of items identified in Category XIII(b)(1), approved in accordance with part 124, provided that:

(i) The defense hardware to be exported supports the activity and is identified by item, quantity and value in the agreement or arrangement; and

(ii) Any provisos or limitations placed on the authorized agreement or arrangement are adhered to; and

(iii) The exporter identifies in the EEI filing by selecting the appropriate code that the export is exempt from the licensing requirements of this subchapter; and

(iv) The total value of all shipments does not exceed the value authorized in the agreement or arrangement.

(v) In the case of a distribution agreement, export must be made directly to the approved foreign distributor.

(2) Port Directors of U.S. Customs and Border Protection shall permit the export of components or spare parts (for exemptions for firearms and ammunition see § 123.17) without a license when the total value does not exceed $500 in a single transaction and:

(i) The components or spare parts are being exported to support a defense article previously authorized for export; and

(ii) The spare parts or components are not going to a distributor, but to a previously approved end-user of the defense articles; and

(iii) The spare parts or components are not to be used to enhance the capability of the defense article;

(iv) Exporters shall not split orders so as not to exceed the dollar value of this exemption;

(v) The exporter may not make more than 24 shipments per calendar year to the previously authorized end user;

(vi) The exporter must certify on the invoice, the bill of lading, air waybill, or shipping documents that the export is exempt from the licensing requirements of this subchapter. This is done by writing ''22 CFR 123.16(b)(2) applicable.''

(3) Port Directors of U.S. Customs and Border Protection shall permit the export without a license, of packing cases specially designed to carry defense articles.

(4) Port Directors of U.S. Customs and Border Protection shall permit the export without a license, of unclassified models or mock-ups of defense articles, provided that such models or mock-ups are nonoperable and do not reveal any technical data in excess of that which is exempted from the licensing requirements of §125.4(b) of this subchapter and do not contain components covered by the U.S. Munitions List (see §121.8(b) of this subchapter). Some models or mockups built to scale or constructed of original materials can reveal technical data. U.S. persons who avail themselves of this exemption must provide a written certification to the Port Director of U.S. Customs and Border Protection that these conditions are met. This exemption does not imply that the Directorate of Defense Trade Controls will approve the export of any defense articles for which models or mocks-ups have been exported pursuant to this exemption.

(5) Port Directors of U.S. Customs and Border Protection shall permit the temporary export without a license of unclassified defense articles to any public exhibition, trade show, air show or related event if that article has previously been licensed for a public exhibition, trade show, air show or related event and the license is still valid. U.S. persons who avail themselves of this exemption must provide a written certification to the Port Director of U.S. Customs and Border Protection that these conditions are met.

(6) For exemptions for firearms and ammunition refer to §123.17 of this subchapter.

(7) For exemptions for firearms for personal use of members of the U.S. Armed Forces and civilian employees see §123.18.

(8) For exports to Canada refer to §126.5 of this subchapter.

(9) Port Directors of U.S. Customs and Border Protection shall permit the temporary export without a license by a U.S. person of any unclassified component, part, tool or test equipment to a subsidiary, affiliate or facility owned or controlled by the U.S. person (see §120.37 of this subchapter for definition of foreign ownership and foreign control) if the component, part, tool or test equipment is to be used for manufacture, assembly, testing, production, or modification provided:

(i) The U.S. person is registered with the Directorate of Defense Trade Controls and complies with all requirements set forth in part 122 of this subchapter;

(ii) No defense article exported under this exemption may be sold or transferred without the appropriate license or other approval from the Directorate of Defense Trade Controls.

(10) Port Directors of U.S. Customs and Border Protection shall permit, without a license, the permanent export, and temporary export and return to the United States, by accredited U.S. institutions of higher learning of articles fabricated only for fundamental research purposes otherwise controlled by Category XV (a) or (e) in §121.1 of this subchapter when all of the following conditions are met:

(i) The export is to an accredited institution of higher learning, a governmental research center or an established government funded private research center located within countries of the North Atlantic Treaty Organization (NATO) or countries which have been designated in accordance with section 517 of the Foreign Assistance Act of 1961 as a major non-NATO ally (and as defined further in section 644(q) of that Act) for purposes of that Act and the Arms Export Control Act, or countries that are members of the European Space Agency or the European Union and involves exclusively nationals of such countries;

(ii) All of the information about the article(s), including its design, and all of the resulting information obtained through fundamental research involving the article will be published and shared broadly within the scientific community, and is not restricted for proprietary reasons or specific U.S. government access and dissemination controls or other restrictions accepted by the institution or its researchers on publication of scientific and technical information resulting from the project

or activity (See § 120.11 of this subchapter); and

(iii) If the article(s) is for permanent export, the platform or system in which the article(s) may be incorporated must be a satellite covered by § 125.4(d)(1)(iii) of this subchapter and be exclusively concerned with fundamental research and only be launched into space from countries and by nationals of countries identified in this section.

[58 FR 39299, July 22, 1993, as amended at 59 FR 29951, June 10, 1994; 59 FR 45622, Sept. 2, 1994; 67 FR 15100, Mar. 29, 2002; 70 FR 50961, Aug. 29, 2005; 71 FR 20541, Apr. 21, 2006; 76 FR 45197, July 28, 2011; 77 FR 16598, Mar. 21, 2012; 78 FR 40631, July 8, 2013]

§ 123.17 Exports of firearms, ammunition, and personal protective gear.

(a) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of:

(1) Parts and components for USML Category I(a) firearms, except barrels, cylinders, receivers (frames), or complete breech mechanisms, when the total value does not exceed $100 wholesale in any transaction, except to any of the countries or entities as provided in § 126.1 of this subchapter;

(2) Parts, components, accessories, or attachments for USML Category I firearms, except barrels, cylinders, receivers (frames), complete breech mechanisms, or fully automatic firearms and parts and components for such firearms, when:

(i) The total value does not exceed $500 wholesale in any transaction;

(ii) The export is to Canada for end-use in Canada or return to the United States, or temporary import into the United States of Canadian-origin items and return to Canada for a Canadian citizen; and

(iii) The exporter makes a declaration via the Automated Export System, pursuant to § 123.22(a) of this subchapter, and the exporter is eligible to export under this exemption, pursuant to § 120.1(c) of this subchapter; or

(3) Parts, components, accessories, or attachments for USML Category I firearms, including fully automatic firearms and parts and components for such firearms, when:

(i) The total value does not exceed $500 wholesale in any transaction;

(ii) The export is to Canada for end-use by the Canadian Federal Government, a Canadian Provincial Government, or a Canadian Municipal Government; and

(iii) The exporter makes a declaration via the Automated Export System, pursuant to § 123.22(a) of this subchapter, and the exporter is eligible to export under this exemption, pursuant to § 120.1(c) of this subchapter.

(b) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of nonautomatic firearms covered by Category I(a) of § 121.1 of this subchapter if they were manufactured in or before 1898, or are replicas of such firearms.

(c) Port Directors of U.S. Customs and Border Protection (CBP) shall permit U.S. persons to export temporarily from the United States without a license not more than three nonautomatic firearms in Category I(a) of § 121.1 of this subchapter and not more than 1,000 cartridges therefor, provided that:

(1) The person declares the articles to a CBP officer upon each departure from the United States, presents the Internal Transaction Number from submission of the Electronic Export Information in the Automated Export System per § 123.22 of this subchapter, and the articles are presented to the CBP officer for inspection;

(2) The firearms and accompanying ammunition to be exported is with the individual's baggage or effects, whether accompanied or unaccompanied (but not mailed); and

(3) The firearms and accompanying ammunition must be for that person's exclusive use and not for reexport or other transfer of ownership. The person must declare that it is his intention to return the article(s) on each return to the United States. The foregoing exemption is not applicable to the personnel referred to in § 123.18 of this subchapter.

(d) Port Directors of U.S. Customs and Border Protection shall permit a foreign person to export without a license such firearms in Category I(a) of § 121.1 of this subchapter and ammunition therefor as the foreign person

brought into the United States under the provisions of 27 CFR 478.115(d). (The latter provision specifically excludes from the definition of importation the bringing into the United States of firearms and ammunition by certain foreign persons for specified purposes.)

(e) Port Directors of U.S. Customs and Border Protection shall permit U.S. persons to export without a license ammunition for nonautomatic firearms referred to in paragraph (a) of this section if the quantity does not exceed 1,000 cartridges (or rounds) in any shipment. The ammunition must also be for personal use and not for resale or other transfer of ownership. The foregoing exemption is also not applicable to the personnel referred to in §123.18.

(f) Port Directors of U.S. Customs and Border Protection (CBP) shall permit U.S. persons to export temporarily from the United States without a license one set of body armor covered by U.S. Munitions List Category X(a)(1), which may include one helmet covered by U.S. Munitions List Category X(a)(6), or one set of chemical agent protective gear covered by U.S. Munitions List Category XIV(f)(4), which may include one additional filter canister, provided:

(1) The person declares the articles to a CBP officer upon each departure from the United States, presents the Internal Transaction Number from submission of the Electronic Export Information in the Automated Export System (AES) per §123.22 of this subchapter, and the articles are presented to the CBP officer for inspection;

(2) The body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, to be exported is with the individual's baggage or effects, whether accompanied or unaccompanied (but not mailed); and

(3) The body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, to be exported is for that person's exclusive use and not for reexport or other transfer of ownership. The person must declare it is his intention to return the article(s) to the United States at the end of tour, contract, or assignment for which the articles were temporarily exported.

(g) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor or chemical agent protective gear for personal use to countries listed in §126.1 of this subchapter provided:

(1) The conditions in paragraph (f) of this section are met; and

(2) The person is affiliated with the U.S. Government traveling on official business or is traveling in support of a U.S. Government contract. The person shall present documentation to this effect, along with the Internal Transaction Number for the AES submission, to the CBP officer.

(h) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, for personal use to Iraq, provided the conditions in paragraph (f) are met, and the person is either affiliated with the U.S. Government traveling on official business or is traveling in support of a U.S. Government contract, or is traveling to Iraq under a direct authorization by the Government of Iraq and engaging in activities for, on behalf of, or at the request of, the Government of Iraq. The person shall present documentation to this effect, along with the Internal Transaction Number for the AES submission, to the CBP officer. Documentation regarding direct authorization from the Government of Iraq shall include an English translation.

(i) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, for personal use to Afghanistan, provided the conditions in paragraph (f) are met.

(j) If the articles temporarily exported pursuant to paragraphs (c) and (f) through (i) of this section are not returned to the United States, a detailed report must be submitted to the Office of Defense Trade Controls Compliance in accordance with the requirements of §127.12(c)(2) of this subchapter.

(k) To use the exemptions in this section, individuals are not required to be registered with the Department of State (the registration requirement is described in part 122 of this subchapter). All other entities must be registered and eligible, as provided in §§120.1(c) and (d) and part 122 of this subchapter.

[58 FR 39299, July 22, 1993, as amended at 64 FR 17534, Apr. 12, 1999; 70 FR 50962, Aug. 29, 2005; 71 FR 20541, Apr. 21, 2006; 74 FR 39213, Aug. 6, 2009; 77 FR 25867, May 2, 2012; 78 FR 40631, July 8, 2013]

§ 123.18 Firearms for personal use of members of the U.S. Armed Forces and civilian employees of the U.S. Government.

The following exemptions apply to members of the U.S. Armed Forces and civilian employees of the U.S. Government who are U.S. persons (both referred to herein as personnel). The exemptions apply only to such personnel if they are assigned abroad for extended duty. These exemptions do not apply to dependents.

(a) *Firearms.* Port Directors of U.S. Customs and Border Protection shall permit nonautomatic firearms in Category I(a) of §121.1 of this subchapter and parts therefor to be exported, except by mail, from the United States without a license if:

(1) They are consigned to servicemen's clubs abroad for uniformed members of the U.S. Armed Forces; or,

(2) In the case of a uniformed member of the U.S. Armed Forces or a civilian employee of the Department of Defense, they are for personal use and not for resale or other transfer of ownership, and if the firearms are accompanied by a written authorization from the commanding officer concerned; or

(3) In the case of other U.S. Government employees, they are for personal use and not for resale or other transfer of ownership, and the Chief of the U.S. Diplomatic Mission or his designee in the country of destination has approved in writing to Department of State the import of the specific types and quantities of firearms into that country. The exporter shall provide a copy of this written statement to the Port Director of U.S. Customs and Border Protection.

(b) *Ammunition.* Port Directors of U.S. Customs and Border Protection shall permit not more than 1,000 cartridges (or rounds) of ammunition for the firearms referred to in paragraph (a) of this section to be exported (but not mailed) from the United States without a license when the firearms are on the person of the owner or with his baggage or effects, whether accompanied or unaccompanied (but not mailed).

[58 FR 39299, July 22, 1993, as amended at 70 FR 50962, Aug. 29, 2005]

§ 123.19 Canadian and Mexican border shipments.

A shipment originating in Canada or Mexico which incidentally transits the United States en route to a delivery point in the same country that originated the shipment is exempt from the requirement for an in transit license.

§ 123.20 Nuclear related controls.

(a) The provisions of this subchapter do not apply to equipment, technical data, or services in Category VI, Category XVI, and Category XX of §121.1 of this subchapter to the extent such equipment, technical data, or services are under the export control of the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or is a government transfer authorized pursuant to these Acts.

(b) The transfer of materials, including special nuclear materials, nuclear parts of nuclear weapons, or other nonnuclear parts of nuclear weapons systems involving Restricted Data or of assistance involving any person directly or indirectly engaging in the production or use thereof is prohibited except as authorized by the Atomic Energy Act of 1954, as amended. The transfer of Restricted Data or such assistance is prohibited except as authorized by the Atomic Energy Act of 1954, as amended. The technical data or defense services relating to nuclear weapons, nuclear weapons systems or related defense purposes (and such data or services relating to applications of atomic energy for peaceful purposes, or related research and development) may

constitute Restricted Data or such assistance, subject to the foregoing prohibition.

(c) A license for the export of any machinery, device, component, equipment, or technical data relating to equipment referred to in Category VI(e) or Category XX(b) of § 121.1 of this subchapter will not be granted unless the proposed equipment comes within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the Atomic Energy Act of 1954, as amended, with the government of the country to which the Article is to be exported. Licenses may be granted in the absence of such an agreement only:

(1) If the proposed export involves an article which is identical to that in use in an unclassified civilian nuclear power plant,

(2) If the proposed export has no relationship to naval nuclear propulsion, and

(3) If it is not for use in a naval propulsion plant.

[67 FR 58988, Sept. 19, 2002, as amended at 78 FR 40933, July 8, 2013]

EFFECTIVE DATE NOTE: At 79 FR 47, Jan. 2, 2014, § 123.20 was amended by revising paragraph (a) and paragraph (c) introductory text, effective July 1, 2014. For the convenience of the user, the revised text is set forth as follows:

§ 123.20 Nuclear related controls.

(a) The provisions of this subchapter do not apply to articles, technical data, or services in Category VI, Category XVI, or Category XX of § 121.1 of this subchapter to the extent that exports of such articles, technical data, or services are controlled by the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or are pursuant to a government transfer authorized pursuant to these Acts. For Department of Commerce controls, *see* 15 CFR 742.3 and 744.2, administered pursuant to Section 309(c) of the Nuclear Nonproliferation Act of 1978, as amended (42 U.S.C. 2139a(c)), and 15 CFR 744.5, none of which are subject to the provisions of this subchapter.

* * * * *

(c) A license for the export of a defense article, technical data, or the furnishing of a defense service relating to defense articles referred to in Category VI(e) or Category XX(b)(1) of § 121.1 of this subchapter will not be granted unless the defense article, technical data, or defense service comes within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the Atomic Energy Act of 1954, as amended, with the government of the country to which the defense article, technical data, or defense service is to be exported. Licenses may be granted in the absence of such an agreement only:

* * * * *

§ 123.21 Duration, renewal, and disposition of licenses.

(a) A license is valid for four years. The license expires when the total value or quantity authorized has been shipped or when the date of expiration has been reached, whichever occurs first. Defense articles to be shipped thereafter require a new application and license. The new application should refer to the expired license. It should not include references to any defense articles other than those of the unshipped balance of the expired license.

(b) Unused, expired, suspended, or revoked licenses must be handled in accordance with § 123.22(c) of this subchapter.

[58 FR 39299, July 22, 1993, as amended at 76 FR 68312, Nov. 4, 2011]

§ 123.22 Filing, retention, and return of export licenses and filing of export information.

(a) Any export, as defined in this subchapter, of a defense article controlled by this subchapter, to include defense articles transiting the United States, requires the electronic reporting of export information. The reporting of the export information shall be to the U.S. Customs and Border Protection using the Automated Export System (AES) or directly to the Directorate of Defense Trade Controls (DDTC). Any license or other approval authorizing the permanent export of hardware must be filed at a U.S. Port before any export. Licenses or other approvals for the permanent export of technical data and defense services shall be retained by the applicant who will send the export information directly to DDTC. Temporary export or temporary import licenses for such items need not be filed

with the U.S. Customs and Border Protection, but must be presented to the U.S. Customs and Border Protection for decrementing of the shipment prior to departure and at the time of entry. The U.S. Customs and Border Protection will only decrement a shipment after the export information has been filed correctly using the AES. Before the export of any hardware using an exemption in this subchapter, the DDTC registered applicant/exporter, or an agent acting on the filer's behalf, must electronically provide export information using the AES (see paragraph (b) of this section). In addition to electronically providing the export information to the U.S. Customs and Border Protection before export, all the mandatory documentation must be presented to the port authorities (e.g., attachments, certifications, proof of AES filing; such as the Internal Transaction Number (ITN)). Export authorizations shall be filed, retained, decremented or returned to DDTC as follows:

(1) *Filing of licenses and documentation for the permanent export of hardware.* For any permanent export of hardware using a license (e.g., DSP–5, DSP–94) or an exemption in this subchapter, the exporter must, prior to an AES filing, deposit the license and provide any required documentation for the license or the exemption with the U.S. Customs and Border Protection, unless otherwise directed in this subchapter (e.g., § 125.9). If necessary, an export may be made through a port other than the one designated on the license if the exporter complies with the procedures established by the U.S. Customs and Border Protection.

(2) *Presentation and retention by the applicant of temporary licenses and related documentation for the export of unclassified defense articles.* Licenses for the temporary export or temporary import of unclassified defense articles need not be filed with the U.S. Customs and Border Protection, but must be retained by the applicant and presented to the U.S. Customs and Border Protection at the time of temporary import and temporary export. When a defense article is temporarily exported from the United States and moved from one destination authorized on a license to another destination authorized on the same or another temporary license, the applicant, or an agent acting on the applicant's behalf, must ensure that the U.S. Customs and Border Protection decrements both temporary licenses to show the exit and entry of the hardware.

(b) *Filing and reporting of export information*—(1) *Filing of export information with the U.S. Customs and Border Protection.* Before exporting any hardware controlled by this subchapter, using a license or exemption, the DDTC registered applicant/exporter, or an agent acting on the filer's behalf, must electronically file the export information with the U.S. Customs and Border Protection using the Automated Export System (AES) in accordance with the following timelines:

(i) *Air or truck shipments.* The export information must be electronically filed at least 8 hours prior to departure.

(ii) *Sea or rail Shipments.* The export information must be electronically filed at least 24 hours prior to departure.

(2) *Emergency shipments of hardware that cannot meet the pre-departure filing requirements.* U.S. Customs and Border Protection may permit an emergency export of hardware by truck (e.g., departures to Mexico or Canada) or air, by a U.S. registered person, when the exporter is unable to comply with the Electronic Export Information (EEI) filing timeline in paragraph (b)(1)(i) of this section. The applicant, or an agent acting on the applicant's behalf, in addition to providing the EEI using the AES, must provide documentation required by U.S. Customs and Border Protection and this subchapter. The documentation provided to U.S. Customs and Border Protection at the port of exit must include the Internal Transaction Number (ITN) for the shipment and a copy of a notification to the Directorate of Defense Trade Controls stating that the shipment is urgent and must be accompanied by an explanation for the urgency. The original of the notification must be immediately provided to the Directorate of Defense Trade Controls. The AES filing of the export information must be made at least two hours prior to any

departure by air from the United States. When shipping via ground, the AES filing must be made at the time when the exporter provides the articles to the carrier or at least one hour prior to departure from the United States, when the permanent export of the hardware has been authorized for export:

(i) In accordance with §126.4 of this subchapter, or

(ii) On a valid license (*i.e.*, DSP–5, DSP–94) and the ultimate recipient and ultimate end user identified on the license is a foreign government.

(3) *Reporting of export information on technical data and defense service.* When an export is being made using a DDTC authorization (e.g., technical data license, agreement or a technical data exemption provided in this subchapter), the DDTC registered exporter will retain the license or other approval and provide the export information electronically to DDTC as follows:

(i) *Technical data license.* Prior to the permanent export of technical data licensed using a Form DSP–5, the applicant shall electronically provide export information using the system for direct electronic reporting to DDTC of export information and self validate the original of the license. When the initial export of all the technical data authorized on the license has been made, the license must be returned to DDTC. Exports of copies of the licensed technical data should be made in accordance with existing exemptions in this subchapter. Should an exemption not apply, the applicant may request a new license.

(ii) *Manufacturing license and technical assistance agreements.* Prior to the initial export of any technical data and defense services authorized in an agreement the U.S. agreement holder must electronically inform DDTC that exports have begun. In accordance with this subchapter, all subsequent exports of technical data and services are not required to be filed electronically with DDTC except when the export is done using a U.S. Port. Records of all subsequent exports of technical data shall be maintained by the exporter in accordance with this subchapter and shall be made immediately available to DDTC upon request. Exports of technical data in furtherance of an agreement using a U.S. Port shall be made in accordance with §125.4 of this subchapter and made in accordance with the procedures in paragraph (b)(3)(iii) of this section.

(iii) *Technical data and defense service exemptions.* In any instance when technical data is exported using an exemption in this subchapter (e.g., §§125.4(b)(2), 125.4(b)(4), 126.5) from a U.S. port, the exporter is not required to report using AES, but must, effective January 18, 2004, provide the export data electronically to DDTC. A copy of the electronic notification to DDTC must accompany the technical data shipment and be made available to the U.S. Customs and Border Protection upon request.

NOTE TO PARAGRAPH (b)(3)(iii): Future changes to the electronic reporting procedure will be amended by publication of a rule in the FEDERAL REGISTER. Exporters are reminded to continue maintaining records of all export transactions, including exemption shipments, in accordance with this subchapter.

(c) *Return of licenses.* Per §123.21 of this subchapter, all DSP licenses issued by the Directorate of Defense Trade Controls (DDTC) must be disposed of in accordance with the following:

(1) A DSP–5 license issued electronically by DDTC and decremented electronically by the U.S. Customs and Border Protection through the Automated Export System (AES) is not required to be returned to DDTC. If a DSP–5 license issued electronically is decremented physically in one or more instance the license must be returned DDTC. A copy of the DSP–5 license must be maintained by the applicant in accordance with §122.5 of this subchapter.

(2) DSP–5, DSP–61, DSP–73, and DSP–85 licenses issued by DDTC but not decremented electronically by the U.S. Customs and Border Protection through AES (e.g., oral or visual technical data releases or temporary import and export licenses retained in accordance with paragraph (a)(2) of this section), must be returned by the applicant, or the government agency with which the license was filed, to DDTC upon expiration, to include when the total authorized value or quantity has been shipped. A copy of the license

must be maintained by the applicant in accordance with § 122.5 of this subchapter. AES does not decrement the DSP–61, DSP–73, and DSP–85 licenses. Submitting the Electronic Export Information is not considered to be decremented electronically for these licenses.

(3) A DSP–94 authorization filed with the U.S. Customs and Border Protection must be returned by the applicant, or the government agency with which the authorization was filed, to DDTC upon expiration, to include when the total authorized value or quantity has been shipped, or when all shipments against the Letter of Offer and Acceptance have been completed. AES does not decrement the DSP–94 authorization. Submitting the Electronic Export Information is not considered to be decremented electronically for the DSP–94. A copy of the DSP–94 must be maintained by the applicant in accordance with § 122.5 of this subchapter.

(4) A license issued by DDTC but not used by the applicant does not need to be returned to DDTC, even when expired.

(5) A license revoked by DDTC is considered expired and must be handled in accordance with paragraphs (c)(1) and (c)(2) of this section.

[68 FR 61101, Oct. 27, 2003, as amended at 70 FR 50962, Aug. 29, 2005; 76 FR 68312, Nov. 4, 2011; 77 FR 16599, Mar. 21, 2012]

§ 123.23 Monetary value of shipments.

Port Directors of U.S. Customs and Border Protection shall permit the shipment of defense articles identified on any license when the total value of the export does not exceed the aggregate monetary value (not quantity) stated on the license by more than ten percent, provided that the additional monetary value does not make the total value of the license or other approval for the export of any major defense equipment sold under a contract reach $14,000,000 or more, and provided that the additional monetary value does not make defense articles or defense services sold under a contract reach the amount of $50,000,000 or more.

[70 FR 50963, Aug. 29, 2005]

§ 123.24 Shipments by U.S. Postal Service.

(a) The export of any defense hardware using a license or exemption in this subchapter by the U.S. Postal Service must be filed with the U.S. Customs and Border Protection using the Automated Export System (AES) and the license must be filed with the U.S. Customs and Border Protection before any hardware is actually sent abroad by mail. The exporter must certify the defense hardware being exported in accordance with this subchapter by clearly marking on the package ''This export is subject to the controls of the ITAR, 22 CFR (identify section for an exemption) or (state license number) and the export has been electronically filed with the U.S. Customs and Border Protection using the Automated Export System (AES).''

(b) The export of any technical data using a license in this subchapter by the U.S. Postal Service must be notified electronically directly to the Directorate of Defense Trade Controls (DDTC). The exporter, using either a license or exemption, must certify, by clearly marking on the package, ''This export is subject to the controls of the ITAR, 22 CFR (identify section for an exemption) or (state license number).'' For those exports using a license, the exporter must also state ''The export has been electronically notified directly to DDTC.'' The license must be returned to DDTC upon completion of the use of the license (*see* § 123.22(c)).

[68 FR 61102, Oct. 27, 2003, as amended at 70 FR 50963, Aug. 29, 2005]

§ 123.25 Amendments to licenses.

(a) The Directorate of Defense Trade Controls may approve an amendment to a license for permanent export, temporary export and temporary import of unclassified defense articles. A suggested format is available from the Directorate of Defense Trade Controls.

(b) The following types of amendments to a license will be considered: Addition of U.S. freight forwarder or U.S. consignor; change due to an obvious typographical error; change in source of commodity; and change of foreign intermediate consignee if that

party is only transporting the equipment and will not process (e.g., integrate, modify) the equipment. For changes in U.S. dollar value see § 123.23.

(c) The following types of amendments to a license will not be approved: Additional quantity, changes in commodity, country of ultimate destination, end-use or end-user, foreign consignee and/or extension of duration. The foreign intermediate consignee may only be amended if that party is acting as freight forwarder and the export does not involve technical data. A new license is required for these changes. Any new license submission must reflect only the unshipped balance of quantity and dollar value.

[58 FR 39299, July 22, 1993, as amended at 71 FR 20542, Apr. 21, 2006; 77 FR 22671, Apr. 17, 2012]

§ 123.26 Recordkeeping for exemptions.

Any person engaging in any export, reexport, transfer, or retransfer of a defense article or defense service pursuant to an exemption must maintain records of each such export, reexport, transfer, or retransfer. The records shall, to the extent applicable to the transaction and consistent with the requirements of § 123.22 of this subchapter, include the following information: A description of the defense article, including technical data, or defense service; the name and address of the end-user and other available contact information (e.g., telephone number and electronic mail address); the name of the natural person responsible for the transaction; the stated end-use of the defense article or defense service; the date of the transaction; the Electronic Export Information (EEI) Internal Transaction Number (ITN); and the method of transmission. The person using or acting in reliance upon the exemption shall also comply with any additional recordkeeping requirements enumerated in the text of the regulations concerning such exemption (e.g., requirements specific to the Defense Trade Cooperation Treaties in § 126.16 and § 126.17 of this subchapter).

[77 FR 16599, Mar. 21, 2012]

§ 123.27 Special licensing regime for export to U.S. allies of commercial communications satellite components, systems, parts, accessories, attachments and associated technical data.

(a) U.S. persons engaged in the business of exporting specifically designed or modified components, systems, parts, accessories, attachments, associated equipment and certain associated technical data for commercial communications satellites, and who are so registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, may submit license applications for multiple permanent and temporary exports and temporary imports of such articles for expeditious consideration without meeting the documentary requirements of § 123.1(c)(4) and (5) concerning purchase orders, letters of intent, contracts and non-transfer and end use certificates, or the documentary requirements of § 123.9, concerning approval of re-exports or re-transfers, when all of the following requirements are met:

(1) The proposed exports or re-exports concern exclusively one or more countries of the North Atlantic Treaty Organization (see § 120.31 of this subchapter) and/or one or more countries which have been designated in accordance with section 517 of the Foreign Assistance Act of 1961 and with section 1206 of the Foreign Relations Authorization Act, Fiscal Year 2003 as a major non-NATO ally (see § 120.32 of this subchapter).

(2) The proposed exports concern exclusively one or more foreign persons (e.g., companies or governments) located within the territories of the countries identified in paragraph (a)(1) of this section, and one or more commercial communications satellite programs included within a list of such persons and programs approved by the U.S. Government for purposes of this section, as signified in a list of such persons and programs that will be publicly available through the Internet Web site of the Directorate of Defense Trade Controls and by other means.

(3) The articles are not major defense equipment sold under a contract in the amount of $14,000,000 or more or defense articles or defense services sold

under a contract in the amount of $50,000,000 or more (for which purpose, as is customary, exporters may not split contracts or purchase orders). Items meeting these statutory thresholds must be submitted on a separate license application to permit the required notification to Congress pursuant to section 36(c) of the Arms Export Control Act.

(4) The articles are not detailed design, development, manufacturing or production data and do not involve the manufacture abroad of significant military equipment.

(5) The U.S. exporter provides complete shipment information to the Directorate of Defense Trade Controls within 15 days of shipment by submitting a report containing a description of the item and the quantity, value, port of exit, and end-user and country of destination of the item, and at that time meets the documentary requirements of §123.1(c)(4) and (5), the documentary requirements of §123.9 in the case of re-exports or re-transfers, and, other documentary requirements that may be imposed as a condition of a license (e.g., parts control plans for MTCR-controlled items). The shipment information reported must include a description of the item and quantity, value, port of exit and end user and country of destination of the item.

(6) At any time in which an item exported pursuant to this section is proposed for re-transfer outside of the approved territory, programs or persons (e.g., such as in the case of an item included in a satellite for launch beyond the approved territory), the detailed requirements of §123.9 apply with regard to obtaining the prior written consent of the Directorate of Defense Trade Controls.

(b) The re-export or re-transfer of the articles authorized for export (including to specified re-export destinations) in accordance with this section do not require the separate prior written approval of the Directorate of Defense Trade Controls provided all of the requirements in paragraph (a) of this section are met.

(c) The Directorate of Defense Trade Controls will consider, on a case-by-case basis, requests to include additional foreign companies and satellite programs within the geographic coverage of a license application submitted pursuant to this section from countries not otherwise covered, who are members of the European Space Agency or the European Union. In no case, however, can the provisions of this section apply or be relied upon by U.S. exporters in the case of countries who are subject to the mandatory requirements of Section 1514 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105–261), concerning national security controls on satellite export licensing.

(d) Registered U.S. exporters may request at the time of a license application submitted pursuant to this section that additional foreign persons or communications satellite programs be added to the lists referred to in paragraph (a)(2) of this section, which additions, if approved, will be included within the publicly available lists of authorized recipients and programs.

[65 FR 34091, May 26, 2000, as amended at 67 FR 58988, Sept. 19, 2002; 69 FR 40314, July 2, 2004; 70 FR 50963, Aug. 29, 2005; 71 FR 20542, Apr. 21, 2006]

PART 124—AGREEMENTS, OFFSHORE PROCUREMENT, AND OTHER DEFENSE SERVICES

Sec.

124.1 Manufacturing license agreements and technical assistance agreements.
124.2 Exemptions for training and military service.
124.3 Exports of technical data in furtherance of an agreement.
124.4 Deposit of signed agreements with the Directorate of Defense Trade Controls.
124.5 Proposed agreements that are not concluded.
124.6 Termination of manufacturing license agreements and technical assistance agreements.
124.7 Information required in all manufacturing license agreements and technical assistance agreements.
124.8 Clauses required both in manufacturing license agreements and technical assistance agreements.
124.9 Additional clauses required only in manufacturing license agreements.
124.10 Nontransfer and use assurances.
124.11 Congressional certification pursuant to Section 36(d) of the Arms Export Control Act.

124.12 Required information in letters of transmittal.
124.13 Procurement by United States persons in foreign countries (offshore procurement).
124.14 Exports to warehouses or distribution points outside the United States.
124.15 Special Export Controls for Defense Articles and Defense Services Controlled under Category XV: Space Systems and Space Launches.
124.16 Special retransfer authorizations for unclassified technical data and defense services to member states of NATO and the European Union, Australia, Japan, New Zealand, and Switzerland.

AUTHORITY: Sec. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39305, July 22, 1993, unless otherwise noted.

§ 124.1 Manufacturing license agreements and technical assistance agreements.

(a) *Approval*. The approval of the Directorate of Defense Trade Controls must be obtained before the defense services described in § 120.9(a) of this subchapter may be furnished. In order to obtain such approval, the U.S. person must submit a proposed agreement to the Directorate of Defense Trade Controls. Such agreements are generally characterized as manufacturing license agreements, technical assistance agreements, distribution agreements, or off-shore procurement agreements, and may not enter into force without the prior written approval of the Directorate of Defense Trade Controls. Once approved, the defense services described in the agreements may generally be provided without further licensing in accordance with §§ 124.3 and 125.4(b)(2) of this subchapter. The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the defense services described in § 120.9(a) of this subchapter (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from licensing requirements of this subchapter pursuant to § 125.4 of this subchapter). This requirement also applies to the training of any foreign military forces, regular and irregular, in the use of defense articles. Technical assistance agreements must be submitted in such cases. In exceptional cases, the Directorate of Defense Trade Controls, upon written request, will consider approving the provision of defense services described in § 120.9(a) of this subchapter by granting a license under part 125 of this subchapter.

(b) *Classified articles*. Copies of approved agreements involving the release of classified defense articles will be forwarded by the Directorate of Defense Trade Controls to the Defense Security Service of the Department of Defense.

(c) *Amendments*. Changes to the scope of approved agreements, including modifications, upgrades, or extensions must be submitted for approval. The amendments may not enter into force until approved by the Directorate of Defense Trade Controls.

(d) *Minor amendments*. Amendments which only alter delivery or performance schedules, or other minor administrative amendments which do not affect in any manner the duration of the agreement or the clauses or information which must be included in such agreements because of the requirements of this part, do not have to be submitted for approval. One copy of all such minor amendments must be submitted to the Directorate of Defense Trade Controls within thirty days after they are concluded.

[71 FR 20542, Apr. 21, 2006, as amended at 75 FR 52624, Aug. 27, 2010]

§ 124.2 Exemptions for training and military service.

(a) Technical assistance agreements are not required for the provision of training in the basic operation and maintenance of defense articles lawfully exported or authorized for export to the same recipient. This does not include training in intermediate and depot level maintenance.

(b) Services performed as a member of the regular military forces of a foreign nation by U.S. persons who have been drafted into such forces are not deemed to be defense services for purposes of § 120.9 of this subchapter.

(c) NATO countries, Australia, Japan, and Sweden, in addition to the

basic maintenance training exemption provided in § 124.2(a) and basic maintenance information exemption in § 125.4(b)(5) of this subchapter, no technical assistance agreement is required for maintenance training or the performance of maintenance, including the export of supporting technical data, when the following criteria can be met:

(1) Defense services are for unclassified U.S.-origin defense articles lawfully exported or authorized for export and owned or operated by and in the inventory of NATO or the Federal Governments of NATO countries, Australia, Japan or Sweden.

(2) This defense service exemption does not apply to any transaction involving defense services for which congressional notification is required in accordance with § 123.15 and § 124.11 of this subchapter.

(3) Maintenance training or the performance of maintenance must be limited to inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components; and excluding any modification, enhancement, upgrade or other form of alteration or improvement that enhances the performance or capability of the defense article. This does not preclude maintenance training or the performance of maintenance that would result in enhancements or improvements only in the reliability or maintainability of the defense article, such as an increased mean time between failure (MTBF).

(4) Supporting technical data must be unclassified and must not include software documentation on the design or details of the computer software, software source code, design methodology, engineering analysis or manufacturing know-how such as that described in paragraphs (c)4)(i) through (c)(4)(iii) as follows:

(i) *Design methodology*, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the ''why'' or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article.

(ii) *Engineering analysis*, such as: Analytical methods and tools used to design or evaluate a defense article's performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities.

(iii) *Manufacturing know-how*, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article.

(5) This defense service exemption does not apply to maintenance training or the performance of maintenance and service or the transfer of supporting technical data for the following defense articles:

(i) All Missile Technology Control Regime Annex Items;

(ii) Firearms listed in Category I; and ammunition listed in Category III for the firearms in Category I;

(iii) Nuclear weapons strategic delivery systems and all components, parts, accessories and attachments specifically designed for such systems and associated equipment;

(iv) Naval nuclear propulsion equipment listed in USML Category VI and USML Category XX;

(v) Gas turbine engine hot sections covered by Categories VI(f) and VIII(b);

(vi) Category VIII(f);

(vii) Category XII(c);

(viii) Chemical agents listed in Category XIV (a), biological agents in Category XIV (b), and equipment listed in Category XIV (c) for dissemination of the chemical agents and biological agents listed in Categories XIV (a) and (b);

(ix) Nuclear radiation measuring devices manufactured to military specifications listed in Category XVI(c);

(x) Category XV;

(xi) Nuclear weapons design and test equipment listed in Category XVI;

(xii) Submersible and semi-submersible vessels and related articles covered in USML Category XX; or

(xiii) Miscellaneous articles covered by Category XXI.

(6) *Eligibility criteria for foreign persons.* Foreign persons eligible to receive technical data or maintenance training under this exemption are limited to nationals of the NATO countries, Australia, Japan, or Sweden.

[58 FR 39305, July 22, 1993, as amended at 65 FR 45283, July 21, 2000; 66 FR 35899, July 10, 2001; 71 FR 20543, Apr. 21, 2006; 78 FR 40933, July 8, 2013]

EFFECTIVE DATE NOTE: At 79 FR 47, Jan. 2, 2014, § 124.2 was amended by removing and reserving paragraphs (c)(5)(iii), (c)(5)(ix), and (c)(5)(xi), effective July 1, 2014.

§ 124.3 Exports of technical data in furtherance of an agreement.

(a) *Unclassified technical data.* The U.S. Customs and Border Protection or U.S. Postal authorities shall permit the export without a license of unclassified technical data if the export is in furtherance of a manufacturing license or technical assistance agreement which has been approved in writing by the Directorate of Defense Trade Controls (DDTC) and the technical data does not exceed the scope or limitations of the relevant agreement. The approval of the DDTC must be obtained for the export of any unclassified technical data that may exceed the terms of the agreement.

(b) *Classified technical data.* The export of classified information in furtherance of an approved manufacturing license or technical assistance agreement which provides for the transmittal of classified information does not require further approval from the Directorate of Defense Trade Controls when:

(1) The United States party certifies to the Department of Defense transmittal authority that the classified information does not exceed the technical or product limitations in the agreement; and

(2) The U.S. party complies with the requirements of the Department of Defense National Industrial Security Program Operating Manual concerning the transmission of classified information (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed) and any other requirements of cognizant U.S. departments or agencies.

[58 FR 39305, July 22, 1993, as amended at 68 FR 61102, Oct. 27, 2003; 70 FR 50963, Aug. 29, 2005; 71 FR 20543, Apr. 21, 2006]

§ 124.4 Deposit of signed agreements with the Directorate of Defense Trade Controls.

(a) The United States party to a manufacturing license or a technical assistance agreement must file one copy of the concluded agreement with the Directorate of Defense Trade Controls not later than 30 days after it enters into force. If the agreement is not concluded within one year of the date of approval, the Directorate of Defense Trade Controls must be notified in writing and be kept informed of the status of the agreement until the requirements of this paragraph or the requirements of § 124.5 are satisfied.

(b) In the case of concluded agreements involving coproduction or licensed production outside of the United States of defense articles of United States origin, a written statement must accompany filing of the concluded agreement with the Directorate of Defense Trade Controls, which shall include:

(1) The identity of the foreign countries, international organization, or foreign firms involved;

(2) A description and the estimated value of the articles authorized to be produced, and an estimate of the quantity of the articles authorized to be produced:

(3) A description of any restrictions on third-party transfers of the foreign-manufactured articles; and

(4) If any such agreement does not provide for United States access to and verification of quantities of articles produced overseas and their disposition in the foreign country, a description of alternative measures and controls to ensure compliance with restrictions in the agreement on production quantities and third-party transfers.

[62 FR 67276, Dec. 24, 1997, as amended at 71 FR 20543, Apr. 21, 2006]

§ 124.5 Proposed agreements that are not concluded.

The United States party to any proposed manufacturing license agreement or technical assistance agreement must inform the Directorate of Defense Trade Controls if a decision is made not to conclude the agreement. The information must be provided within 60 days of the date of the decision. These requirements apply only if the approval of the Directorate of Defense Trade Controls was obtained for the agreement to be concluded (with or without any provisos).

[71 FR 20543, Apr. 21, 2006]

§ 124.6 Termination of manufacturing license agreements and technical assistance agreements.

The U.S. party to a manufacturing license or a technical assistance agreement must inform the Directorate of Defense Trade Controls in writing of the impending termination of the agreement not less than 30 days prior to the expiration date of such agreement.

[71 FR 20543, Apr. 21, 2006]

§ 124.7 Information required in all manufacturing license agreements and technical assistance agreements.

The following information must be included in all proposed manufacturing license agreements and technical assistance agreements. The information should be provided in terms which are as precise as possible. If the applicant believes that a clause or that required information is not relevant or necessary, the applicant may request the omission of the clause or information. The transmittal letter accompanying the agreement must state the reasons for any proposed variation in the clauses or required information.

(1) The agreement must describe the defense article to be manufactured and all defense articles to be exported, including any test and support equipment or advanced materials. They should be described by military nomenclature, contract number, National Stock Number, nameplate data, or other specific information. Supporting technical data or brochures should be submitted in seven copies. Only defense articles listed in the agreement will be eligible for export under the exemption in § 123.16(b)(1) of this subchapter.

(2) The agreement must specifically describe the assistance and technical data, including the design and manufacturing know-how involved, to be furnished and any manufacturing rights to be granted;

(3) The agreement must specify its duration; and

(4) The agreement must specifically identify the countries or areas in which manufacturing, production, processing, sale or other form of transfer is to be licensed.

§ 124.8 Clauses required both in manufacturing license agreements and technical assistance agreements.

The following statements must be included both in manufacturing license agreements and in technical assistance agreements:

(1) ''This agreement shall not enter into force, and shall not be amended or extended, without the prior written approval of the Department of State of the U.S. Government.''

(2) ''This agreement is subject to all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations.''

(3) ''The parties to this agreement agree that the obligations contained in this agreement shall not affect the performance of any obligations created by prior contracts or subcontracts which the parties may have individually or collectively with the U.S. Government.''

(4) ''No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the U.S. Government's approval of this agreement.''

(5) The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a foreign person except pursuant to §§ 124.16 and 126.18,

as specifically authorized in this agreement, or where prior written approval of the Department of State has been obtained.

(6) ''All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.''

[58 FR 39305, July 22, 1993, as amended at 76 FR 28177, May 16, 2011]

§ 124.9 Additional clauses required only in manufacturing license agreements.

(a) *Clauses for all manufacturing license agreements.* The following clauses must be included only in manufacturing license agreements:

(1) ''No export, sale, transfer, or other disposition of the licensed article is authorized to any country outside the territory wherein manufacture or sale is herein licensed without the prior written approval of the U.S. Government unless otherwise exempted by the U.S. Government. Sales or other transfers of the licensed article shall be limited to governments of countries wherein manufacture or sale is hereby licensed and to private entities seeking to procure the licensed article pursuant to a contract with any such government unless the prior written approval of the U.S. Government is obtained.''

(2) ''It is agreed that sales by licensee or its sub-licensees under contracts made through the U.S. Government will not include either charges for patent rights in which the U.S. Government holds a royalty-free license, or charges for data which the U.S. Government has a right to use and disclose to others, which are in the public domain, or which the U.S. Government has acquired or is entitled to acquire without restrictions upon their use and disclosure to others.''

(3) ''If the U.S. Government is obligated or becomes obligated to pay to the licensor royalties, fees, or other charges for the use of technical data or patents which are involved in the manufacture, use, or sale of any licensed article, any royalties, fees or other charges in connection with purchases of such licensed article from licensee or its sub-licensees with funds derived through the U.S. Government may not exceed the total amount the U.S. Government would have been obligated to pay the licensor directly.''

(4) ''If the U.S. Government has made financial or other contributions to the design and development of any licensed article, any charges for technical assistance or know-how relating to the item in connection with purchases of such articles from licensee or sub-licensees with funds derived through the U.S. Government must be proportionately reduced to reflect the U.S. Government contributions, and subject to the provisions of paragraphs (a) (2) and (3) of this section, no other royalties, or fees or other charges may be assessed against U.S. Government funded purchases of such articles. However, charges may be made for reasonable reproduction, handling, mailing, or similar administrative costs incident to the furnishing of such data.''

(5) ''The parties to this agreement agree that an annual report of sales or other transfers pursuant to this agreement of the licensed articles, by quantity, type, U.S. dollar value, and purchaser or recipient, shall be provided by (applicant or licensee) to the Department of State.'' This clause must specify which party is obligated to provide the annual report. Such reports may be submitted either directly by the licensee or indirectly through the licensor, and may cover calendar or fiscal years. Reports shall be deemed proprietary information by the Department of State and will not be disclosed to unauthorized persons. See § 126.10(b) of this subchapter.

(6) (Licensee) agrees to incorporate the following statement as an integral provision of a contract, invoice or other appropriate document whenever the licensed articles are sold or otherwise transferred:

These commodities are authorized for export by the U.S. Government only to (country of ultimate destination or approved sales territory). They may not be resold, diverted, transferred, transshipped, or otherwise be disposed of in any other country, either in their original form or after being incorporated through an intermediate process into other end-items, without the prior written approval of the U.S. Department of State.

(b) *Special clause for agreements relating to significant military equipment.* With respect to an agreement for the production of significant military equipment, the following additional provisions must be included in the agreement:

(1) ''A completed nontransfer and use certificate (DSP–83) must be executed by the foreign end-user and submitted to the Department of State of the United States before any transfer may take place.''

(2) ''The prior written approval of the U.S. Government must be obtained before entering into a commitment for the transfer of the licensed article by sale or otherwise to any person or government outside of the approved sales territory.''

§ 124.10 Nontransfer and use assurances.

(a) Types of agreements requiring assurances. With respect to any manufacturing license agreement or technical assistance agreement which relates to significant military equipment or classified defense articles, including classified technical data, a Nontransfer and Use Certificate (Form DSP–83) (see § 123.10 of this subchapter) signed by the applicant and the foreign party must be submitted to the Directorate of Defense Trade Controls. With respect to all agreements involving classified articles, including classified technical data, an authorized representative of the foreign government must sign the DSP–83 (or provide the same assurances in the form of a diplomatic note), unless the Directorate of Defense Trade Controls has granted an exception to this requirement. The Directorate of Defense Trade Controls may require that a DSP–83 be provided in conjunction with an agreement that does not relate to significant military equipment or classified defense articles. The Directorate of Defense Trade Controls may also require with respect to any agreement that an appropriate authority of the foreign party's government also sign the DSP–83 (or provide the same assurances in the form of a diplomatic note).

(b) *Timing of submission of assurances.* Submission of a Form DSP–83 and/or diplomatic note must occur as follows:

(1) Agreements which have been signed by all parties before being submitted to the Directorate of Defense Trade Controls may only be submitted along with any required DSP–83 and/or diplomatic note.

(2) If an agreement has not been signed by all parties before being submitted, the required DSP–83 and/or diplomatic note must be submitted along with the signed agreement.

NOTE TO PARAGRAPH (b): In no case may a transfer occur before a required DSP–83 and/or diplomatic note has been submitted to the Directorate of Defense Trade Controls.

[59 FR 29951, June 10, 1994, as amended at 71 FR 20543, Apr. 21, 2006]

§ 124.11 Congressional certification pursuant to Section 36(d) of the Arms Export Control Act.

(a) The Arms Export Control Act requires that a certification be provided to the Congress prior to the granting of any approval of a manufacturing license agreement or technical assistance agreement as defined in Sections 120.21 and 120.22 respectively for the manufacturing abroad of any item of significant military equipment (see § 120.7 of this subchapter) that is entered into with any country regardless of dollar value. Additionally, any manufacturing license agreement or technical assistance agreement providing for the export of major defense equipment, as defined in § 120.8 of this subchapter shall also require a certification when meeting the requirements of § 123.15 of this subchapter.

(b) Unless an emergency exists which requires the immediate approval of the agreement in the national security interests of the United States, approval may not be granted until at least 15 calendar days have elapsed after receipt by the Congress of the certification required by 22 U.S.C. 2776(d)(1) involving the North Atlantic Treaty Organization, any member country of that Organization, or Australia, Israel, Japan, New Zealand, or the Republic of Korea or at least 30 calendar days have elapsed for any other country. Approvals may not be granted when the Congress has enacted a joint resolution prohibiting the export.

(c) Persons who intend to export defense articles and defense services pursuant to any exemption in this subchapter under the circumstances described in this section and section 123.15 must provide written notification to the Directorate of Defense Trade Controls and include a signed contract and a DSP–83 signed by the applicant, the foreign consignee and the end-user.

[70 FR 34654, June 15, 2005, as amended at 73 FR 38343, Aug. 3, 2009; 77 FR 16599, Mar. 21, 2012]

§ 124.12 Required information in letters of transmittal.

(a) An application for the approval of a manufacturing license or technical assistance agreement with a foreign person must be accompanied by an explanatory letter. The original letter and seven copies of the letter and eight copies of the proposed agreement shall be submitted to the Directorate of Defense Trade Controls. The explanatory letter shall contain:

(1) A statement giving the applicant's Directorate of Defense Trade Controls registration number.

(2) A statement identifying the licensee and the scope of the agreement.

(3) A statement identifying the U.S. Government contract under which the equipment or technical data was generated, improved, or developed and supplied to the U.S. Government, and whether the equipment or technical data was derived from any bid or other proposal to the U.S. Government.

(4) A statement giving the military security classification of the equipment or technical data.

(5) A statement identifying any patent application which discloses any of the subject matter of the equipment or technical data covered by an invention secrecy order issued by the U.S. Patent and Trademark Office.

(6) A statement of the actual or estimated value of the agreement, including the estimated value of all defense articles to be exported in furtherance of the agreement or amendments thereto. If the value is $500,000 or more, an additional statement must be made regarding the payment of political contributions, fees or commissions, pursuant to part 130 of this subchapter.

(7) A statement indicating whether any foreign military sales credits or loan guarantees are or will be involved in financing the agreement.

(8) The agreement must describe any classified information involved and identify, from Department of Defense form DD254, the address and telephone number of the U.S. Government office that classified the information.

(9) For agreements that may require the export of classified information, the Defense Investigative Service cognizant security offices that have responsibility for the facilities of the U.S. parties to the agreement shall be identified. The facility security clearance codes of the U.S. parties shall also be provided.

(10) A statement specifying whether the applicant is requesting retransfer of defense articles and defense services pursuant to § 124.16 of this subchapter.

(b) The following statements must be made in the letter of transmittal:

(1) ''If the agreement is approved by the Department of State, such approval will not be construed by (the applicant) as passing on the legality of the agreement from the standpoint of antitrust laws or other applicable statutes, nor will (the applicant) construe the Department's approval as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement.''

(2) ''The (applicant) will not permit the proposed agreement to enter into force until it has been approved by the Department of State.''

(3) ''The (applicant) will furnish the Department of State with one copy of the signed agreement (or amendment) within 30 days from the date that the agreement is concluded and will inform the Department of its termination not less than 30 days prior to expiration and provide information on the continuation of any foreign rights or the flow of technical data to the foreign party. If a decision is made not to conclude the proposed agreement, the applicant will so inform the Department within 60 days.''

(4) ''If this agreement grants any rights to sub-license, it will be amended to require that all sub-licensing arrangements incorporate all the provisions of the basic agreement that refer

to the U.S. Government and the Department of State (*i.e.*, 22 CFR 124.9 and 124.10).''

[58 FR 39305, July 22, 1993, as amended at 71 FR 20543, Apr. 21, 2006; 72 FR 71786, Dec. 19, 2007]

§ 124.13 Procurement by United States persons in foreign countries (offshore procurement).

Notwithstanding the other provisions in part 124 of this subchapter, the Directorate of Defense Trade Controls may authorize by means of a license (DSP–5) the export of unclassified technical data to foreign persons for offshore procurement of defense articles, provided that:

(a) The contract or purchase order for offshore procurement limits delivery of the defense articles to be produced only to the person in the United States or to an agency of the U.S. Government; and

(b) The technical data of U.S.-origin to be used in the foreign manufacture of defense articles does not exceed that required for bid purposes on a build-to-print basis (build-to-print means producing an end-item (*i.e.*, system, subsystem or component) from technical drawings and specifications (which contain no process or know-how information) without the need for additional technical assistance). Release of supporting documentation (e.g., acceptance criteria, object code software for numerically controlled machines) is permissible. Build-to-print does not include the release of any information which discloses design methodology, engineering analysis, detailed process information or manufacturing know-how); and

(c) The contract or purchase order between the person in the United States and the foreign person:

(1) Limits the use of the technical data to the manufacture of the defense articles required by the contract or purchase order only; and

(2) Prohibits the disclosure of the data to any other person except subcontractors within the same country; and

(3) Prohibits the acquisition of any rights in the data by any foreign person; and

(4) Provides that any subcontracts between foreign persons in the approved country for manufacture of equipment for delivery pursuant to the contract or purchase order contain all the limitations of this paragraph (c); and

(5) Requires the foreign person, including subcontractors, to destroy or return to the person in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of their terms; and

(6) Requires delivery of the defense articles manufactured abroad only to the person in the United States or to an agency of the U.S. Government; and

(d) The person in the United States provides the Directorate of Defense Trade Controls with a copy of each contract, purchase order or subcontract for offshore procurement at the time it is accepted. Each such contract, purchase order or subcontract must clearly identify the article to be produced and must identify the license number or exemption under which the technical data was exported; and

(e) Licenses issued pursuant to this section must be renewed prior to their expiration if offshore procurement is to be extended beyond the period of validity of the original approved license. In all instances a license for offshore procurement must state as the purpose ''Offshore procurement in accordance with the conditions established in the ITAR, including § 124.13. No other use will be made of the technical data.'' If the technical data involved in an offshore procurement arrangement is otherwise exempt from the licensing requirements of this subchapter (e.g., § 126.4), the DSP–5 referred to in the first sentence of this section is not required. However, the exporter must comply with the other requirements of this section and provide a written certification to the Directorate of Defense Trade Controls annually of the offshore procurement activity and cite the exemption under which the technical data was exported. The exemptions under § 125.4 of this subchapter may not

be used to establish offshore procurement arrangements.

[58 FR 39305, July 22, 1993, as amended at 64 FR 17534, Apr. 12, 1999; 71 FR 20543, Apr. 21, 2006]

§ 124.14 Exports to warehouses or distribution points outside the United States.

(a) *Agreements.* Agreements (e.g., contracts) between U.S. persons and foreign persons for the warehousing and distribution of defense articles must be approved by the Directorate of Defense Trade Controls before they enter into force. Such agreements will be limited to unclassified defense articles and must contain conditions for special distribution, end-use and reporting. Licenses for exports pursuant to such agreements must be obtained prior to exports of the defense articles unless an exemption under § 123.16(b)(1) of this subchapter is applicable.

(b) *Required information.* Proposed warehousing and distribution agreements (and amendments thereto) shall be submitted to the Directorate of Defense Trade Controls for approval. The following information must be included in all such agreements:

(1) A description of the defense articles involved including test and support equipment covered by the U.S. Munitions List. This shall include when applicable the military nomenclature, the Federal stock number, nameplate data, and any control numbers under which the defense articles were developed or procured by the U.S. Government. Only those defense articles specifically listed in the agreement will be eligible for export under the exemption in § 123.16(b)(1) of this subchapter.

(2) A detailed statement of the terms and conditions under which the defense articles will be exported and distributed;

(3) The duration of the proposed agreement;

(4) Specific identification of the country or countries that comprise the distribution territory. Distribution must be specifically limited to the governments of such countries or to private entities seeking to procure defense articles pursuant to a contract with a government within the distribution territory or to other eligible entities as specified by the Directorate of Defense Trade Controls. Consequently, any deviation from this condition must be fully explained and justified. A nontransfer and use certificate (DSP–83) will be required to the same extent required in licensing agreements under § 124.9(b).

(c) *Required statements.* The following statements must be included in all warehousing and distribution agreements:

(1) ''This agreement shall not enter into force, and may not be amended or extended, without the prior written approval of the Department of State of U.S. Government.''

(2) ''This agreement is subject to all United States laws and regulations related to exports and to all administrative acts of the United States Government pursuant to such laws and regulations.

(3) ''The parties to this agreement agree that the obligations contained in this agreement shall not affect the performance of any obligations created by prior contracts or subcontracts which the parties may have individually or collectively with the U.S. Government.''

(4) ''No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign by reason of the U.S. Government's approval of this agreement.''

(5) ''No export, sale, transfer, or other disposition of the defense articles covered by this agreement is authorized to any country outside the distribution territory without the prior written approval of the Directorate of Defense Trade Controls of the U.S. Department of State.''

(6) ''The parties to this agreement agree that an annual report of sales or other transfers pursuant to this agreement of the licensed articles, by quantity, type, U.S. dollar value, and purchaser or recipient shall be provided by (applicant or licensee) to the Department of State.'' This clause must specify which party is obligated to provide the annual report. Such reports may be

submitted either directly by the licensee or indirectly through the licensor, and may cover calendar or fiscal years. Reports shall be deemed proprietary information by the Department of State and will not be disclosed to unauthorized persons. (See §126.10(b) of this subchapter.)

(7) (Licensee) agrees to incorporate the following statement as an integral provision of a contract, invoice or other appropriate document whenever the articles covered by this agreement are sold or otherwise transferred:

> These commodities are authorized for export by the U.S. Government only to (country of ultimate destination or approved sales territory). They may not be resold, diverted, transferred, transshipped, or otherwise be disposed of in any other country, either in their original form or after being incorporated through an intermediate process into other end-items, without the prior written approval of the U.S. Department of State.

(8) ''All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.''

(9) Additional clause. Unless the articles covered by the agreement are in fact intended to be distributed to private persons or entities (e.g., sporting firearms for commercial resale, cryptographic devices and software for financial and business applications), the following clause must be included in all warehousing and distribution agreements: ''Sales or other transfers of the licensed article shall be limited to governments of the countries in the distribution territory and to private entities seeking to procure the licensed article pursuant to a contract with a government within the distribution territory, unless the prior written approval of the U.S. Department of State is obtained.''

(d) *Special clauses for agreements relating to significant military equipment.* With respect to agreements for the warehousing and distribution of significant military equipment, the following additional provisions must be included in the agreement:

(1) A completed nontransfer and use certificate (DSP–83) must be executed by the foreign end-user and submitted to the U.S. Department of State before any transfer may take place.

(2) The prior written approval of the U.S. Department of State must be obtained before entering into a commitment for the transfer of the licensed article by sale or otherwise to any person or government outside the approved distribution territory.

(e) *Transmittal letters.* Requests for approval of warehousing and distribution agreements with foreign persons must be made by letter. The original letter and seven copies of the letter and seven copies of the proposed agreement shall be submitted to the Directorate of Defense Trade Controls. The letter shall contain:

(1) A statement giving the applicant's Directorate of Defense Trade Controls registration number.

(2) A statement identifying the foreign party to the agreement.

(3) A statement identifying the defense articles to be distributed under the agreement.

(4) A statement identifying any U.S. Government contract under which the equipment may have been generated, improved, developed or supplied to the U.S. Government, and whether the equipment was derived from any bid or other proposal to the U.S. Government.

(5) A statement that no classified defense articles or classified technical data are involved.

(6) A statement identifying any patent application which discloses any of the subject matter of the equipment or related technical data covered by an invention secrecy order issued by the U.S. Patent and Trademark Office.

(f) *Required clauses.* The following statements must be made in the letter of transmittal:

(1) ''If the agreement is approved by the Department of State, such approval will not be construed by (applicant) as passing on the legality of the agreement from the standpoint of antitrust laws or other applicable statutes, nor will (the applicant) construe the Department's approval as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement.''

(2) ''The (applicant) will not permit the proposed agreement to enter into

force until it has been approved by the Department of State.''

(3) ''(Applicant) will furnish the Department of State with one copy of the signed agreement (or amendment thereto) within 30 days from the date that the agreement is concluded, and will inform the Department of its termination not less than 30 days prior to expiration. If a decision is made not to conclude the proposed agreement, (applicant) will so inform the Department within 60 days.''

[58 FR 39305, July 22, 1993, as amended at 71 FR 20544, Apr. 21, 2006]

§ 124.15 Special Export Controls for Defense Articles and Defense Services Controlled under Category XV: Space Systems and Space Launches.

(a) The export of any satellite or related item (see § 121.1, Category XV(a) and (e)) or any defense service controlled by this subchapter associated with the launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization or a major non-NATO ally of the United States always requires special exports controls, in addition to other export controls required by this subchapter, as follows:

(1) All licenses and other requests for approval require a technology transfer control plan (TTCP) approved by the Department of Defense and an encryption technology control plan approved by the National Security Agency. Drafts reflecting advance discussions with both agencies must accompany submission of the license application or proposed technical assistance agreement, and the letter of transmittal required in § 124.12 must identify the U.S. Government officials familiar with the preparation of the draft TTCPs. The TTCP must require any U.S. person or entity involved in the export to notify the Department of Defense in advance of all meetings and interactions with any foreign person or entity that is a party to the export and require such U.S. person or entity to certify that it has complied with this notification requirement within 30 days after launch.

(2) The U.S. person must make arrangements with the Department of Defense for monitoring. The costs of such monitoring services must be fully reimbursed to the Department of Defense by the U.S. person receiving such services. The letter of transmittal required under § 124.12 must also state that such reimbursement arrangements have been made with the Department of Defense and identify the specific Department of Defense official with whom these arrangements have been made. As required by Public Law 105–261, such monitoring will cover, but not be limited to—

(i) Technical discussions and activities, including the design, development, operation, maintenance, modification, and repair of satellites, satellite components, missiles, other equipment, launch facilities, and launch vehicles;

(ii) Satellite processing and launch activities, including launch preparation, satellite transportation, integration of the satellite with the launch vehicle, testing and checkout prior to launch, satellite launch, and return of equipment to the United States;

(iii) Activities relating to launch failure, delay, or cancellation, including post-launch failure investigations or analyses with regard to either the launcher or the satellite; and

(iv) All other aspects of the launch.

(b) Mandatory licenses for launch failure (crash) investigations or analyses: In the event of a failure of a launch from a foreign country (including a post liftoff failure to reach proper orbit)—

(1) The activities of U.S. persons or entities in connection with any subsequent investigation or analysis of the failure continue to be subject to the controls established under section 38 of the Arms Export Control Act, including the requirements under this subchapter for express approval prior to participation in such investigations or analyses, regardless of whether a license was issued under this subchapter for the initial export of the satellite or satellite component;

(2) Officials of the Department of Defense must monitor all activities associated with the investigation or analyses to insure against unauthorized transfer of technical data or services

and U.S. persons must follow the procedures set forth in paragraphs (a)(1) and (a)(2) of this Category.

(c) Although Public Law 105–261 does not require the application of special export controls for the launch of U.S.-origin satellites and components from or by nationals of countries that are members of NATO or major non-NATO allies, such export controls may nonetheless be applied, in addition to any other export controls required under this subchapter, as appropriate in furtherance of the security and foreign policy of the United States. Further, the export of any article or defense service controlled under this subchapter to any destination may also require that the special export controls identified in paragraphs (a)(1) and (a)(2) of this category be applied in furtherance of the security and foreign policy of the United States.

(d) Mandatory licenses for exports to insurance providers and underwriters: None of the exemptions or sub-licensing provisions available in this subchapter may be used for the export of technical data in order to obtain or satisfy insurance requirements. Such exports are always subject to the prior approval and re-transfer requirements of sections 3 and 38 of the Arms Export Control Act, as applied by relevant provisions of this subchapter.

[64 FR 13681, Mar. 22, 1999]

§ 124.16 Special retransfer authorizations for unclassified technical data and defense services to member states of NATO and the European Union, Australia, Japan, New Zealand, and Switzerland.

The provisions of § 124.8(5) of this subchapter notwithstanding, the Department may approve access to unclassified defense articles exported in furtherance of or produced as a result of a TAA/MLA, and retransfer of technical data and defense services to individuals who are dual national or third-country national employees of the foreign signatory or its approved sub-licensees, including the transfer to dual nationals or third-country nationals who are bona fide regular employees, directly employed by the foreign signatory or approved sub-licensees, provided they are nationals exclusively of countries that are members of NATO the European Union, Australia, Japan, New Zealand, and Switzerland and their employer is a signatory to the agreement or has executed a Non Disclosure Agreement. The retransfer must take place completely within the physical territories of these countries or the United States. Permanent retransfer of hardware is not authorized.

[76 FR 28177, May 16, 2011]

PART 125—LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

Sec.

125.1 Exports subject to this part.
125.2 Exports of unclassified technical data.
125.3 Exports of classified technical data and classified defense articles.
125.4 Exemptions of general applicability.
125.5 Exemptions for plant visits.
125.6 Certification requirements for exemptions.
125.7 Procedures for the export of classified technical data and other classified defense articles.
125.8 [Reserved]
125.9 Filing of licenses and other authorizations for exports of classified technical data and classified defense articles.

AUTHORITY: Secs. 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39310, July 22, 1993, unless otherwise noted.

§ 125.1 Exports subject to this part.

(a) The controls of this part apply to the export of technical data and the export of classified defense articles. Information which is in the public domain (see § 120.11 of this subchapter and § 125.4(b)(13)) is not subject to the controls of this subchapter.

(b) A license for the export of technical data and the exemptions in § 125.4 may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained. Such approval is generally provided only pursuant to the procedures specified in part 124 of this subchapter.

(c) Technical data authorized for export may not be reexported, transferred or diverted from the country of ultimate end-use or from the authorized foreign end-user (as designated in

the license or approval for export) or disclosed to a national of another country without the prior written approval of the Directorate of Defense Trade Controls.

(d) The controls of this part apply to the exports referred to in paragraph (a) of this section regardless of whether the person who intends to export the technical data produces or manufactures defense articles if the technical data is determined by the Directorate of Defense Trade Controls to be subject to the controls of this subchapter.

(e) The provisions of this subchapter do not apply to technical data related to articles in Category VI(e), Category XVI, and Category XX(b) of § 121.1 of this subchapter. The export of such data is controlled by the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

[58 FR 39310, July 22, 1993, as amended at 71 FR 20544, Apr. 21, 2006; 78 FR 40933, July 8, 2013]

EFFECTIVE DATE NOTE: At 79 FR 47, Jan. 2, 2014, § 125.1 was amended by revising paragraph (e), effective July 1, 2014. For the convenience of the user, the revised text is set forth as follows:

§ 125.1 Exports subject to this part.

* * * * *

(e) For the export of technical data related to articles in Category VI(e), Category XVI, and Category XX(b)(1) of § 121.1 of this subchapter, please see § 123.20 of this subchapter.

§ 125.2 Exports of unclassified technical data.

(a) *License*. A license (DSP–5) is required for the export of unclassified technical data unless the export is exempt from the licensing requirements of this subchapter. In the case of a plant visit, details of the proposed discussions must be transmitted to the Directorate of Defense Trade Controls for an appraisal of the technical data. Seven copies of the technical data or the details of the discussion must be provided.

(b) *Patents*. A license issued by the Directorate of Defense Trade Controls is required for the export of technical data whenever the data exceeds that which is used to support a domestic filing of a patent application or to support a foreign filing of a patent application whenever no domestic application has been filed. Requests for the filing of patent applications in a foreign country, and requests for the filing of amendments, modifications or supplements to such patents, should follow the regulations of the U.S. Patent and Trademark Office in accordance with 37 CFR part 5. The export of technical data to support the filing and processing of patent applications in foreign countries is subject to regulations issued by the U.S. Patent and Trademark Office pursuant to 35 U.S.C. 184.

(c) *Disclosures*. Unless otherwise expressly exempted in this subchapter, a license is required for the oral, visual or documentary disclosure of technical data by U.S. persons to foreign persons. A license is required regardless of the manner in which the technical data is transmitted (e.g., in person, by telephone, correspondence, electronic means, etc.). A license is required for such disclosures by U.S. persons in connection with visits to foreign diplomatic missions and consular offices.

[58 FR 39310, July 22, 1993, as amended at 71 FR 20544, Apr. 21, 2006]

§ 125.3 Exports of classified technical data and classified defense articles.

(a) A request for authority to export defense articles, including technical data, classified by a foreign government or pursuant to Executive Order 12356, successor orders, or other legal authority must be submitted to the Directorate of Defense Trade Controls for approval. The application must contain full details of the proposed transaction. It should also list the facility security clearance code of all U.S. parties on the license and include the Defense Security Service cognizant security office of the party responsible for packaging the commodity for shipment. A nontransfer and use certificate (Form DSP–83) executed by the applicant, foreign consignee, end-user and an authorized representative of the foreign government involved will be required.

(b) Classified technical data which is approved by the Directorate of Defense

Trade Controls either for export or reexport after a temporary import will be transferred or disclosed only in accordance with the requirements in the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). Any other requirements imposed by cognizant U.S. departments and agencies must also be satisfied.

(c) The approval of the Directorate of Defense Trade Controls must be obtained for the export of technical data by a U.S. person to a foreign person in the U.S. or in a foreign country unless the proposed export is exempt under the provisions of this subchapter.

(d) All communications relating to a patent application covered by an invention secrecy order are to be addressed to the U.S. Patent and Trademark Office (see 37 CFR 5.11).

[58 FR 39310, July 22, 1993, as amended at 71 FR 20544, Apr. 21, 2006]

§ 125.4 Exemptions of general applicability.

(a) The following exemptions apply to exports of technical data for which approval is not needed from the Directorate of Defense Trade Controls. The exemptions, except for paragraph (b)(13) of this section, do not apply to exports to proscribed destinations under § 126.1 of this subchapter or for persons considered generally ineligible under § 120.1(c) of this subchapter. The exemptions are also not applicable for purposes of establishing offshore procurement arrangements or producing defense articles offshore (*see* § 124.13), except as authorized under § 125.4(c). Transmission of classified information must comply with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade controls, in which case the latter guidance must be followed) and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.

(b) The following exports are exempt from the licensing requirements of this subchapter.

(1) Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;

(2) Technical data, including classified information, in furtherance of a manufacturing license or technical assistance agreement approved by the Department of State under part 124 of this subchapter and which meet the requirements of § 124.3 of this subchapter;

(3) Technical data, including classified information, in furtherance of a contract between the exporter and an agency of the U.S. Government, if the contract provides for the export of the data and such data does not disclose the details of design, development, production, or manufacture of any defense article;

(4) Copies of technical data, including classified information, previously authorized for export to the same recipient. Revised copies of such technical data are also exempt if they pertain to the identical defense article, and if the revisions are solely editorial and do not add to the content of technology previously exported or authorized for export to the same recipient;

(5) Technical data, including classified information, in the form of basic operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient. Intermediate or depot-level repair and maintenance information may be exported only under a license or agreement approved specifically for that purpose;

(6) Technical data, including classified information, related to firearms not in excess of caliber .50 and ammunition for such weapons, except detailed design, development, production or manufacturing information;

(7) Technical data, including classified information, being returned to the original source of import;

(8) Technical data directly related to classified information which has been previously exported or authorized for export in accordance with this part to the same recipient, and which does not

disclose the details of the design, development, production, or manufacture of any defense article;

(9) Technical data, including classified information, and regardless of media or format, sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency to a U.S. person employed by that U.S. corporation or to a U.S. Government agency outside the United States. This exemption is subject to the limitations of § 125.1(b) of this subchapter and may be used only if:

(i) The technical data is to be used outside the United States solely by a U.S. person;

(ii) The U.S. person outside the United States is an employee of the U.S. Government or is directly employed by the U.S. corporation and not by a foreign subsidiary; and

(iii) The classified information is sent or taken outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

(10) Disclosures of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees. This exemption is available only if:

(i) The employee's permanent abode throughout the period of employment is in the United States;

(ii) The employee is not a national of a country to which exports are prohibited pursuant to § 126.1 of this subchapter; and

(iii) The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls;

(11) Technical data, including classified information, for which the exporter, pursuant to an arrangement with the Department of Defense, Department of Energy or NASA which requires such exports, has been granted an exemption in writing from the licensing provisions of this part by the Directorate of Defense Trade Controls. Such an exemption will normally be granted only if the arrangement directly implements an international agreement to which the United States is a party and if multiple exports are contemplated. The Directorate of Defense Trade Controls, in consultation with the relevant U.S. Government agencies, will determine whether the interests of the United States Government are best served by expediting exports under an arrangement through an exemption (see also paragraph (b)(3) of this section for a related exemption);

(12) Technical data which is specifically exempt under part 126 of this subchapter; or

(13) Technical data approved for public release (*i.e.*, unlimited distribution) by the cognizant U.S. Government department or agency or Office of Freedom of Information and Security Review. This exemption is applicable to information approved by the cognizant U.S. Government department or agency for public release in any form. It does not require that the information be published in order to qualify for the exemption.

(c) Defense services and related unclassified technical data are exempt from the licensing requirements of this subchapter, to nationals of NATO countries, Australia, Japan, and Sweden, for the purposes of responding to a written request from the Department of Defense for a quote or bid proposal. Such exports must be pursuant to an official written request or directive from an authorized official of the U.S. Department of Defense. The defense services and technical data are limited to paragraphs (c)(1), (c)(2), and (c)(3) of this section and must not include paragraphs (c)(4), (c)(5), and (c)(6) of this section which follow:

(1) *Build-to-Print.* ''Build-to-Print'' means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a ''hands-off'' approach since the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria,

and specifications, may be released on an as-required basis (*i.e.* ''must have'') such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (*i.e.* ''nice to have'') is not considered within the boundaries of a ''Build-to-Print'' data package;

(2) *Build/Design-to-Specification*. ''Build/Design-to-Specification'' means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a ''hands-off'' approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information;

(3) *Basic Research*. ''Basic Research'' means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include ''Applied Research'' (*i.e.* a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.);

(4) *Design Methodology*, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the ''why'' or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

(5) *Engineering Analysis*, such as: Analytical methods and tools used to design or evaluate a defense article's performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

(6) *Manufacturing Know-how*, such as: information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package that is necessary in order to produce an acceptable defense article.)

(d)(1) Defense services for the items identified in §123.16(b)(10) of this subchapter exported by accredited U.S. institutions of higher learning are exempt from the licensing requirements of this subchapter when the export is:

(i) To countries identified in §123.16(b)(10)(i) of this subchapter and exclusively to nationals of such countries when engaged in international fundamental research conducted under the aegis of an accredited U.S. institution of higher learning; and

(ii) In direct support of fundamental research as defined in §120.11(8) of this subchapter being conducted either at accredited U.S. institutions of higher learning or an accredited institution of higher learning, a governmental research center or an established government funded private research center located within the countries identified in §123.16(b)(10)(i) of this subchapter; and

(iii) Limited to discussions on assembly of any article described in §123.16(b)(10) of this subchapter and or integrating any such article into a scientific, research, or experimental satellite.

(2) The exemption in paragraph (d)(1) of this section, while allowing accredited U.S. institutions of higher learning to participate in technical meetings with foreign nationals from countries specified in §123.16(b)(10)(i) of this subchapter for the purpose of conducting space scientific fundamental research either in the United States or

in these countries when working with information that meets the requirements of § 120.11 of this subchapter in activities that would generally be controlled as a defense service in accordance with § 124.1(a) of this subchapter, does not cover:

(i) Any level of defense service or information involving launch activities including the integration of the satellite or spacecraft to the launch vehicle;

(ii) Articles and information listed in the Missile Technology Control Regime (MTCR) Annex or classified as significant military equipment; or

(iii) The transfer of or access to technical data, information, or software that is otherwise controlled by this subchapter.

[58 FR 39310, July 22, 1993, as amended at 65 FR 45284, July 21, 2000; 66 FR 35900, July 10, 2001; 67 FR 15101, Mar. 29, 2002; 71 FR 20545, Apr. 21, 2006; 75 FR 52624, 52626, Aug. 27, 2010]

§ 125.5 Exemptions for plant visits.

(a) A license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign person, provided: The classified visit has itself been authorized pursuant to a license issued by the Directorate of Defense Trade Controls; or the classified visit was approved in connection with an actual or potential government-to-government program or project by a U.S. Government agency having classification jurisdiction over the classified defense article or classified technical data involved under Executive Order 12356 or other applicable Executive Order; and the unclassified information to be released is directly related to the classified defense article or technical data for which approval was obtained and does not disclose the details of the design, development, production or manufacture of any other defense articles. In the case of visits involving classified information, the requirements of the Department of Defense National Industrial Security Program Operating Manual must be met (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

(b) The approval of the Directorate of Defense Trade Controls is not required for the disclosure of oral and visual classified information to a foreign person during the course of a plant visit approved by the appropriate U.S. Government agency if: The requirements of the Department of Defense National Industrial Security Program Operating Manual have been met (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed); the classified information is directly related to that which was approved by the U.S. Government agency; it does not exceed that for which approval was obtained; and it does not disclose the details of the design, development, production or manufacture of any defense articles.

(c) A license is not required for the disclosure to a foreign person of unclassified technical data during the course of a plant visit (either classified or unclassified) approved by the Directorate of Defense Trade Controls or a cognizant U.S. Government agency provided the technical data does not contain information in excess of that approved for disclosure. This exemption does not apply to technical data which could be used for design, development, production or manufacture of a defense article.

[71 FR 20545, Apr. 21, 2006]

§ 125.6 Certification requirements for exemptions.

(a) To claim an exemption for the export of technical data under the provisions of this subchapter (e.g., §§ 125.4 and 125.5), the exporter must certify that the proposed export is covered by a relevant section of this subchapter, to include the paragraph and applicable subparagraph. Certifications consist of clearly marking the package or letter containing the technical data ''22 CFR [insert ITAR exemption] applicable.'' This certification must be made in written form and retained in the exporter's files for a period of 5 years (see § 123.22 of this subchapter).

(b) For exports that are oral, visual, or electronic the exporter must also

complete a written certification as indicated in paragraph (a) of this section and retain it for a period of 5 years.

[68 FR 61102, Oct. 27, 2003]

§ 125.7 Procedures for the export of classified technical data and other classified defense articles.

(a) All applications for the export or temporary import of classified technical data or other classified defense articles must be submitted to the Directorate of Defense Trade Controls on Form DSP–85.

(b) An application for the export of classified technical data or other classified defense articles must be accompanied by seven copies of the data and a completed Form DSP–83 (see § 123.10 of this subchapter). Only one copy of the data or descriptive literature must be provided if a renewal of the license is requested. All classified materials accompanying an application must be transmitted to the Directorate of Defense Trade Controls in accordance with the procedures contained in the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

[71 FR 20546, Apr. 21, 2006]

§ 125.8 [Reserved]

§ 125.9 Filing of licenses and other authorizations for exports of classified technical data and classified defense articles.

Licenses and other authorizations for the export of classified technical data or classified defense articles will be forwarded by the Directorate of Defense Trade Controls to the Defense Security Service of the Department of Defense in accordance with the provisions of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). The Directorate of Defense Trade Controls will forward a copy of the license to the applicant for the applicant's information. The Defense Security Service will return the endorsed license to the Directorate of Defense Trade Controls upon completion of the authorized export or expiration of the license, whichever occurs first.

[71 FR 20546, Apr. 21, 2006]

PART 126—GENERAL POLICIES AND PROVISIONS

Sec.

126.1 Prohibited exports, imports, and sales to or from certain countries.
126.2 Temporary suspension or modification of this subchapter.
126.3 Exceptions.
126.4 Shipments by or for United States Government agencies.
126.5 Canadian exemptions.
126.6 Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales program.
126.7 Denial, revocation, suspension, or amendment of licenses and other approvals.
126.8 [Reserved]
126.9 Advisory opinions and related authorizations.
126.10 Disclosure of information.
126.11 Relations to other provisions of law.
126.12 Continuation in force.
126.13 Required information.
126.14 Special comprehensive export authorizations for NATO, Australia, Japan, and Sweden.
126.15 Expedited processing of license applications for the export of defense articles and defense services to Australia or the United Kingdom.
126.16 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and Australia.
126.17 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom.
126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.

SUPPLEMENT NO. 1 TO PART 126

AUTHORITY: Secs. 2, 38, 40, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117; Pub. L. 111–266; Section 7045, Pub. L. 112–74; Section 7046, Pub. L. 112–74; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39312, July 22, 1993, unless otherwise noted.

§ 126.1 Prohibited exports, imports, and sales to or from certain countries.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to Belarus, Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, and the Republic of the Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Information regarding certain other embargoes appears elsewhere in this section. Comprehensive arms embargoes are normally the subject of a Department of State notice published in the FEDERAL REGISTER. The exemptions provided in this subchapter, except §§ 123.17, 126.4, and 126.6 of this subchapter or when the recipient is a U.S. Government department or agency, do not apply with respect to defense articles or defense services originating in or for export to any proscribed countries, areas, or persons identified in this section or to brokering activities involving such countries, areas, or persons. (*See* § 129.7 of this subchapter, which imposes restrictions on brokering activities similar to those in this section.)

(b) *Shipments.* A defense article licensed or otherwise authorized for export, temporary import, reexport, or retransfer under this subchapter may not be shipped on a vessel, aircraft, spacecraft, or other means of conveyance that is owned by, operated by, leased to, or leased from any of the proscribed countries, areas, or other persons referred to in this section.

(c) *Exports and sales prohibited by United Nations Security Council embargoes.* Whenever the United Nations Security Council mandates an arms embargo, all transactions that are prohibited by the embargo and that involve U.S. persons (see § 120.15 of this subchapter) anywhere, or any person in the United States, and defense articles or services of a type enumerated on the United States Munitions List (22 CFR part 121), irrespective of origin, are prohibited under the ITAR for the duration of the embargo, unless the Department of State publishes a notice in the FEDERAL REGISTER specifying different measures. This would include, but is not limited to, transactions involving trade by U.S. persons who are located inside or outside of the United States in defense articles or services of U.S. or foreign origin that are located inside or outside of the United States. United Nations Security Council arms embargoes include, but are not necessarily limited to, the following countries:

(1) Cote d'Ivoire (see also paragraph (q) of this section).

(2) Democratic Republic of Congo (see also paragraph (i) of this section).

(3) Eritrea.

(4) Iraq (see also paragraph (f) of this section).

(5) Iran.

(6) Lebanon (see also paragraph (t) of this section).

(7) Liberia (see also paragraph (o) of this section).

(8) Libya (see also paragraph (k) of this section).

(9) North Korea.

(10) Somalia (see also paragraph (m) of this section).

(11) The Republic of the Sudan (see also paragraph (v) of this section).

(d) *Terrorism.* Exports to countries which the Secretary of State has determined to have repeatedly provided support for acts of international terrorism are contrary to the foreign policy of the United States and are thus subject to the policy specified in paragraph (a) of this section and the requirements of section 40 of the Arms Export Control Act (22 U.S.C. 2780) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (22 U.S.C. 4801, note). The countries in this category are: Cuba, Iran, the Republic of the Sudan, and Syria.

(e)(1) *Proposed and final sales.* No sale, export, transfer, reexport, or retransfer of, and no proposal or presentation to sell, export, transfer, reexport, or retransfer, any defense articles or defense services subject to this subchapter may be made to any country referred to in this section (including the embassies or consulates of such a

country), or to any person acting on its behalf, whether in the United States or abroad, without first obtaining a license or written approval of the Directorate of Defense Trade Controls. However, in accordance with paragraph (a) of this section, it is the policy of the Department of State to deny licenses and approvals in such cases.

(2) *Duty to notify*. Any person who knows or has reason to know of a proposed, final, or actual sale, export, transfer, reexport, or retransfer of articles, services, or data as described in paragraph (e)(1) of this section must immediately inform the Directorate of Defense Trade Controls. Such notifications should be submitted to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls.

NOTE TO PARAGRAPH (e): ''Proposal'' and ''presentation'' mean the communication of information in sufficient detail that it would permit an intended purchaser to decide to acquire the article in question or to enter into an agreement as described in part 124 of this subchapter. For example, communicating information on the equipment's performance characteristics, price, and probable availability for delivery would be a proposal or presentation requiring a license or other approval.

(f) *Iraq*. It is the policy of the United States to deny licenses or other approvals for exports and imports of defense articles and defense services, destined for or originating in Iraq, except that a license or other approval may be issued, on a case-by-case basis for:

(1) Non-lethal military equipment; and

(2) Lethal military equipment required by the Government of Iraq or coalition forces.

(g) *Afghanistan*. It is the policy of the United States to deny licenses or other approvals for exports and imports of defense articles and defense services, destined for or originating in Afghanistan, except that a license or other approval may be issued, on a case-by-case basis, for the Government of Afghanistan or coalition forces. In addition, the names of individuals, groups, undertakings, and entities subject to arms embargoes, due to their affiliation with the Taliban, Al-Qaida, or those associated with them, are published in lists maintained by the United Nations Security Council's Sanctions Committees (established pursuant to United Nations Security Council resolutions (UNSCR) 1267, 1988, and 1989).

(h) [Reserved]

(i) *Democratic Republic of the Congo*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Democratic Republic of the Congo, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Defense articles and defense services for the Government of the Democratic Republic of the Congo as notified in advance to the Committee of the Security Council concerning the Democratic Republic of the Congo;

(2) Defense articles and defense services intended solely for the support of or use by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC);

(3) Personal protective gear temporarily exported to the Democratic Republic of the Congo by United Nations personnel, representatives of the media, and humanitarian and development workers and associated personnel, for their personal use only; and

(4) Non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee of the Security Council concerning the Democratic Republic of the Congo.

(j) *Haiti*. (1) It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Haiti, except that a license or other approval may be issued, on a case-by-case basis, for:

(i) Defense articles and defense services intended solely for the support of or use by security units that operate under the command of the Government of Haiti, to include the Coast Guard;

(ii) Defense articles and defense services intended solely for the support of or use by the United Nations or a United Nations-authorized mission; and

(iii) Personal protective gear for use by personnel from the United Nations and other international organizations,

representatives of the media, and development workers and associated personnel.

(2) All shipments of arms and related materials consistent with the above exceptions shall only be made to Haitian security units as designated by the Government of Haiti, in coordination with the U.S. Government.

(k) *Libya.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Libya, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Arms and related materiel intended solely for security or disarmament assistance to the Libyan government, notified to the Committee of the Security Council concerning Libya in advance and in the absence of a negative decision by the Committee within five working days of such a notification;

(2) Non-lethal military equipment when intended solely for security or disarmament assistance to the Libyan government;

(3) The provision of any technical assistance or training when intended solely for security or disarmament assistance to the Libyan government;

(4) Small arms, light weapons, and related materiel temporarily exported to Libya for the sole use of United Nations personnel, representatives of the media, and humanitarian and development workers and associated personnel, notified to the Committee of the Security Council concerning Libya in advance and in the absence of a negative decision by the Committee within five working days of such a notification;

(5) Non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training; or

(6) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee of the Security Council concerning Libya.

(l) *Vietnam.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Vietnam, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Non-lethal defense articles and defense services, and

(2) Non-lethal, safety-of-use defense articles (e.g., cartridge actuated devices, propellant actuated devices and technical manuals for military aircraft for purposes of enhancing the safety of the aircraft crew) for lethal end-items.

For non-lethal defense end-items, no distinction will be made between Vietnam's existing and new inventory.

(m) *Somalia.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Somalia, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Defense articles and defense services intended solely for support for the African Union Mission to Somalia (AMISOM); and

(2) Defense services for the purpose of helping develop security sector institutions in Somalia that further the objectives of peace, stability and reconciliation in Somalia, after advance notification of the proposed export by the United States Government to the UNSC Somalia Sanctions Committee and the absence of a negative decision by that committee.

Exemptions from the licensing requirement may not be used with respect to any export to Somalia unless specifically authorized in writing by the Directorate of Defense Trade Controls.

(n) *Sri Lanka.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Sri Lanka, except that a license or other approval may be issued, on a case-by-case basis, for humanitarian demining and aerial or maritime surveillance.

(o) *Liberia.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Liberia, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Defense articles and defense services for the Government of Liberia as notified in advance to the Committee of the Security Council concerning Liberia;

(2) Defense articles and defense services intended solely for support of or use by the United Nations Mission in Liberia (UNMIL);

(3) Personal protective gear temporarily exported to Liberia by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only; and

(4) Non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee of the Security Council concerning Liberia.

(p) *Fiji*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Fiji, except that a license or other approval may be issued, on a case-by-case basis, for defense articles and defense services intended solely in support of peacekeeping activities.

(q) *Côte d'Ivoire*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Côte d'Ivoire, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Defense articles and defense services intended solely for support of or use by the United Nations Operations in Côte d'Ivoire (UNOCI) and the French forces that support them;

(2) Non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as approved in advance to the Committee of the Security Council concerning Côte d'Ivoire;

(3) Personal protective gear temporarily exported to Côte d'Ivoire by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only;

(4) Supplies temporarily exported to Côte d'Ivoire to the forces of a State which is taking action, in accordance with international law, solely and directly to facilitate the evacuation of its nationals and those for whom it has consular responsibility in Côte d'Ivoire, as notified in advance to the Committee of the Security Council concerning Côte d'Ivoire; and

(5) Non-lethal equipment intended solely to enable the Ivorian security forces to use only appropriate and proportionate force while maintaining public order, as approved in advance by the Sanctions Committee.

(r) *Cyprus*. It is the policy of the United States to deny licenses or other approvals, for exports or imports of defense articles and defense services destined for or originating in Cyprus, except that a license or other approval may be issued, on a case-by-case basis, for the United Nations Forces in Cyprus (UNFICYP) or for civilian end-users.

(s) *Zimbabwe*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Zimbabwe, except that a license or other approval may be issued, on a case-by-case basis, for the temporary export of firearms and ammunition for personal use by individuals (not for resale or retransfer, including to the Government of Zimbabwe). Such exports may meet the licensing exemptions of § 123.17 of this subchapter.

(t) *Lebanon*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Lebanon, except that a license or other approval may be issued, on a case-by-case basis, for the United Nations Interim Force in Lebanon (UNIFIL) or as authorized by the Government of Lebanon.

(u) [Reserved]

(v) *Sudan*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the Sudan, except a license or other approval may be issued, on a case-by-case basis, for:

(1) Supplies and related technical training and assistance to monitoring,

verification, or peace support operations, including those authorized by the United Nations or operating with the consent of the relevant parties;

(2) Supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring, or protective uses and related technical training and assistance;

(3) Personal protective gear for the personal use of United Nations personnel, human rights monitors, representatives of the media, and humanitarian and development workers and associated personnel; or

(4) Assistance and supplies provided in support of implementation of the Comprehensive Peace Agreement.

NOTE TO § 126.1. On July 9, 2011, the Republic of South Sudan declared independence from Sudan and was recognized as a sovereign state by the United States. This policy does not apply to the Republic of South Sudan. Licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the South Sudan will be considered on a case-by-case basis.

[58 FR 39312, July 22, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 126.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 126.2 Temporary suspension or modification of this subchapter.

The Deputy Assistant Secretary for Defense Trade Controls may order the temporary suspension or modification of any or all of the regulations of this subchapter in the interest of the security and foreign policy of the United States.

[79 FR 8085, Feb. 11, 2014]

§ 126.3 Exceptions.

In a case of exceptional or undue hardship, or when it is otherwise in the interest of the United States Government, the Deputy Assistant Secretary of State for Defense Trade Controls may make an exception to the provisions of this subchapter.

[79 FR 8085, Feb. 11, 2014]

§ 126.4 Shipments by or for United States Government agencies.

(a) A license is not required for the temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service, by or for any agency of the U.S. Government for official use by such an agency, or for carrying out any foreign assistance, cooperative project or sales program authorized by law and subject to control by the President by other means. This exemption applies only when all aspects of a transaction (export, carriage, and delivery abroad) are affected by a United States Government agency or when the export is covered by a United States Government Bill of Lading. This exemption, however, does not apply when a U.S. Government agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements. The approval of the Directorate of Defense Trade Controls must be obtained before defense articles previously exported pursuant to this exemption are permanently transferred (e.g., property disposal of surplus defense articles overseas) unless the transfer is pursuant to a grant, sale, lease, loan or cooperative project under the Arms Export Control Act or a sale, lease or loan under the Foreign Assistance Act of 1961, as amended, or the defense articles have been rendered useless for military purposes beyond the possibility of restoration.

NOTE: *Special definition*. For purposes of this section, defense articles exported abroad for incorporation into a foreign launch vehicle or for use on a foreign launch vehicle or satellite that is to be launched from a foreign country shall be considered a permanent export.

(b) This section does not authorize any department or agency of the U.S. Government to make any export which is otherwise prohibited by virtue of other administrative provisions or by any statute.

(c) A license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a defense service, for end-use by a U.S.

Government Agency in a foreign country under the following circumstances:

(1) The export or temporary import is pursuant to a contract with, or written direction by, an agency of the U.S. Government; and

(2) The end-user in the foreign country is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and

(3) The urgency of the U.S. Government requirement is such that the appropriate export license or U.S. Government Bill of Lading could not have been obtained in a timely manner.

(d) An Electronic Export Information (EEI) filing, required under §123.22 of this subchapter, and a written statement by the exporter certifying that these requirements have been met must be presented at the time of export to the appropriate Port Directors of U.S. Customs and Border Protection or Department of Defense transmittal authority. A copy of the EEI filing and the written certification statement shall be provided to the Directorate of Defense Trade Controls immediately following the export.

[58 FR 39312, July 22, 1993, as amended at 70 FR 50964, Aug. 29, 2005; 77 FR 16600, Mar. 21, 2012]

§126.5 Canadian exemptions.

(a) *Temporary import of defense articles.* Port Directors of U.S. Customs and Border Protection and postmasters shall permit the temporary import and return to Canada without a license of any unclassified defense articles (*see* §120.6 of this subchapter) that originate in Canada for temporary use in the United States and return to Canada. All other temporary imports shall be in accordance with §§123.3 and 123.4 of this subchapter.

(b) *Permanent and temporary export of defense articles.* Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person, or for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1). The exceptions are subject to meeting the requirements of this subchapter, to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and §126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, ''Canadian-registered person'' is any Canadian national (including Canadian business entities organized under the laws of Canada), dual citizen of Canada and a third country other than a country listed in §126.1 of this subchapter, and permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the Internet Web site of the Directorate of Defense Trade Controls and by other means.

(c) [Reserved]

(d) *Reexports/retransfer.* Reexport/retransfer in Canada to another end-user or end-use or from Canada to another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end-user the request for reexport/retransfer may be made directly to the Directorate of Defense Trade Controls. All requests must include the information in §123.9(c) of this subchapter. Reexport/retransfer approval is acquired by:

(1) If the reexport/retransfer being requested could be made pursuant to this section (*i.e.*, a retransfer within Canada to another eligible Canadian recipient under this section) if exported directly from the U.S., upon receipt by the U.S. company of a request by a Canadian end user, the original U.S. exporter is authorized to grant on behalf of the

U.S. Government by confirming in writing to the Canadian requester that the reexport/retransfer is authorized subject to the conditions of this section; or

(2) If the reexport/retransfer is to an end use or end user that, if directly exported from the U.S. requires a license, retransfer must be handled in accordance with § 123.9 of this subchapter.

NOTES TO § 126.5: 1. In any instance when the exporter has knowledge that the defense article exempt from licensing is being exported for use other than by a qualified Canadian-registered person or for export to another foreign destination, other than the United States, in its original form or incorporated into another item, an export license must be obtained prior to the transfer to Canada.

2. Additional exemptions exist in other sections of this subchapter that are applicable to Canada, for example §§ 123.9, 125.4, and 124.2, that allow for the performance of defense services related to training in basic operations and maintenance, without a license, for certain defense articles lawfully exported, including those identified in Supplement No. 1 to part 126 of this subchapter.

[66 FR 10576, Feb. 16, 2001; 66 FR 36834, July 13, 2001, as amended at 67 FR 78686, Dec. 26, 2002; 70 FR 34654, June 15, 2005; 70 FR 39919, July 12, 2005; 70 FR 50964, Aug. 29, 2005; 71 FR 20546, Apr. 21, 2006; 77 FR 16600, Mar. 21, 2012]

§ 126.6 Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales program.

(a) A license from the Directorate of Defense Trade Controls is not required if:

(1) The article or technical data to be exported was sold, leased, or loaned by the Department of Defense to a foreign country or international organization pursuant to the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, and

(2) The article or technical data is delivered to representatives of such a country or organization in the United States; and

(3) The article or technical data is to be exported from the United States on a military aircraft or naval vessel of that government or organization or via the Defense Transportation Service (DTS).

(b) *Foreign military aircraft and naval vessels.* A license is not required for the entry into the United States of military aircraft or naval vessels of any foreign state if no overhaul, repair, or modification of the aircraft or naval vessel is to be performed. However, Department of State approval for overflight (pursuant to the 49 U.S.C. 40103) and naval visits must be obtained from the Bureau of Political-Military Affairs, Office of International Security Operations.

(c) *Foreign Military Sales Program.* A license from the Directorate of Defense Trade Controls is not required if the defense article or technical data or a defense service to be transferred was sold, leased or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to an Letter of Offer and Acceptance (LOA) authorizing such transfer which meets the criteria stated below:

(1) Transfers of the defense articles, technical data or defense services using this exemption may take place only during the period which the FMS Letter of Offer and Acceptance (LOA) and implementing USG FMS contracts and subcontracts are in effect and serve as authorization for the transfers hereunder in lieu of a license. After the USG FMS contracts and subcontracts have expired and the LOA no longer serves as such authorization, any further provision of defense articles, technical data or defense services shall not be covered by this section and shall instead be subject to other authorization requirements of this subchapter; and

(2) The defense article, technical data or defense service to be transferred are specifically identified in an executed LOA, in furtherance of the Foreign Military Sales Program signed by an authorized Department of Defense Representative and an authorized representative of the foreign government, and

(3) The transfer of the defense article and related technical data is effected during the duration of the relevant Letter of Offer and Acceptance (LOA), similarly a defense service is to be provided only during the duration of the USG FMS contract or subcontract and not to exceed the specified duration of the LOA, and

(4) The transfer is not to a country identified in § 126.1 of this subchapter, and

(5) The U.S. person responsible for the transfer maintains records of all transfers in accordance with part 122 of this subchapter, and

(6) For transfers of defense articles and technical data,

(i) The transfer is made by the relevant foreign diplomatic mission of the purchasing country or its authorized freight forwarder, provided that the freight forwarder is registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, and

(ii) At the time of shipment, the Port Director of U.S. Customs and Border Protection is provided an original and properly executed DSP–94 accompanied by a copy of the LOA and any other documents required by U.S. Customs and Border Protection in carrying out its responsibilities. The Shippers Export Declaration or, if authorized, the outbound manifest, must be annotated ''This shipment is being exported under the authority of Department of State Form DSP–94. It covers FMS Case [insert case identification], expiration [insert date]. 22 CFR 126.6 applicable. The U.S. Government point of contact is _____, telephone number _____,'' and

(iii) If, classified hardware and related technical data are involved the transfer must have the requisite USG security clearance and transportation plan and be shipped in accordance with the Department of Defense National Industrial Security Program Operating Manual, or

(7) For transfers of defense services:

(i) A contract or subcontract between the U.S. person(s) responsible for providing the defense service and the USG exists that:

(A) Specifically defines the scope of the defense service to be transferred;

(B) Identifies the FMS case identifier,

(C) Identifies the foreign recipients of the defense service

(D) Identifies any other U.S. or foreign parties that may be involved and their roles/responsibilities, to the extent known when the contract is executed,

(E) Provides a specified period of duration in which the defense service may be performed, and

(ii) The U.S. person(s) identified in the contract maintain a registration with the Directorate of Defense Trade Controls for the entire time that the defense service is being provided. In any instance when the U.S. registered person(s) identified in the contract employs a subcontractor, the subcontractor may only use this exemption when registered with DDTC, and when such subcontract meets the above stated requirements, and

(iii) In instances when the defense service involves the transfer of classified technical data, the U.S. person transferring the defense service must have the appropriate USG security clearance and a transportation plan, if appropriate, in compliance with the Department of Defense National Industrial Security Program Operating Manual, and

(iv) The U.S. person responsible for the transfer reports the initial transfer, citing this section of the ITAR, the FMS case identifier, contract and subcontract number, the foreign country, and the duration of the service being provided to the Directorate of Defense Trade Controls using DDTC's Direct Shipment Verification Program.

[65 FR 45287, July 21, 2000, as amended at 70 FR 50964, Aug. 29, 2005; 71 FR 20546, Apr. 21, 2006]

§ 126.7 Denial, revocation, suspension, or amendment of licenses and other approvals.

(a) *Policy*. Licenses or approvals shall be denied or revoked whenever required by any statute of the United States (see §§ 127.7 and 127.11 of this subchapter). Any application for an export license or other approval under this subchapter may be disapproved, and any license or other approval or exemption granted under this subchapter may be revoked, suspended, or amended without prior notice whenever:

(1) The Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable; or

(2) The Department of State believes that 22 U.S.C. 2778, any regulation contained in this subchapter, or the terms of any U.S. Government export authorization (including the terms of a manufacturing license or technical assistance agreement, or export authorization granted pursuant to the Export Administration Act, as amended) has been violated by any party to the export or other person having significant interest in the transaction; or

(3) An applicant is the subject of a criminal complaint, other criminal charge (e.g., an information), or indictment for a violation of any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(4) An applicant or any party to the export or the agreement has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(5) An applicant is ineligible to contract with, or to receive a license or other authorization to import defense articles or defense services from, any agency of the U.S. Government; or

(6) An applicant, any party to the export or agreement, any source or manufacturer of the defense article or defense service or any person who has a significant interest in the transaction has been debarred, suspended, or otherwise is ineligible to receive an export license or other authorization from any agency of the U.S. government (e.g., pursuant to debarment by the Department of Commerce under 15 CFR part 760 or by the Department of State under part 127 or 128 of this subchapter); or

(7) An applicant has failed to include any of the information or documentation expressly required to support a license application, exemption, or other request for approval under this subchapter, or as required in the instructions in the applicable Department of State form or has failed to provide notice or information as required under this subchapter; or

(8) An applicant is subject to sanctions under other relevant U.S. laws (e.g., the Missile Technology Controls title of the National Defense Authorization Act for FY 1991 (Pub. L. 101–510); the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (Pub. L. 102–182); or the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102–484)).

(b) *Notification*. The Directorate of Defense Trade Controls will notify applicants or licensees or other appropriate United States persons of actions taken pursuant to paragraph (a) of this section. The reasons for the action will be stated as specifically as security and foreign policy considerations permit.

(c) *Reconsideration*. If a written request for reconsideration of an adverse decision is made within 30 days after a person has been informed of the decision, the U.S. person will be accorded an opportunity to present additional information. The case will then be reviewed by the Directorate of Defense Trade Controls.

(d) *Reconsideration of certain applications*. Applications for licenses or other requests for approval denied for repeated failure to provide information or documentation expressly required will normally not be reconsidered during the thirty day period following denial. They will be reconsidered after this period only after a final decision is made on whether the applicant will be subject to an administrative penalty imposed pursuant to this subchapter. Any request for reconsideration shall be accompanied by a letter explaining the steps that have been taken to correct the failure and to ensure compliance with the requirements of this subchapter.

(e) *Special definition*. For purposes of this subchapter, the term ''party to the export'' means:

(1) The chief executive officer, president, vice-presidents, other senior officers and officials (e.g., comptroller, treasurer, general counsel) and any member of the board of directors of the applicant;

(2) The freight forwarders or designated exporting agent of the applicant; and

(3) Any consignee or end-user of any item to be exported.

[58 FR 39312, July 22, 1993, as amended at 71 FR 20546, Apr. 21, 2006; 77 FR 16600, Mar. 21, 2012]

§ 126.8 [Reserved]

§ 126.9 Advisory opinions and related authorizations.

(a) *Advisory opinion*. Any person desiring information as to whether the Directorate of Defense Trade Controls would be likely to grant a license or other approval for the export or approval of a particular defense article or defense service to a particular country may request an advisory opinion from the Directorate of Defense Trade Controls. Advisory opinions are issued on a case-by-case basis and apply only to the particular matters presented to the Directorate of Defense Trade Controls. These opinions are not binding on the Department of State, and may not be used in future matters before the Department. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved. An original and seven copies of the letter must be provided along with seven copies of suitable descriptive information concerning the defense article or defense service.

(b) *Related authorizations*. The Directorate of Defense Trade Controls may, as appropriate, in accordance with the procedures set forth in paragraph (a) of this section, provide export authorization, subject to all other relevant requirements of this subchapter, both for transactions that have been the subject of advisory opinions requested by prospective U.S. exporters, or for the Directorate's own initiatives. Such initiatives may cover pilot programs, or specifically anticipated circumstances for which the Directorate considers special authorizations appropriate.

[71 FR 20547, Apr. 21, 2006]

§ 126.10 Disclosure of information.

(a) *Freedom of information*. Subchapter R of this title contains regulations on the availability to the public of information and records of the Department of State. The provisions of subchapter R apply to such disclosures by the Directorate of Defense Trade Controls.

(b) *Determinations required by law*. Section 38(e) of the Arms Export Control Act (22 U.S.C. 2778) provides by reference to certain procedures of the Export Administration Act that certain information required by the Department of State in connection with the licensing process may generally not be disclosed to the public unless certain determinations relating to the national interest are made in accordance with the procedures specified in that provision, except that the names of the countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that release of such information would be contrary to the national interest. Registration with the Directorate of Defense Trade Controls is required of certain persons, in accordance with Section 38 of the Arms Export Control Act. The requirements and guidance are provided in the ITAR pursuant to parts 122 and 129. Registration is generally a precondition to the issuance of any license or other approvals under this subchapter, to include the use of any exemption. Therefore, information provided to the Department of State to effect registration, as well as that regarding actions taken by the Department of State related to registration, may not generally be disclosed to the public. Determinations required by Section 38(e) shall be made by the Assistant Secretary for Political-Military Affairs.

(c) *Information required under part 130*. Part 130 of this subchapter contains specific provisions on the disclosure of information described in that part.

(d) *National Interest Determinations*. In accordance with section 38(e) of the Arms Export Control Act (22 U.S.C. 2778(e)), the Secretary of State has determined that the following disclosures are in the national interest of the United States:

(1) Furnishing information to foreign governments for law enforcement or regulatory purposes; and

(2) Furnishing information to foreign governments and other agencies of the U.S. Government in the context of multilateral or bilateral export regimes (e.g., the Missile Technology

Control Regime, the Australia Group, and Wassenaar Arrangement).

[58 FR 39312, July 22, 1993, as amended at 62 FR 67276, Dec. 24, 1997; 70 FR 50965, Aug. 29, 2005; 71 FR 20547, Apr. 21, 2006]

§ 126.11 Relations to other provisions of law.

The provisions in this subchapter are in addition to, and are not in lieu of, any other provisions of law or regulations. The sale of firearms in the United States, for example, remains subject to the provisions of the Gun Control Act of 1968 and regulations administered by the Department of Justice. The performance of defense services on behalf of foreign governments by retired military personnel continues to require consent pursuant to part 3a of this title. Persons who intend to export defense articles or furnish defense services should not assume that satisfying the requirements of this subchapter relieves one of other requirements of law.

[71 FR 20547, Apr. 21, 2006]

§ 126.12 Continuation in force.

All determinations, authorizations, licenses, approvals of contracts and agreements and other action issued, authorized, undertaken, or entered into by the Department of State pursuant to section 414 of the Mutual Security Act of 1954, as amended, or under the previous provisions of this subchapter, continue in full force and effect until or unless modified, revoked or superseded by the Department of State.

§ 126.13 Required information.

(a) All applications for licenses (DSP–5, DSP–61, DSP–73, and DSP–85), all requests for approval of agreements and amendments thereto under part 124 of this subchapter, and all requests for other written authorizations (including requests for retransfer or reexport pursuant to § 123.9 of this subchapter) must include a letter signed by a responsible official empowered by the applicant and addressed to the Directorate of Defense Trade Controls, stating whether:

(1) The applicant or the chief executive officer, president, vice-presidents, secretary, partner, member, other senior officers or officials (e.g., comptroller, treasurer, general counsel) or any member of the board of directors is the subject of an indictment or has been otherwise charged (e.g., by criminal information in lieu of indictment) for, or has been convicted of, violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter;

(2) The applicant or the chief executive officer, president, vice-presidents, secretary, partner, member, other senior officers or officials (e.g., comptroller, treasurer, general counsel) or any member of the board of directors is ineligible to contract with, or to receive a license or other approval to temporarily import or export defense articles or defense services from any agency of the U.S. Government;

(3) To the best of the applicant's knowledge, any party to the export as defined in § 126.7(e) has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is ineligible to contract with, or to receive a license or other approval to temporarily import or export defense articles or defense services from any agency of the U.S. government; and

(4) The natural person signing the application, notification, or other request for approval (including the statement required by this subchapter) is a citizen or national of the United States, has been lawfully admitted to the United States for permanent residence (and maintains such lawful permanent residence status) under the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(20), 66 Stat. 163), or is an official of a foreign government entity in the United States, or is a foreign person making a request pursuant to § 123.9 of this subchapter.

(b) In addition, all applications for licenses must include the complete names and addresses of all U.S. consignors and freight forwarders, and all foreign consignees and foreign intermediate consignees involved in the transaction. Port Directors of U.S. Customs and Border Protection and Department of Defense transmittal authorities will permit only those U.S. consignors or freight forwarders listed on the license to make shipments under the license, and only to those

foreign consignees and foreign intermediate consignees listed on the license. Applicants should list all freight forwarders who may be involved with shipments under the license to ensure that the list is complete and to avoid the need for amendments after the license has been approved. If there are unusual or extraordinary circumstances that preclude the specific identification of all the U.S. consignors and freight forwarders and all foreign consignees and foreign intermediate consignees, the applicant must provide a letter of explanation with each application.

(c) In cases when natural foreign persons are employed at or assigned to security-cleared facilities, provision by the applicant of a technology control plan will facilitate processing.

[58 FR 39312, July 22, 1993, as amended at 70 FR 50965, Aug. 29, 2005; 71 FR 20547, Apr. 21, 2006; 75 FR 52624, Aug. 27, 2010; 77 FR 16601, Mar. 21, 2012; 78 FR 52688, Aug. 26, 2013]

§ 126.14 Special comprehensive export authorizations for NATO, Australia, Japan, and Sweden.

(a) *Comprehensive authorizations*. With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide the comprehensive authorizations described in paragraphs (a) and (b) of this section for circumstances where the full parameters of a commercial export endeavor including the needed defense exports can be well anticipated and described in advance, thereby making use of such comprehensive authorizations appropriate.

(1) *Major project authorization*. With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide comprehensive authorizations for well circumscribed commercially developed ''major projects'', where a principal registered U.S. exporter/prime contractor identifies in advance the broad parameters of a commercial project including defense exports needed, other participants (e.g., exporters with whom they have ''teamed up,'' or subcontractors), and foreign government end users. Projects eligible for such authorization may include a commercial export of a major weapons system for a foreign government involving, for example, multiple U.S. suppliers under a commercial teaming agreement to design, develop and manufacture defense articles to meet a foreign government's requirements. U.S. exporters seeking such authorization must provide detailed information concerning the scope of the project, including other exporters, U.S. subcontractors, and planned exports (including re-exports) of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(2) *Major program authorization*. With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide comprehensive authorizations for well circumscribed commercially developed ''major program''. This variant would be available where a single registered U.S. exporter defines in advance the parameters of a broad commercial program for which the registrant will be providing all phases of the necessary support (including the needed hardware, technical data, defense services, development, manufacturing, and logistic support). U.S. exporters seeking such authorization must provide detailed information concerning the scope of the program, including planned exports (including re-exports) of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(3)(i) *Global project authorization*. With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide a comprehensive ''Global Project Authorization'' to registered U.S. exporters for exports of defense articles, technical data or defense services in support of government to government cooperative projects (covering research and development or production) with one of these countries undertaken pursuant to an agreement between the U.S. Government and the government of such country, or a memorandum of understanding/agreement between the Department of Defense and the country's Ministry of Defense.

(ii) A set of standard terms and conditions derived from and corresponding to the breadth of the activities and phases covered in such a cooperative MOU will provide the basis for this comprehensive authorization for all U.S. exporters (and foreign end users) identified by DoD as participating in such cooperative project. Such authorizations may cover a broad range of defined activities in support of such programs including multiple shipments of defense articles and technical data and performance of defense services for extended periods, and re-exports to approved end users.

(iii) Eligible end users will be limited to ministries of defense of MOU signatory countries and foreign companies serving as contractors of such countries.

(iv) Any requirement for non-transfer and use assurances from a foreign government may be deemed satisfied by the signature by such government of a cooperative agreement or by its ministry of defense of a cooperative MOU/MOA where the agreement or MOU contains assurances that are comparable to that required by a DSP–83 with respect to foreign governments and that clarifies that the government is undertaking responsibility for all its participating companies. The authorized non-government participants or end users (e.g., the participating government's contractors) will still be required to execute DSP–83s.

(4) *Technical data supporting an acquisition, teaming arrangement, merger, joint venture authorization.* With respect to NATO member countries, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide a registered U.S. defense company a comprehensive authorization to export technical data in support of the U.S. exporter's consideration of entering into a teaming arrangement, joint venture, merger, acquisition, or similar arrangement with prospective foreign partners. Specifically, the authorization is designed to permit the export of a broadly defined set of technical data to qualifying well established foreign defense firms in NATO countries, Australia, Japan, or Sweden in order to better facilitate a sufficiently in depth assessment of the benefits, opportunities and other relevant considerations presented by such prospective arrangements. U.S. exporters seeking such authorization must provide detailed information concerning the arrangement, joint venture, merger or acquisition, including any planned exports of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(b) *Provisions and requirements for comprehensive authorizations.* Requests for the special comprehensive authorizations set forth in paragraph (a) of this section should be by letter addressed to the Directorate of Defense Trade Controls. With regard to a commercial major program or project authorization, or technical data supporting a teaming arrangement, merger, joint venture or acquisition, registered U.S. exporters may consult the Deputy Assistant Secretary of State for Defense Trade Controls about eligibility for and obtaining available comprehensive authorizations set forth in paragraph (a) of this section or pursuant to § 126.9(b) of this subchapter.

(1) Requests for consideration of all such authorizations should be formulated to correspond to one of the authorizations set out in paragraph (a) of this section, and should include:

(i) A description of the proposed program or project, including where appropriate a comprehensive description of all phases or stages; and

(ii) Its value; and

(iii) Types of exports needed in support of the program or project; and

(iv) Projected duration of same, within permissible limits; and

(v) Description of the exporter's plan for record keeping and auditing of all phases of the program or project; and

(vi) In the case of authorizations for exports in support of government to government cooperative projects, identification of the cooperative project.

(2) Amendments to the requested authorization may be requested in writing as appropriate, and should include a detailed description of the aspects of the activities being proposed for amendment.

(3) The comprehensive authorizations set forth in paragraph (a) of this section may be made valid for the duration of the major commercial program or project, or cooperative project, not to exceed 10 years.

(4) Included among the criteria required for such authorizations are those set out in part 124, e.g., §§ 124.7, 124.8 and 124.9, as well as §§ 125.4 (technical data exported in furtherance of an agreement) and 123.16 (hardware being included in an agreement). Provisions required will also take into account the congressional notification requirements in §§ 123.15 and 124.11 of the ITAR. Specifically, comprehensive congressional notifications corresponding to the comprehensive parameters for the major program or project or cooperative project should be possible, with additional notifications such as those required by law for changes in value or other significant modifications.

(5) All authorizations will be consistent with all other applicable requirements of the ITAR, including requirements for non-transfer and use assurances (see §§ 123.10 and 124.10), congressional notifications (e.g., §§ 123.15 and 124.11), and other documentation (e.g., §§ 123.9 and 126.13).

(6) Special auditing and reporting requirements will also be required for these authorizations. Exporters using special authorizations are required to establish an electronic system for keeping records of all defense articles, defense services and technical data exported and comply with all applicable requirements for submitting shipping or export information within the allotted time.

[65 FR 45285, July 21, 2000, as amended at 66 FR 35900, July 10, 2001; 71 FR 20548, Apr. 21, 2006; 79 FR 8085, Feb. 11, 2014]

§ 126.15 Expedited processing of license applications for the export of defense articles and defense services to Australia or the United Kingdom.

(a) Any application submitted for authorization of the export of defense articles or services to Australia or the United Kingdom will be expeditiously processed by the Department of State, in consultation with the Department of Defense. Such license applications will not be referred to any other Federal department or agency, except when the defense articles or defense services are classified or exceptional circumstances apply. (See section 1225, Pub. L. 108–375).

(b) To be eligible for the expedited processing in paragraph (a) of this section, the destination of the prospective export must be limited to Australia or the United Kingdom. No other country may be included as intermediary or ultimate end-user.

[70 FR 39919, July 12, 2005]

§ 126.16 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and Australia.

(a) *Scope of exemption and required conditions*—(1) *Definitions.* (i) An *export* means, for purposes of this section only, the initial movement of defense articles or defense services from the United States Community to the Australian Community.

(ii) A *transfer* means, for purposes of this section only, the movement of a previously exported defense article or defense service by a member of the Australian Community within the Australian Community, or between a member of the United States Community and a member of the Australian Community.

(iii) *Retransfer and reexport* have the meaning provided in § 120.19 of this subchapter.

(iv) *Intermediate consignee* means, for purposes of this section, an entity or person who receives, but does not have access to, defense articles, including technical data, for the sole purpose of effecting onward movement to members of the Approved Community (*see* paragraph (k) of this section).

(2) Persons or entities exporting or transferring defense articles or defense services are exempt from the otherwise applicable licensing requirements if such persons or entities comply with the regulations set forth in this section. Except as provided in Supplement No. 1 to part 126 of this subchapter, Port Directors of U.S. Customs and Border Protection and postmasters shall permit the permanent and temporary export without a license from

members of the United States Community to members of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community) of defense articles and defense services not listed in Supplement No. 1 to part 126 of this subchapter, for the end-uses specifically identified pursuant to paragraphs (e) and (f) of this section. The purpose of this section is to specify the requirements to export, transfer, reexport, retransfer, or otherwise dispose of a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and Australia. All persons must continue to comply with statutory and regulatory requirements outside of this subchapter concerning the import of defense articles and defense services or the possession or transfer of defense articles, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 CFR parts 447, 478, and 479, which are unaffected by the Defense Trade Cooperation Treaty between the United States and Australia.

(3) *Export*. In order for an exporter to export a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and Australia, all of the following conditions must be met:

(i) The exporter must be registered with the Directorate of Defense Trade Controls (DDTC) and must be eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other forms of authorization to export) from any agency of the U.S. Government without restriction (*see* paragraphs (b) and (c) of this section for specific requirements);

(ii) The recipient of the export must be a member of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community). Australian non-governmental entities and facilities that become ineligible for such membership will be removed from the Australian Community;

(iii) Intermediate consignees involved in the export must not be ineligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to handle or receive a defense article or defense service without restriction (*see* paragraph (k) of this section for specific requirements);

(iv) The export must be for an end-use specified in the Defense Trade Cooperation Treaty between the United States and Australia and mutually agreed to by the U.S. Government and the Government of Australia pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and the Implementing Arrangement thereto (the Australia Implementing Arrangement) (*see* paragraphs (e) and (f) of this section regarding authorized end-uses);

(v) The defense article or defense service is not excluded from the scope of the Defense Trade Cooperation Treaty between the United States and Australia (*see* paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter for specific information on the scope of items excluded from export under this exemption) and is marked or identified, at a minimum, as ''Restricted USML'' (*see* paragraph (j) of this section for specific requirements on marking exports);

(vi) All required documentation of such export is maintained by the exporter and recipient and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vii) The Department of State has provided advance notification to the Congress, as required, in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(4) *Transfers*. In order for a member of the Approved Community (*i.e.*, the United States Community and Australian Community) to transfer a defense article or defense service under the Defense Trade Cooperation Treaty within the Approved Community, all of the following conditions must be met:

(i) The defense article or defense service must have been previously exported in accordance with paragraph (a)(3) of this section or transitioned

from a license or other approval in accordance with paragraph (i) of this section;

(ii) The transferor and transferee of the defense article or defense service are members of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community) or the United States Community (*see* paragraph (b) of this section for information on the United States Community/approved exporters);

(iii) The transfer is required for an end-use specified in the Defense Trade Cooperation Treaty between the United States and Australia and mutually agreed to by the Government of the United States and the Government of Australia pursuant to the terms of the Defense Trade Cooperation Treaty between the United States and Australia and the Australia Implementing Arrangement (*see* paragraphs (e) and (f) of this section regarding authorized end-uses);

(iv) The defense article or defense service is not identified in paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter as ineligible for export under this exemption, and is marked or otherwise identified, at a minimum, as ''Restricted USML'' (*see* paragraph (j) of this section for specific requirements on marking exports);

(v) All required documentation of such transfer is maintained by the transferor and transferee and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vi) The Department of State has provided advance notification to the Congress in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(5) This section does not apply to the export of defense articles or defense services from the United States pursuant to the Foreign Military Sales program. Once such items are delivered to the Australian Government, they may be treated as if they were exported pursuant to the Treaty and then must be marked, identified, transmitted, stored and handled in accordance with the Treaty, the Australia Implementing Arrangement, and the provisions of this section.

(b) *United States Community*. The following persons compose the United States Community and may export or transfer defense articles and defense services pursuant to the Defense Trade Cooperation Treaty between the United States and Australia:

(1) Departments and agencies of the U.S. Government, including their personnel acting in their official capacity, with, as appropriate, a security clearance and a need-to-know; and

(2) Non-governmental U.S. persons registered with DDTC and eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other forms of authorization to export) from any agency of the U.S. Government without restriction, including their employees acting in their official capacity with, as appropriate, a security clearance and a need-to-know.

(c) An exporter that is otherwise an authorized exporter pursuant to paragraph (b) of this section may not export or transfer pursuant to the Defense Trade Cooperation Treaty between the United States and Australia if the exporter's president, chief executive officer, any vice-president, any other senior officer or official (e.g., comptroller, treasurer, general counsel); any member of the board of directors of the exporter; any party to the export; or any source or manufacturer is ineligible to receive export licenses (or other forms of authorization to export) from any agency of the U.S. Government.

(d) *Australian Community*. For purposes of the exemption provided by this section, the Australian Community consists of:

(1) Government of Australia authorities with entities identified as members of the Approved Community through the DDTC Web site at the time of a transaction under this section; and

(2) The non-governmental Australian entities and facilities identified as members of the Approved Community through the DDTC Web site at the time of a transaction under this section; non-governmental Australian entities

and facilities that become ineligible for such membership will be removed from the Australian Community.

(e) *Authorized End-uses.* The following end-uses, subject to paragraph (f) of this section, are specified in the Defense Trade Cooperation Treaty between the United States and Australia:

(1) United States and Australian combined military or counter-terrorism operations;

(2) United States and Australian cooperative security and defense research, development, production, and support programs;

(3) Mutually determined specific security and defense projects where the Government of Australia is the end-user; or

(4) U.S. Government end-use.

(f) Procedures for identifying authorized end-uses pursuant to paragraph (e) of this section:

(1) Operations, programs, and projects that can be publicly identified will be posted on the DDTC Web site;

(2) Operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from DDTC; or

(3) U.S. Government end-use will be identified specifically in a U.S. Government contract or solicitation as being eligible under the Treaty.

(4) No other operations, programs, projects, or end-uses qualify for this exemption.

(g) *Items eligible under this section.* With the exception of items listed in Supplement No. 1 to part 126 of this subchapter, defense articles and defense services may be exported under this section subject to the following:

(1) An exporter authorized pursuant to paragraph (b)(2) of this section may market a defense article to members of the Australian Community if that exporter has been licensed by DDTC to export (as defined by § 120.17 of this subchapter) the identical type of defense article to any foreign person and end-use of the article is for an end-use identified in paragraph (e) of this section.

(2) The export of any defense article specific to the existence of (e.g., reveals the existence of or details of) anti-tamper measures made at U.S. Government direction always requires prior written approval from DDTC.

(3) U.S.-origin classified defense articles or defense services may be exported only pursuant to a written request, directive, or contract from the U.S. Department of Defense that provides for the export of the classified defense article(s) or defense service(s).

(4) U.S.-origin defense articles specific to developmental systems that have not obtained written Milestone B approval from the U.S. Department of Defense milestone approval authority are not eligible for export unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified pursuant to paragraph (e)(1), (2), or (4) of this section.

(5) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (e.g., USML Category XI (a)(3) electronically scanned array radar excluded by Note 2) that are embedded in a larger system that is eligible to ship under this section (e.g., a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article under this subchapter. The exporter must obtain a license or other authorization from DDTC for the export of such embedded defense articles (for example, USML Category XI (a)(3) electronically scanned array radar systems that are exempt from this section that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(6) No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of an export conducted pursuant to this section.

(7) Sales by exporters made through the U.S. Government shall not include either charges for patent rights in which the U.S. Government holds a royalty-free license, or charges for information which the U.S. Government has a right to use and disclose to others, which is in the public domain, or

which the U.S. Government has acquired or is entitled to acquire without restrictions upon its use and disclosure to others.

(h) *Transfers, retransfers, and reexports.* (1) Any transfer of a defense article or defense service not exempted in Supplement No. 1 to part 126 of this subchapter by a member of the Australian Community (*see* paragraph (d) of this section for specific information on the identification of the Community) to another member of the Australian Community or the United States Community for an end-use that is authorized by this exemption (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) is authorized under this exemption.

(2) Any transfer or other provision of a defense article or defense service for an end-use that is not authorized by the exemption provided by this section is prohibited without a license or the prior written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(3) Any retransfer or reexport, or other provision of a defense article or defense service by a member of the Australian Community to a foreign person that is not a member of the Australian Community, or to a U.S. person that is not a member of the United States Community, is prohibited without a license or the prior written approval of DDTC (*see* paragraph (d) of this section for specific information on the identification of the Australian Community).

(4) Any change in the use of a defense article or defense service previously exported, transferred, or obtained under this exemption by any foreign person, including a member of the Australian Community, to an end-use that is not authorized by this exemption is prohibited without a license or other written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(5) Any retransfer, reexport, or change in end-use requiring such approval of the U.S. Government shall be made in accordance with §123.9 of this subchapter.

(6) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (e.g., USML Category XI (a)(3) electronically scanned array radar systems) that are embedded in a larger system that is eligible to ship under this section (e.g., a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article unless otherwise specified. A license or other authorization must be obtained from DDTC for the export, transfer, reexport, retransfer, or change in end-use of any such embedded defense article (for example, USML Category XI(a)(3) electronically scanned array radar systems that are excluded from this section by Supplement No. 1 to part 126 of this subchapter, Note 2 that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(7) A license or prior approval from DDTC is not required for a transfer, retransfer, or reexport of an exported defense article or defense service under this section, if:

(i) The transfer of defense articles or defense services is made by a member of the United States Community to Australian Department of Defence (ADOD) elements deployed outside the Territory of Australia and engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section (Note: For purposes of paragraph (h)(7)(i) through (iv) of this section, per Section 9(9) of the Australia Implementing Arrangement, ''ADOD Transmission channels'' includes electronic transmission of a defense article and transmission of a defense article by an ADOD contracted carrier or freight forwarder that merely transports or arranges transport for the defense article in this instance.);

(ii) The transfer of defense articles or defense services is made by a member of the United States Community to an Approved Community member (either United States or Australian) that is operating in direct support of ADOD elements deployed outside the Territory of Australia and engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized

end-uses) using ADOD transmission channels or the provisions of this section;

(iii) The reexport is made by a member of the Australian Community to ADOD elements deployed outside the Territory of Australia engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section;

(iv) The reexport is made by a member of the Australian Community to an Approved Community member (either United States or Australian) that is operating in direct support of ADOD elements deployed outside the Territory of Australia engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section; or

(v) The defense article or defense service will be delivered to the ADOD for an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses); the ADOD may deploy the item as necessary when conducting official business within or outside the Territory of Australia. The item must remain under the effective control of the ADOD while deployed and access may not be provided to unauthorized third parties.

(8) U.S. persons registered, or required to be registered, pursuant to part 122 of this subchapter and members of the Australian Community must immediately notify DDTC of any actual or proposed sale, retransfer, or reexport of a defense article or defense service on the U.S. Munitions List originally exported under this exemption to any of the countries listed in § 126.1 of this subchapter or any person acting on behalf of such countries, whether within or outside the United States. Any person knowing or having reason to know of such a proposed or actual sale, reexport, or retransfer shall submit such information in writing to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls.

(i) *Transitions.* (1) Any previous export of a defense article under a license or other approval of the U.S. Department of State remains subject to the conditions and limitations of the original license or authorization unless DDTC has approved in writing a transition to this section.

(2) If a U.S. exporter desires to transition from an existing license or other approval to the use of the provisions of this section, the following is required:

(i) The U.S. exporter must submit a written request to DDTC, which identifies the defense articles or defense services to be transitioned, the existing license(s) or other authorizations under which the defense articles or defense services were originally exported, and the Treaty-eligible end-use for which the defense articles or defense services will be used. Any license(s) filed with U.S. Customs and Border Protection should remain on file until the exporter has received approval from DDTC to retire the license(s) and transition to this section. When this approval is conveyed to U.S. Customs and Border Protection by DDTC, the license(s) will be returned to DDTC by U.S. Customs and Border Protection in accord with existing procedures for the return of expired licenses in § 123.22(c) of this subchapter.

(ii) Any license(s) not filed with U.S. Customs and Border Protection must be returned to DDTC with a letter citing approval by DDTC to transition to this section as the reason for returning the license(s).

(3) If a member of the Australian Community desires to transition defense articles received under an existing license or other approval to the processes established under the Treaty, the Australian Community member must submit a written request to the Government of Australia. The Government of Australia will submit the request to DDTC for review and approval. The defense article or defense service shall remain subject to the conditions and limitations of the existing license or other approval until the Australian Community member has received via the Government of Australia the approval from DDTC.

(4) Authorized exporters identified in paragraph (b)(2) of this section who have exported a defense article or defense service that has subsequently been placed on the list of exempted

items in Supplement No. 1 to part 126 of this subchapter must review and adhere to the requirements in the relevant FEDERAL REGISTER notice announcing such removal. Once removed, the defense article or defense service will no longer be subject to this section, and such defense article or defense service previously exported shall remain on the U.S. Munitions List and be subject to the requirements of this subchapter unless the applicable FEDERAL REGISTER notice states otherwise. Subsequent reexport or retransfer must be made pursuant to § 123.9 of this subchapter.

(5) Any defense article or defense service transitioned from a license or other approval to treatment under this section must be marked in accordance with the requirements of paragraph (j) of this section.

(j) *Marking of exports.* (1) All defense articles and defense services exported or transitioned pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section shall be marked or identified prior to movement as follows:

(i) For classified defense articles and defense services the standard marking or identification shall read''//CLASSIFICATION LEVEL USML//REL AUS and USA Treaty Community//.'' For example, for defense articles classified SECRET, the marking or identification shall be ''//SECRET USML//REL AUS and USA Treaty Community//.''

(ii) Unclassified defense articles and defense services exported under or transitioned pursuant to this section shall be handled while in Australia as ''Restricted USML'' and the standard marking or identification shall read''// RESTRICTED USML//REL AUS and USA Treaty Community//.''

(2) Where U.S.-origin defense articles are returned to a member of the United States Community identified in paragraph (b) of this section, any defense articles marked or identified pursuant to paragraph (j)(1)(ii) of this section as ''//RESTRICTED USML//REL AUS and USA Treaty Community//'' will be considered unclassified and the marking or identification shall be removed; and

(3) The standard marking and identification requirements are as follows:

(i) Defense articles (other than technical data) shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such labeling is impracticable (e.g., propellants, chemicals), shall be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section;

(ii) Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (physical, oral, or electronic), shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such labeling is impractical shall be accompanied by documentation (such as contracts or invoices) or verbal notification clearly associating the technical data with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section; and

(4) Defense services shall be accompanied by documentation (contracts, invoices, shipping bills, or bills of lading) clearly labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section.

(5) The exporter shall incorporate the following statement as an integral part of the bill of lading and the invoice whenever defense articles are to be exported: ''These U.S. Munitions List commodities are authorized by the U.S. Government under the U.S.-Australia Defense Trade Cooperation Treaty for export only to Australia for use in approved projects, programs or operations by members of the Australian Community. They may not be retransferred or reexported or used outside of an approved project, program, or operation, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.''

(k) *Intermediate consignees.* (1) Unclassified exports under this section may only be handled by:

(i) U.S. intermediate consignees who are:

(A) Exporters registered with DDTC and eligible;

(B) Licensed customs brokers who are subject to background investigation and have passed a comprehensive examination administered by U.S. Customs and Border Protection; or

(C) Commercial air freight and surface shipment carriers, freight forwarders, or other parties not exempt from registration under §129.3(b)(3) of this subchapter, that are identified at the time of export as being on the U.S. Department of Defense Civil Reserve Air Fleet (CRAF) list of approved air carriers, a link to which is available on the DDTC Web site; or

(ii) Australian intermediate consignees who are:

(A) Members of the Australian Community; or

(B) Freight forwarders, customs brokers, commercial air freight and surface shipment carriers, or other Australian parties that are identified at the time of export as being on the list of Authorized Australian Intermediate Consignees, which is available on the DDTC Web site.

(2) Classified exports must comply with the security requirements of the National Industrial Security Program Operating Manual (DoD 5220.22–M and supplements or successors).

(l) *Records*. (1) All exporters authorized pursuant to paragraph (b)(2) of this section who export defense articles or defense services pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section shall maintain detailed records of their exports, imports, and transfers. Exporters shall also maintain detailed records of any reexports and retransfers approved or otherwise authorized by DDTC of defense articles or defense services subject to the Defense Trade Cooperation Treaty between the United States and Australia and this section. These records shall be maintained for a minimum of five years from the date of export, import, transfer, reexport, or retransfer and shall be made available upon request to DDTC or a person designated by DDTC (e.g., the Diplomatic Security Service) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, ''legible'' and ''legibility'' mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. ''Readable'' and ''readability'' means the quality of a group of letters or numerals being recognized as complete words or numbers.). These records shall consist of the following:

(i) Port of entry/exit;

(ii) Date of export/import;

(iii) Method of export/import;

(iv) Commodity code and description of the commodity, including technical data;

(v) Value of export;

(vi) Reference to this section and justification for export under the Treaty;

(vii) End-user/end-use;

(viii) Identification of all U.S. and foreign parties to the transaction;

(ix) How the export was marked;

(x) Security classification of the export;

(xi) All written correspondence with the U.S. Government on the export;

(xii) All information relating to political contributions, fees, or commissions furnished or obtained, offered, solicited, or agreed upon as outlined in paragraph (m) of this section;

(xiii) Purchase order or contract;

(xiv) Technical data actually exported;

(xv) The Internal Transaction Number for the Electronic Export Information filing in the Automated Export System;

(xvi) All shipping documentation (including, but not limited to the airway bill, bill of lading, packing list, delivery verification, and invoice); and

(xvii) Statement of Registration (Form DS–2032).

(2) *Filing of export information*. All exporters of defense articles under the Defense Trade Cooperation Treaty between the United States and Australia and this section must electronically file Electronic Export Information

(EEI) using the Automated Export System citing one of the four below referenced codes in the appropriate field in the EEI for each shipment:

(i) For exports in support of United States and Australian combined military or counter-terrorism operations identify §126.16(e)(1) (the name or an appropriate description of the operation shall be placed in the appropriate field in the EEI, as well);

(ii) For exports in support of United States and Australian cooperative security and defense research, development, production, and support programs identify §126.16(e)(2) (the name or an appropriate description of the program shall be placed in the appropriate field in the EEI, as well);

(iii) For exports in support of mutually determined specific security and defense projects where the Government of Australia is the end-user identify §126.16(e)(3) (the name or an appropriate description of the project shall be placed in the appropriate field in the EEI, as well); or

(iv) For exports that will have a U.S. Government end-use identify §126.16(e)(4) (the U.S. Government contract number or solicitation number (e.g., ''U.S. Government contract number XXXXX'') shall be placed in the appropriate field in the EEI, as well). Such exports must meet the required export documentation and filing guidelines, including for defense services, of §123.22(a), (b)(1), and (b)(2) of this subchapter.

(m) *Fees and commissions.* All exporters authorized pursuant to paragraph (b)(2) of this section shall, with respect to each export, transfer, reexport, or retransfer, pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section, submit a statement to DDTC containing the information identified in §130.10 of this subchapter relating to fees, commissions, and political contributions on contracts or other instruments valued in an amount of $500,000 or more.

(n) *Violations and enforcement.* (1) Exports, transfers, reexports, and retransfers that do not comply with the conditions prescribed in this section will constitute violations of the Arms Export Control Act and this subchapter, and are subject to all relevant criminal, civil, and administrative penalties (*see* §127.1 of this subchapter), and may also be subject to penalty under other statutes or regulations.

(2) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers may take appropriate action to ensure compliance with this section as to the export or the attempted export of any defense article or technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft.

(3) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers have the authority to investigate, detain, or seize any export or attempted export of defense articles or technical data that does not comply with this section or that is otherwise unlawful.

(4) DDTC or a person designated by DDTC (e.g., the Diplomatic Security Service), U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection may require the production of documents and information relating to any actual or attempted export, transfer, reexport, or retransfer pursuant to this section. Any foreign person refusing to provide such records within a reasonable period of time shall be suspended from the Australian Community and ineligible to receive defense articles or defense services pursuant to the exemption under this section or otherwise.

(o) *Procedures for legislative notification.* (1) Exports pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section by any person identified in paragraph (b)(2) of this section shall not take place until 30 days after DDTC has acknowledged receipt of a written notification from the exporter notifying the Department of State if the export involves one or more of the following:

(i) A contract or other instrument for the export of major defense equipment in the amount of $25,000,000 or more, or for defense articles and defense services in the amount of $100,000,000 or more;

(ii) A contract for the export of firearms controlled under Category I of

the U.S. Munitions List of the International Traffic in Arms Regulations in an amount of $1,000,000 or more;

(iii) A contract, regardless of value, for the manufacturing abroad of any item of significant military equipment (*see* § 120.7 of this subchapter); or

(iv) An amended contract that meets the requirements of paragraphs (o)(1)(i) through (o)(1)(iii) of this section.

(2) The written notification required in paragraph (o)(1) of this section shall indicate the item/model number, general item description, U.S. Munitions List category, value, and quantity of items to be exported pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section, and shall be accompanied by the following additional information:

(i) The information identified in § 130.10 and § 130.11 of this subchapter;

(ii) A statement regarding whether any offset agreement is final to be entered into in connection with the export and a description of any such offset agreement;

(iii) A copy of the signed contract; and

(iv) If the notification is for paragraph (o)(1)(ii) of this section, a statement of what will happen to the weapons in their inventory (for example, whether the current inventory will be sold, reassigned to another service branch, destroyed, etc.).

(3) The Department of State will notify the Congress of exports that meet the requirements of paragraph (o)(1) of this section.

[78 FR 21526, Apr. 11, 2013]

§ 126.17 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom.

(a) *Scope of exemption and required conditions*—(1) *Definitions.* (i) An *export* means, for purposes of this section only, the initial movement of defense articles or defense services from the United States Community to the United Kingdom Community.

(ii) A *transfer* means, for purposes of this section only, the movement of a previously exported defense article or defense service by a member of the United Kingdom Community within the United Kingdom Community, or between a member of the United States Community and a member of the United Kingdom Community.

(iii) *Retransfer and reexport* have the meaning provided in § 120.19 of this subchapter.

(iv) *Intermediate consignee* means, for purposes of this section, an approved entity or person who receives, but does not have access to, defense articles, including technical data, for the sole purpose of effecting onward movement to members of the Approved Community (*see* paragraph (k) of this section).

(2) Persons or entities exporting or transferring defense articles or defense services are exempt from the otherwise applicable licensing requirements if such persons or entities comply with the regulations set forth in this section. Except as provided in Supplement No. 1 to part 126 of this subchapter, Port Directors of U.S. Customs and Border Protection and postmasters shall permit the permanent and temporary export without a license from members of the United States Community to members of the United Kingdom Community (*see* paragraph (d) of this section regarding the identification of members of the United Kingdom Community) of defense articles and defense services not listed in Supplement No. 1 to part 126 of this subchapter, for the end-uses specifically identified pursuant to paragraphs (e) and (f) of this section. The purpose of this section is to specify the requirements to export, transfer, reexport, retransfer, or otherwise dispose of a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom. All persons must continue to comply with statutory and regulatory requirements outside of this subchapter concerning the import of defense articles and defense services or the possession or transfer of defense articles, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 CFR parts 447, 478, and 479, which are unaffected by the Defense Trade Cooperation Treaty between the United States and the United Kingdom and

continue to apply fully to defense articles and defense services subject to either of the aforementioned treaties and the exemptions contained in this section.

(3) *Export*. In order for an exporter to export a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom, all of the following conditions must be met:

(i) The exporter must be registered with the Directorate of Defense Trade Controls (DDTC) and must be eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other forms of authorization to export) from any agency of the U.S. Government without restriction (*see* paragraphs (b) and (c) of this section for specific requirements);

(ii) The recipient of the export must be a member of the United Kingdom Community (*see* paragraph (d) of this section regarding the identification of members of the United Kingdom Community). United Kingdom non-governmental entities and facilities that become ineligible for such membership will be removed from the United Kingdom Community;

(iii) Intermediate consignees involved in the export must not be ineligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to handle or receive a defense article or defense service without restriction (*see* paragraph (k) of this section for specific requirements);

(iv) The export must be for an end-use specified in the Defense Trade Cooperation Treaty between the United States and the United Kingdom and mutually agreed to by the U.S. Government and the Government of the United Kingdom pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and the Implementing Arrangement thereto (United Kingdom Implementing Arrangement) (*see* paragraphs (e) and (f) of this section regarding authorized end-uses);

(v) The defense article or defense service is not excluded from the scope of the Defense Trade Cooperation Treaty between the United States and the United Kingdom (*see* paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter for specific information on the scope of items excluded from export under this exemption) and is marked or identified, at a minimum, as ''Restricted USML'' (*see* paragraph (j) of this section for specific requirements on marking exports);

(vi) All required documentation of such export is maintained by the exporter and recipient and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vii) The Department of State has provided advance notification to the Congress, as required, in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(4) *Transfers*. In order for a member of the Approved Community (*i.e.*, the United States Community and United Kingdom Community) to transfer a defense article or defense service under the Defense Trade Cooperation Treaty within the Approved Community, all of the following conditions must be met:

(i) The defense article or defense service must have been previously exported in accordance with paragraph (a)(3) of this section or transitioned from a license or other approval in accordance with paragraph (i) of this section;

(ii) The transferor and transferee of the defense article or defense service are members of the United Kingdom Community (*see* paragraph (d) of this section regarding the identification of members of the United Kingdom Community) or the United States Community (*see* paragraph (b) of this section for information on the United States Community/approved exporters);

(iii) The transfer is required for an end-use specified in the Defense Trade Cooperation Treaty between the United States and the United Kingdom and mutually agreed to by the Government of the United States and the Government of the United Kingdom pursuant to the terms of the Defense Trade Cooperation Treaty between the United States and the United Kingdom and the United Kingdom Implementing Arrangement (*see* paragraphs (e) and (f) of

this section regarding authorized end-uses);

(iv) The defense article or defense service is not identified in paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter as ineligible for export under this exemption, and is marked or otherwise identified, at a minimum, as ''Restricted USML'' (*see* paragraph (j) of this section for specific requirements on marking exports);

(v) All required documentation of such transfer is maintained by the transferor and transferee and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vi) The Department of State has provided advance notification to the Congress in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(5) This section does not apply to the export of defense articles or defense services from the United States pursuant to the Foreign Military Sales program. Once such items are delivered to Her Majesty's Government, they may be treated as if they were exported pursuant to the Treaty and then must be marked, identified, transmitted, stored and handled in accordance with the Treaty, the United Kingdom Implementing Arrangement, and the provisions of this section.

(b) *United States Community*. The following persons compose the United States Community and may export or transfer defense articles and defense services pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom:

(1) Departments and agencies of the U.S. Government, including their personnel acting in their official capacity, with, as appropriate, a security clearance and a need-to-know; and

(2) Non-governmental U.S. persons registered with DDTC and eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other form of authorization to export) from any agency of the U.S. Government without restriction, including their employees acting in their official capacity with, as appropriate, a security clearance and a need-to-know.

(c) An exporter that is otherwise an authorized exporter pursuant to paragraph (b) of this section may not export or transfer pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom if the exporter's president, chief executive officer, any vice-president, any other senior officer or official (e.g., comptroller, treasurer, general counsel); any member of the board of directors of the exporter; any party to the export; or any source or manufacturer is ineligible to receive export licenses (or other forms of authorization to export) from any agency of the U.S. Government.

(d) *United Kingdom Community*. For purposes of the exemption provided by this section, the United Kingdom Community consists of:

(1) Her Majesty's Government entities and facilities identified as members of the Approved Community through the DDTC Web site at the time of a transaction under this section; and

(2) The non-governmental United Kingdom entities and facilities identified as members of the Approved Community through the DDTC Web site (*www.pmddtc.state.gov*) at the time of a transaction under this section; non-governmental United Kingdom entities and facilities that become ineligible for such membership will be removed from the United Kingdom Community.

(e) *Authorized End-uses*. The following end-uses, subject to paragraph (f) of this section, are specified in the Defense Trade Cooperation Treaty between the United States and the United Kingdom:

(1) United States and United Kingdom combined military or counter-terrorism operations;

(2) United States and United Kingdom cooperative security and defense research, development, production, and support programs;

(3) Mutually determined specific security and defense projects where the Government of the United Kingdom is the end-user; or

(4) U.S. Government end-use.

(f) Procedures for identifying authorized end-uses pursuant to paragraph (e) of this section:

(1) Operations, programs, and projects that can be publicly identified will be posted on the DDTC Web site;

(2) Operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from DDTC; or

(3) U.S. Government end-use will be identified specifically in a U.S. Government contract or solicitation as being eligible under the Treaty.

(4) No other operations, programs, projects, or end-uses qualify for this exemption.

(g) *Items eligible under this section.* With the exception of items listed in Supplement No. 1 to part 126 of this subchapter, defense articles and defense services may be exported under this section subject to the following:

(1) An exporter authorized pursuant to paragraph (b)(2) of this section may market a defense article to members of the United Kingdom Community if that exporter has been licensed by DDTC to export (as defined by § 120.17 of this subchapter) the identical type of defense article to any foreign person and end-use of the article is for an end-use identified in paragraph (e) of this section.

(2) The export of any defense article specific to the existence of (e.g., reveals the existence of or details of) anti-tamper measures made at U.S. Government direction always requires prior written approval from DDTC.

(3) U.S.-origin classified defense articles or defense services may be exported only pursuant to a written request, directive, or contract from the U.S. Department of Defense that provides for the export of the classified defense article(s) or defense service(s).

(4) U.S.-origin defense articles specific to developmental systems that have not obtained written Milestone B approval from the U.S. Department of Defense milestone approval authority are not eligible for export unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified pursuant to paragraph (e)(1), (2), or (4) of this section.

(5) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (e.g., USML Category XI (a)(3) electronically scanned array radar excluded by Note 2) that are embedded in a larger system that is eligible to ship under this section (e.g., a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article under this subchapter. The exporter must obtain a license or other authorization from DDTC for the export of such embedded defense articles (for example, USML Category XI (a)(3) electronically scanned array radar systems that are exempt from this section that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(6) No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of an export conducted pursuant to this section.

(7) Sales by exporters made through the U.S. Government shall not include either charges for patent rights in which the U.S. Government holds a royalty-free license, or charges for information which the U.S. Government has a right to use and disclose to others, which is in the public domain, or which the U.S. Government has acquired or is entitled to acquire without restrictions upon its use and disclosure to others.

(8) Defense articles on the European Union Dual Use List (as described in Annex 1 to EC Council Regulation No. 428/2009) are not eligible for export under the Defense Trade Cooperation Treaty between the United States and the United Kingdom. These articles have been identified and included in Supplement No.1 to part 126.

(h) *Transfers, retransfers, and reexports.* (1) Any transfer of a defense article or defense service not exempted in Supplement No. 1 to part 126 of this subchapter by a member of the United Kingdom Community (*see* paragraph (d) of this section for specific information on the identification of the Community) to another member of the United Kingdom Community or the United States Community for an end-use that is authorized by this exemption (*see*

paragraphs (e) and (f) of this section regarding authorized end-uses) is authorized under this exemption.

(2) Any transfer or other provision of a defense article or defense service for an end-use that is not authorized by the exemption provided by this section is prohibited without a license or the prior written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(3) Any retransfer or reexport, or other provision of a defense article or defense service by a member of the United Kingdom Community to a foreign person that is not a member of the United Kingdom Community, or to a U.S. person that is not a member of the United States Community, is prohibited without a license or the prior written approval of DDTC (*see* paragraph (d) of this section for specific information on the identification of the United Kingdom Community).

(4) Any change in the use of a defense article or defense service previously exported, transferred, or obtained under this exemption by any foreign person, including a member of the United Kingdom Community, to an end-use that is not authorized by this exemption is prohibited without a license or other written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(5) Any retransfer, reexport, or change in end-use requiring such approval of the U.S. Government shall be made in accordance with §123.9 of this subchapter.

(6) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (e.g., USML Category XI (a)(3) electronically scanned array radar systems) that are embedded in a larger system that is eligible to ship under this section (e.g., a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article unless otherwise specified. A license or other authorization must be obtained from DDTC for the export, transfer, reexport, retransfer, or change in end-use of any such embedded defense article (for example, USML Category XI(a)(3) electronically scanned array radar systems that are excluded from this section by Supplement No. 1 to part 126 of this subchapter, Note 2 that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(7) A license or prior approval from DDTC is not required for a transfer, retransfer, or reexport of an exported defense article or defense service under this section, if:

(i) The transfer of defense articles or defense services is made by a member of the United States Community to United Kingdom Ministry of Defence (UK MOD) elements deployed outside the Territory of the United Kingdom and engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using United Kingdom Armed Forces transmission channels or the provisions of this section;

(ii) The transfer of defense articles or defense services is made by a member of the United States Community to an Approved Community member (either United States or UK) that is operating in direct support of UK MOD elements deployed outside the Territory of the United Kingdom and engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using United Kingdom Armed Forces transmission channels or the provisions of this section;

(iii) The reexport is made by a member of the United Kingdom Community to UK MOD elements deployed outside the Territory of the United Kingdom engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using United Kingdom Armed Forces transmission channels or the provisions of this section;

(iv) The reexport is made by a member of the United Kingdom Community to an Approved Community member (either U.S. or UK) that is operating in direct support of UK MOD elements deployed outside the Territory of the United Kingdom engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using United Kingdom Armed Forces transmission channels or the provisions of this section; or

(v) The defense article or defense service will be delivered to the UK MOD for an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses); the UK MOD may deploy the item as necessary when conducting official business within or outside the Territory of the United Kingdom. The item must remain under the effective control of the UK MOD while deployed and access may not be provided to unauthorized third parties.

(8) U.S. persons registered, or required to be registered, pursuant to part 122 of this subchapter and members of the United Kingdom Community must immediately notify DDTC of any actual or proposed sale, retransfer, or reexport of a defense article or defense service on the U.S. Munitions List originally exported under this exemption to any of the countries listed in § 126.1 of this subchapter or any person acting on behalf of such countries, whether within or outside the United States. Any person knowing or having reason to know of such a proposed or actual sale, reexport, or retransfer shall submit such information in writing to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls.

(i) *Transitions.* (1) Any previous export of a defense article under a license or other approval of the U.S. Department of State remains subject to the conditions and limitations of the original license or authorization unless DDTC has approved in writing a transition to this section.

(2) If a U.S. exporter desires to transition from an existing license or other approval to the use of the provisions of this section, the following is required:

(i) The U.S. exporter must submit a written request to DDTC, which identifies the defense articles or defense services to be transitioned, the existing license(s) or other authorizations under which the defense articles or defense services were originally exported, and the Treaty-eligible end-use for which the defense articles or defense services will be used. Any license(s) filed with U.S. Customs and Border Protection should remain on file until the exporter has received approval from DDTC to retire the license(s) and transition to this section. When this approval is conveyed to U.S. Customs and Border Protection by DDTC, the license(s) will be returned to DDTC by U.S. Customs and Border Protection in accord with existing procedures for the return of expired licenses in § 123.22(c) of this subchapter.

(ii) Any license(s) not filed with U.S. Customs and Border Protection must be returned to DDTC with a letter citing approval by DDTC to transition to this section as the reason for returning the license(s).

(3) If a member of the United Kingdom Community desires to transition defense articles received under an existing license or other approval to the processes established under the Treaty, the United Kingdom Community member must submit a written request to DDTC, either directly or through the original U.S. exporter, which identifies the defense articles or defense services to be transitioned, the existing license(s) or other authorizations under which the defense articles or defense services were received, and the Treaty-eligible end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) for which the defense articles or defense services will be used. The defense article or defense service shall remain subject to the conditions and limitations of the existing license or other approval until the United Kingdom Community member has received approval from DDTC.

(4) Authorized exporters identified in paragraph (b)(2) of this section who have exported a defense article or defense service that has subsequently been placed on the list of exempted items in Supplement No. 1 to part 126 of this subchapter must review and adhere to the requirements in the relevant FEDERAL REGISTER notice announcing such removal. Once removed, the defense article or defense service will no longer be subject to this section, and such defense article or defense service previously exported shall remain on the U.S. Munitions List and be subject to the requirements of this subchapter unless the applicable FEDERAL REGISTER notice states otherwise. Subsequent reexport or retransfer must be made pursuant to § 123.9 of this subchapter.

(5) Any defense article or defense service transitioned from a license or other approval to treatment under this section must be marked in accordance with the requirements of paragraph (j) of this section.

(j) *Marking of exports.* (1) All defense articles and defense services exported or transitioned pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section shall be marked or identified prior to movement as follows:

(i) For classified defense articles and defense services the standard marking or identification shall read ''//CLASSIFICATION LEVEL USML//REL USA and GBR Treaty Community//.'' For example, for defense articles classified SECRET, the marking or identification shall be ''//SECRET USML//REL USA and GBR Treaty Community//.''

(ii) Unclassified defense articles and defense services exported under or transitioned pursuant to this section shall be handled while in the UK as ''Restricted USML'' and the standard marking or identification shall read ''// RESTRICTED USML//REL USA and GBR Treaty Community//.''

(2) Where U.S.-origin defense articles are returned to a member of the United States Community identified in paragraph (b) of this section, any defense articles marked or identified pursuant to paragraph (j)(1)(ii) of this section as ''//RESTRICTED USML//REL USA and GBR Treaty Community//'' will be considered unclassified and the marking or identification shall be removed; and

(3) The standard marking and identification requirements are as follows:

(i) Defense articles (other than technical data) shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such labeling is impracticable (e.g., propellants, chemicals), shall be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section;

(ii) Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (physical, oral, or electronic), shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such labeling is impractical shall be accompanied by documentation (such as contracts or invoices) or verbal notification clearly associating the technical data with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section; and

(4) Defense services shall be accompanied by documentation (contracts, invoices, shipping bills, or bills of lading) clearly labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section.

(5) The exporter shall incorporate the following statement as an integral part of the bill of lading and the invoice whenever defense articles are to be exported: ''These U.S. Munitions List commodities are authorized by the U.S. Government under the U.S.-UK Defense Trade Cooperation Treaty for export only to United Kingdom for use in approved projects, programs or operations by members of the United Kingdom Community. They may not be retransferred or reexported or used outside of an approved project, program, or operation, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.''

(k) *Intermediate consignees.* (1) Unclassified exports under this section may only be handled by:

(i) U.S. intermediate consignees who are:

(A) Exporters registered with DDTC and eligible;

(B) Licensed customs brokers who are subject to background investigation and have passed a comprehensive examination administered by U.S. Customs and Border Protection; or

(C) Commercial air freight and surface shipment carriers, freight forwarders, or other parties not exempt from registration under §129.3(b)(3) of this subchapter, that are identified at the time of export as being on the U.S. Department of Defense Civil Reserve Air Fleet (CRAF) list of approved air carriers, a link to which is available on the DDTC Web site; or

(ii) United Kingdom intermediate consignees who are:

(A) Members of the United Kingdom Community; or

(B) Freight forwarders, customs brokers, commercial air freight and surface shipment carriers, or other United Kingdom parties that are identified at the time of export as being on the list of Authorized United Kingdom Intermediate Consignees, which is available on the DDTC Web site.

(2) Classified exports must comply with the security requirements of the National Industrial Security Program Operating Manual (DoD 5220.22–M and supplements or successors).

(l) *Records*. (1) All exporters authorized pursuant to paragraph (b)(2) of this section who export defense articles or defense services pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section shall maintain detailed records of their exports, imports, and transfers. Exporters shall also maintain detailed records of any reexports and retransfers approved or otherwise authorized by DDTC of defense articles or defense services subject to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section. These records shall be maintained for a minimum of five years from the date of export, import, transfer, reexport, or retransfer and shall be made available upon request to DDTC or a person designated by DDTC (e.g., U.S. Department of State's Bureau of Diplomatic Security) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, ''legible'' and ''legibility'' mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. ''Readable'' and ''readability'' means the quality of a group of letters or numerals being recognized as complete words or numbers.) These records shall consist of the following:

(i) Port of entry/exit;

(ii) Date of export/import;

(iii) Method of export/import;

(iv) Commodity code and description of the commodity, including technical data;

(v) Value of export;

(vi) Reference to this section and justification for export under the Treaty;

(vii) End-user/end-use;

(viii) Identification of all U.S. and foreign parties to the transaction;

(ix) How the export was marked;

(x) Security classification of the export;

(xi) All written correspondence with the U.S. Government on the export;

(xii) All information relating to political contributions, fees, or commissions furnished or obtained, offered, solicited, or agreed upon as outlined in paragraph (m) of this section;

(xiii) Purchase order or contract;

(xiv) Technical data actually exported;

(xv) The Internal Transaction Number for the Electronic Export Information filing in the Automated Export System;

(xvi) All shipping documentation (including, but not limited to the airway bill, bill of lading, packing list, delivery verification, and invoice); and

(xvii) Statement of Registration (Form DS–2032).

(2) *Filing of export information*. All exporters of defense articles under the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section must electronically file Electronic Export Information (EEI) using the Automated Export System citing one of the four below referenced codes in the appropriate field in the EEI for each shipment:

(i) For exports in support of United States and United Kingdom combined military or counter-terrorism operations identify §126.17(e)(1) (the name or an appropriate description of the operation shall be placed in the appropriate field in the EEI, as well);

(ii) For exports in support of United States and United Kingdom cooperative security and defense research, development, production, and support

programs identify §126.17(e)(2) (the name or an appropriate description of the program shall be placed in the appropriate field in the EEI, as well);

(iii) For exports in support of mutually determined specific security and defense projects where the Government of the United Kingdom is the end-user identify §126.17(e)(3) (the name or an appropriate description of the project shall be placed in the appropriate field in the EEI, as well); or

(iv) For exports that will have a U.S. Government end-use identify §126.17(e)(4) (the U.S. Government contract number or solicitation number (e.g., ''U.S. Government contract number XXXXX'') shall be placed in the appropriate field in the EEI, as well). Such exports must meet the required export documentation and filing guidelines, including for defense services, of §123.22(a), (b)(1), and (b)(2) of this subchapter.

(m) *Fees and commissions.* All exporters authorized pursuant to paragraph (b)(2) of this section shall, with respect to each export, transfer, reexport, or retransfer, pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section, submit a statement to DDTC containing the information identified in §130.10 of this subchapter relating to fees, commissions, and political contributions on contracts or other instruments valued in an amount of $500,000 or more.

(n) *Violations and enforcement.* (1) Exports, transfers, reexports, and retransfers that do not comply with the conditions prescribed in this section will constitute violations of the Arms Export Control Act and this subchapter, and are subject to all relevant criminal, civil, and administrative penalties (*see* §127.1 of this subchapter), and may also be subject to penalty under other statutes or regulations.

(2) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers may take appropriate action to ensure compliance with this section as to the export or the attempted export of any defense article or technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft.

(3) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers have the authority to investigate, detain, or seize any export or attempted export of defense articles or technical data that does not comply with this section or that is otherwise unlawful.

(4) DDTC or a person designated by DDTC (e.g., U.S. Department of State's Bureau of Diplomatic Security), U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection may require the production of documents and information relating to any actual or attempted export, transfer, reexport, or retransfer pursuant to this section. Any foreign person refusing to provide such records within a reasonable period of time shall be suspended from the United Kingdom Community and ineligible to receive defense articles or defense services pursuant to the exemption under this section or otherwise.

(o) *Procedures for legislative notification.* (1) Exports pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section by any person identified in paragraph (b)(2) of this section shall not take place until 30 days after DDTC has acknowledged receipt of a written notification from the exporter notifying the Department of State if the export involves one or more of the following:

(i) A contract or other instrument for the export of major defense equipment in the amount of $25,000,000 or more, or for defense articles and defense services in the amount of $100,000,000 or more;

(ii) A contract for the export of firearms controlled under Category I of the U.S. Munitions List of the International Traffic in Arms Regulations in an amount of $1,000,000 or more;

(iii) A contract, regardless of value, for the manufacturing abroad of any item of significant military equipment (*see* §120.7 of this subchapter); or

(iv) An amended contract that meets the requirements of paragraphs (o)(1)(i) through (o)(1)(iii) of this section.

(2) The written notification required in paragraph (o)(1) of this section shall indicate the item/model number, general item description, U.S. Munitions

List category, value, and quantity of items to be exported pursuant to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and this section, and shall be accompanied by the following additional information:

(3) The Department of State will notify the Congress of exports that meet the requirements of paragraph (o)(1) of this section.

[77 FR 16601, Mar. 21, 2012, as amended at 79 FR 8085, Feb. 11, 2014]

§ 126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.

(a) Subject to the requirements of paragraphs (b) and (c) of this section and notwithstanding any other provisions of this part, and where the exemption provided in § 124.16 cannot be implemented because of applicable domestic laws, no approval is needed from the Directorate of Defense Trade Controls (DDTC) for the transfer of unclassified defense articles, which includes technical data (see § 120.6), to or within a foreign business entity, foreign governmental entity, or international organization that is an authorized end-user or consignee (including approved sub-licensees) for those defense articles, including the transfer to dual nationals or third-country nationals who are bona fide regular employees, directly employed by the foreign consignee or end-user. The transfer of defense articles pursuant to this section must take place completely within the physical territory of the country where the end-user is located, where the governmental entity or international organization conducts official business, or where the consignee operates, and be within the scope of an approved export license, other export authorization, or license exemption.

(b) The provisions of § 127.1(b) are applicable to any transfer under this section. As a condition of transferring to foreign person employees described in paragraph (a) of this section any defense article under this provision, any foreign business entity, foreign governmental entity, or international organization, as a ''foreign person'' within the meaning of § 120.16, that receives a defense article, must have effective procedures to prevent diversion to destinations, entities, or for purposes other than those authorized by the applicable export license or other authorization (e.g., written approval or exemption) in order to comply with the applicable provisions of the Arms Export Control Act and the ITAR.

(c) The end-user or consignee may satisfy the condition in paragraph (b) of this section, prior to transferring defense articles, by requiring:

(1) A security clearance approved by the host nation government for its employees, or

(2) The end-user or consignee to have in place a process to screen its employees and to have executed a Non-Disclosure Agreement that provides assurances that the employee will not transfer any defense articles to persons or entities unless specifically authorized by the consignee or end-user. The end-user or consignee must screen its employees for substantive contacts with restricted or prohibited countries listed in § 126.1. Substantive contacts include regular travel to such countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion. Although nationality does not, in and of itself, prohibit access to defense articles, an employee who has substantive contacts with persons from countries listed in § 126.1(a) shall be presumed to raise a risk of diversion, unless DDTC determines otherwise. End-users and consignees must maintain a technology security/clearance plan that includes procedures for screening employees for such substantive contacts and maintain records of such screening for five years. The technology security/clearance plan and screening records shall be made available to DDTC or its agents for civil and criminal law enforcement purposes upon request.

[76 FR 28177, May 16, 2011]

SUPPLEMENT NO. 1 TO PART 126

SUPPLEMENT NO. 1*

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
I–XXI	Classified defense articles and services. *See* Note 1..	X	X	X
I–XXI	Defense articles listed in the Missile Technology Control Regime (MTCR) Annex.	X	X	X
I–XXI	U.S. origin defense articles and services used for marketing purposes and not previously licensed for export in accordance with this subchapter.	.....	X	X
I–XXI	Defense services for or technical data related to defense articles identified in this supplement as excluded from the Canadian exemption.	X		
I–XXI	Any transaction involving the export of defense articles and services for which congressional notification is required in accordance with § 123.15 and § 124.11 of this subchapter.	X		
I–XXI	U.S. origin defense articles and services specific to developmental systems that have not obtained written Milestone B approval from the U.S. Department of Defense milestone approval authority, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of § 126.16 or § 126.17 of this subchapter and is consistent with other exclusions of this supplement.	.....	X	X
I–XXI	Nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments specifically designed for such systems and associated equipment.	X		
I–XXI	Defense articles and services specific to the existence or method of compliance with anti-tamper measures, where such measures are readily identifiable, made at originating Government direction.	.....	X	X
I–XXI	Defense articles and services specific to reduced observables or counter low observables in any part of the spectrum. *See* Note 2.	.....	X	X
I–XXI	Defense articles and services specific to sensor fusion beyond that required for display or identification correlation *See* Note 3.	.....	X	X
I–XXI	Defense articles and services specific to the automatic target acquisition or recognition and cueing of multiple autonomous unmanned systems.	.....	X	X
I–XXI	Nuclear power generating equipment or propulsion equipment (e.g., nuclear reactors), specifically designed for military use and components therefore, specifically designed for military use. *See* also § 123.20 of this subchapter.	.....	.....	X
I–XXI	Libraries (parametric technical databases) specially designed for military use with equipment controlled on the USML. *See* Note 13.	.....	.....	X
I–XXI	Defense services or technical data specific to applied research as defined in § 125.4(c)(3) of this subchapter, design methodology as defined in § 125.4(c)(4) of this subchapter, engineering analysis as defined in § 125.4(c)(5) of this subchapter, or manufacturing know-how as defined in § 125.4(c)(6) of this subchapter. *See* Note 12.	X		

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
I–XXI	Defense services other than those required to prepare a quote or bid proposal in response to a written request from a department or agency of the United States Federal Government or from a Canadian Federal, Provincial, or Territorial Government; or defense services other than those required to produce, design, assemble, maintain or service a defense article for use by a registered U.S. company, or a U.S. Federal Government Program, or for end-use in a Canadian Federal, Provincial, or Territorial Government Program. *See* Note 14.	X		
I	Firearms, close assault weapons, and combat shotguns.	X		
II(k)	Software source code related to USML Category II(c), II(d), or II(i). *See* Note 4.		X	X
II(k)	Manufacturing know-how related to USML Category II(d). *See* Note 5.	X	X	X
III	Ammunition for firearms, close assault weapons, and combat shotguns listed in USML Category I.	X		
III	Defense articles and services specific to ammunition and fuse setting devices for guns and armament controlled in USML Category II.			X
III(e)	Manufacturing know-how related to USML Category III(d)(1) or III(d)(2) and their specially designed components. *See* Note 5.	X	X	X
III(e)	Software source code related to USML Category III(d)(1) or III(d)(2). *See* Note 4.		X	X
IV	Defense articles and services specific to man-portable air defense systems (MANPADS). *See* Note 6.	X	X	X
IV	Defense articles and services specific to rockets, designed or modified for non-military applications that do not have a range of 300 km (*i.e.,* not controlled on the MTCR Annex).			X
IV	Defense articles and services specific to torpedoes.		X	X
IV	Defense articles and services specific to anti-personnel landmines. *See* Note 15.	X	X	X
IV	Defense articles and services specific to cluster munitions. *See* Note 16.	X	X	X
IV(i)	Software source code related to USML Category IV(a), IV(b), IV(c), or IV(g). *See* Note 4.		X	X
IV(i)	Manufacturing know-how related to USML Category IV(a), IV(b), IV(d), or IV(g) and their specially designed components *See* Note 5..	X	X	X
V	The following energetic materials and related substances:. a. TATB (triaminotrinitrobenzene) (CAS 3058–38–6);. b. Explosives controlled in USML Category V(a)(32) or V(a)(33);. c. Iron powder (CAS 7439–89–6) with particle size of 3 micrometers or less produced by reduction of iron oxide with hydrogen;. d. BOBBA–8 (bis(2-methylaziridinyl)2-(2-hydroxypropanoxy) propylamino phosphine oxide), and other MAPO derivatives;. e. N-methyl-p-nitroaniline (CAS 100–15–2); or. f. Trinitrophenylmethylnitramine (tetryl) (CAS 479–45–8).			X
V(c)(7)	Pyrotechnics and pyrophorics specifically formulated for military purposes to enhance or control radiated energy in any part of the IR spectrum.			X
V(d)(3)	Bis-2, 2-dinitropropylnitrate (BDNPN)			X

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
VI	Defense articles specific to cryogenic equipment, and specially designed components or accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C).			X
VI	Defense Articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			X
VI	Defense articles and services specific to naval technology and systems relating to acoustic spectrum control and awareness *See* Note 10.		X	X
VI(a)	Nuclear powered vessels	X	X	X
VI(e)	Defense articles and services specific to naval nuclear propulsion equipment. *See* Note 7.	X	X	X
VI(g)	Software source code related to USML Category VI(a) or VI(c) *See* Note 4.		X	X
VII	Defense articles specific to cryogenic equipment, and specially designed components or accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C).			X
VII	Defense articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			X
VIII	Defense articles specific to cryogenic equipment, and specially designed components and accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C).			X
VIII	Defense articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			X
VIII(a)	All USML Category VIII(a) items	X		

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
VIII(f)	Developmental aircraft parts, components, accessories, and attachments identified in USML Category VIII(f).	X		
VIII(i)	Manufacturing know-how related to USML Category VIII(a) or VIII(e), and specially designed parts or components therefor. *See* Note 5.	X	X	X
VIII(i)	Software source code related to USML Category VIII(a) or VIII(e). *See* Note 4.		X	X
IX	Training or simulation equipment for Man Portable Air Defense Systems (MANPADS). *See* Note 6.		X	X
IX(e)	Software source code related to USML Category IX(a) or IX(b). *See* Note 4.		X	X
IX(e)	Software that is both specifically designed or modified for military use and specifically designed or modified for modeling or simulating military operational scenarios.			X
X(e)	Manufacturing know-how related to USML Category X(a)(1) or X(a)(2), and specially designed components therefor. *See* Note 5.	X	X	X
XI(a)	Defense articles and services specific to countermeasures and counter- countermeasures *See* Note 9.		X	X
XI(a)	High Frequency and Phased Array Microwave Radar systems, with capabilities such as search, acquisition, tracking, moving target indication, and imaging radar systems. *See* Note 17.		X	
XI	Defense articles and services specific to naval technology and systems relating to acoustic spectrum control and awareness. *See* Note 10.		X	X
XI(b), XI(c), XI(d)	Defense articles and services specific to USML Category XI (b) (e.g., communications security (COMSEC) and TEMPEST).		X	X
XI(d)	Software source code related to USML Category XI(a). *See* Note 4.		X	X
XI(d)	Manufacturing know-how related to USML Category XI(a)(3) or XI(a)(4), and specially designed components therefor. *See* Note 5.	X	X	X
XII	Defense articles and services specific to countermeasures and counter- countermeasures. *See* Note 9.		X	X
XII	Defense articles and services specific to USML Category XII(c) articles, except any 1st- and 2nd-generation image intensification tubes and 1st- and 2nd-generation image intensification night sighting equipment. End-items in USML Category XII(c) and related technical data limited to basic operations, maintenance, and training information as authorized under the exemption in § 125.4(b)(5) of this subchapter may be exported directly to a Canadian Government entity (*i.e.,* federal, provincial, territorial, or municipal) consistent with § 126.5, other exclusions, and the provisions of this subchapter.	X		
XII	Technical data or defense services for night vision equipment beyond basic operations, maintenance, and training data. However, the AS and UK Treaty exemptions apply when such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of § 126.16 or § 126.17 of this subchapter and is consistent with other exclusions of this supplement.	X	X	X
XII(f)	Manufacturing know-how related to USML Category XII(d) and specially designed components therefor. *See* Note 5.	X	X	X
XII(f)	Software source code related to USML Category XII(a), XII(b), XII(c), or XII(d). *See* Note 4.		X	X

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
XIII(b)	Defense articles and services specific to USML Category XIII(b) (Military Information Security Assurance Systems, cryptographic devices, software, and components).		X	X
XIII(d)	Carbon/carbon billets and preforms which are reinforced in three or more dimensional planes, specifically designed, developed, modified, configured or adapted for defense articles.			X
XIII(e)	Defense articles and services specific to armored plate manufactured to comply with a military standard or specification or suitable for military use. *See* Note 11.			X
XIII(g)	Defense articles and services related to concealment and deception equipment and materials.			X
XIII(h)	Energy conversion devices other than fuel cells			X
XIII(j)	Defense articles and services related to hardware associated with the measurement or modification of system signatures for detection of defense articles as described in Note 2.		X	X
XIII(l)	Software source code related to USML Category XIII(a). *See* Note 4.		X	X
XIV	Defense articles and services related to toxicological agents, including chemical agents, biological agents, and associated equipment.		X	X
XIV(a), XIV(b), XIV(d), XIV(e), XIV(f).	Chemical agents listed in USML Category XIV(a), (d) and (e), biological agents and biologically derived substances in USML Category XIV(b), and equipment listed in USML Category XIV(f) for dissemination of the chemical agents and biological agents listed in USML Category XIV(a), (b), (d), and (e).	X		
XV(a)	Defense articles and services specific to spacecraft/satellites. However, the Canadian exemption may be used for commercial communications satellites that have no other type of payload.	X	X	X
XV(b)	Defense articles and services specific to ground control stations for spacecraft telemetry, tracking, and control. Defense articles and services are not excluded under this entry if they do not control the spacecraft. Receivers for receiving satellite transmissions are also not excluded under this entry.		X	X
XV(c)	Defense articles and services specific to GPS/PPS security modules.		X	X
XV(c)	Defense articles controlled in USML Category XV(c) except end-items for end-use by the Federal Government of Canada exported directly or indirectly through a Canadian-registered person.	X		
XV(d)	Defense articles and services specific to radiation-hardened microelectronic circuits.	X	X	X
XV(e)	Anti-jam systems with the ability to respond to incoming interference by adaptively reducing antenna gain (nulling) in the direction of the interference.	X		
XV(e)	Antennas having any of the following:.			
	a. Aperture (overall dimension of the radiating portions of the antenna) greater than 30 feet;.			
	b. All sidelobes less than or equal to -35 dB relative to the peak of the main beam; or.			
	c. Designed, modified, or configured to provide coverage area on the surface of the earth less than 200 nautical miles in diameter, where ''coverage area'' is defined as that area on the surface of the earth that is illuminated by the main beam width of the antenna (which is the angular distance between half power points of the beam).	X		
XV(e)	Optical intersatellite data links (cross links) and optical ground satellite terminals.	X		

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
XV(e)	Spaceborne regenerative baseband processing (direct up and down conversion to and from baseband) equipment.	X		
XV(e)	Propulsion systems which permit acceleration of the satellite on-orbit (*i.e.,* after mission orbit injection) at rates greater than 0.1 g.	X		
XV(e)	Attitude control and determination systems designed to provide spacecraft pointing determination and control or payload pointing system control better than 0.02 degrees per axis.	X		
XV(e)	All specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for all USML Category XV(a) items, except when specifically designed or modified for use in commercial communications satellites.	X		
XV(e)	Defense articles and services specific to spacecraft and ground control station systems (only for telemetry, tracking and control as controlled in USML Category XV(b)), subsystems, components, parts, accessories, attachments, and associated equipment.	.....	X	X
XV(f)	Technical data and defense services directly related to the other defense articles excluded from the exemptions for USML Category XV.	X	X	X
XVI	Defense articles and services specific to design and testing of nuclear weapons.	X	X	X
XVI(c)	Nuclear radiation measuring devices manufactured to military specifications.	X		
XVI(e)	Software source code related to USML Category XVI(c). *See* Note 4.	.....	X	X
XVII	Classified articles, and technical data and defense services relating thereto, not elsewhere enumerated. *See* Note 1.	X	X	X
XVIII	Defense articles and services specific to directed energy weapon systems.	.....	X	X
XIX(e), XIX(f)(1), XIX(f)(2), XIX(g).	Defense articles and services specific to gas turbine engine hot section components and to Full Authority Digital Engine Control Systems (FADEC) or Digital Electronic Engine Controls (DEEC). *See* Note 8.	.....	X	X
XIX(g)	Technical data and defense services for gas turbine engine hot sections. (This does not include hardware). *See* Note 8.	X	X	X
XX	Defense articles and services related to submersible vessels, oceanographic, and associated equipment.	X	X	X
XX	Defense articles and services specific to naval technology and systems relating to acoustic spectrum control and awareness. *See* Note 10.	.....	X	X
XX	Defense articles specific to cryogenic equipment, and specially designed components or accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C).	.....	.....	X
XX	Defense articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.	.....	.....	X
XX(a)	Nuclear powered vessels	X	X	X

SUPPLEMENT NO. 1*—Continued

USML category	Exclusion	(CA) § 126.5	(AS) § 126.16	(UK) § 126.17
XX(b)	Defense articles and services specific to naval nuclear propulsion equipment. *See* Note 7.	X	X	X
XX(c)	Defense articles and services specific to submarine combat control systems.	.....	X	X
XX(d)	Software source code related to USML Category XX(a). *See* Note 4.	.....	X	X
XXI	Articles, and technical data and defense services relating thereto, not otherwise enumerated on the USML, but placed in this category by the Director, Office of Defense Trade Controls Policy.	X	X	X

Note 1: Classified defense articles and services are not eligible for export under the Canadian exemptions. U.S. origin articles, technical data, and services controlled in USML Category XVII are not eligible for export under the UK Treaty exemption. U.S. origin classified defense articles and services are not eligible for export under either the UK or AS Treaty exemptions except when being released pursuant to a U.S. Department of Defense written request, directive, or contract that provides for the export of the defense article or service.

Note 2: The phrase ''any part of the spectrum'' includes radio frequency (RF), infrared (IR), electro-optical, visual, ultraviolet (UV), acoustic, and magnetic. Defense articles related to reduced observables or counter reduced observables are defined as:

(a) Signature reduction (radio frequency (RF), infrared (IR), Electro-Optical, visual, ultraviolet (UV), acoustic, magnetic, RF emissions) of defense platforms, including systems, subsystems, components, materials (including dual-purpose materials used for Electromagnetic Interference (EM) reduction), technologies, and signature prediction, test and measurement equipment and software and material transmissivity/reflectivity prediction codes and optimization software.

(b) Electronically scanned array radar, high power radars, radar processing algorithms, periscope-mounted radar systems (PATRIOT), LADAR, multistatic and IR focal plane array-based sensors, to include systems, subsystems, components, materials, and technologies.

Note 3: Defense Articles related to sensor fusion beyond that required for display or identification correlation is defined as techniques designed to automatically combine information from two or more sensors/sources for the purpose of target identification, tracking, designation, or passing of data in support of surveillance or weapons engagement. Sensor fusion involves sensors such as acoustic, infrared, electro optical, frequency, etc. Display or identification correlation refers to the combination of target detections from multiple sources for assignment of common target track designation.

Note 4: Software source code beyond that source code required for basic operation, maintenance, and training for programs, systems, and/or subsystems is not eligible for use of the UK or AS Treaty exemptions, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of § 126.16 or § 126.17 of this subchapter and is consistent with other exclusions of this supplement.

Note 5: Manufacturing know-how, as defined in § 125.4(c)(6) of this subchapter, is not eligible for use of the UK or AS Treaty exemptions, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of § 126.16 or § 126.17 of this subchapter and is consistent with other exclusions of this supplement.

Note 6: Defense Articles specific to Man Portable Air Defense Systems (MANPADS) includes missiles which can be used without modification in other applications. It also includes production and test equipment and components specifically designed or modified for MANPAD systems, as well as training equipment specifically designed or modified for MANPAD systems.

Note 7: Naval nuclear propulsion plants includes all of USML Category VI(e). Naval nuclear propulsion information is technical data that concerns the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of naval nuclear-powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities. Examples of defense articles covered by this exclusion include nuclear propulsion plants and nuclear submarine technologies or systems; nuclear powered vessels (*see* USML Categories VI and XX).

Note 8: A complete gas turbine engine with embedded hot section components or digital engine controls is eligible for export or transfer under the Treaties. Technical data, other than required for routine external maintenance and operation, related to the hot section is not eligible for export under the Canadian exemption. Technical data, other than required for routine external maintenance and operation, related to the hot section or digital engine controls, as well as individual hot section parts or components are not eligible for the Treaty exemption whether shipped separately or accompanying a complete engine. Gas turbine engine hot section exempted defense article components and technology are combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles. Examples of gas turbine engine hot section developmental technologies are Integrated High Performance Turbine Engine Technology (IHPTET), Versatile, Affordable Advanced Turbine Engine (VAATE), and Ultra-Efficient Engine Technology (UEET), which are also excluded from export under the exemptions.

Note 9: Examples of countermeasures and counter-countermeasures related to defense articles not exportable under the AS or UK Treaty exemptions are:

(a) IR countermeasures;

(b) Classified techniques and capabilities;

(c) Exports for precision radio frequency location that directly or indirectly supports fire control and is used for situation awareness, target identification, target acquisition, and weapons targeting and Radio Direction Finding (RDF) capabilities. Precision RF location is defined as angle of arrival accuracy of less than five degrees (RMS) and RF emitter location of less than ten percent range error;

(d) Providing the capability to reprogram; and

(e) Acoustics (including underwater), active and passive countermeasures, and counter-countermeasures.

Note 10: Examples of defense articles covered by this exclusion include underwater acoustic vector sensors; acoustic reduction; off-board, underwater, active and passive sensing, propeller/propulsor technologies; fixed mobile/floating/powered detection systems which include in-buoy signal processing for target detection and classification; autonomous underwater vehicles capable of long endurance in ocean environments (manned submarines excluded); automated control algorithms embedded in on-board autonomous platforms which enable (a) group behaviors for target detection and classification, (b) adaptation to the environment or tactical situation for enhancing target detection and classification; ''intelligent autonomy'' algorithms which define the status, group (greater than 2) behaviors, and responses to detection stimuli by autonomous, underwater vehicles; and low frequency, broad-band ''acoustic color,'' active acoustic ''fingerprint'' sensing for the purpose of long range, single pass identification of ocean bottom objects, buried or otherwise (controlled under Category USML XI(a)(1), (a)(2), (b), (c), and (d)).

Note 11: This exclusion does not apply to the platforms (e.g., vehicles) for which the armored plates are applied. For exclusions related to the platforms, reference should be made to the other exclusions in this list, particularly for the category in which the platform is controlled.

The excluded defense articles include constructions of metallic or non-metallic materials or combinations thereof specially designed to provide protection for military systems. The phrase ''suitable for military use'' applies to any articles or materials which have been tested to level IIIA or above IAW NIJ standard 0108.01 or comparable national standard. This exclusion does not include military helmets, body armor, or other protective garments which may be exported IAW the terms of the AS or UK Treaty.

Note 12: Defense services or technical data specific to applied research (§ 125.4(c)(3) of this subchapter), design methodology (§ 125.4(c)(4) of this subchapter), engineering analysis (§ 125.4(c)(5) of this subchapter), or manufacturing know-how (§ 125.4(c)(6) of this subchapter) are not eligible for export under the Canadian exemptions. However, this exclusion does not include defense services or technical data specific to build-to-print as defined in § 125.4(c)(1) of this subchapter, build/design-to-specification as defined in § 125.4(c)(2) of this subchapter, or basic research as defined in § 125.4(c)(3) of this subchapter, or maintenance (*i.e.,* inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items parts or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item) of non-excluded defense articles which may be exported subject to other exclusions or terms of the Canadian exemptions.

Note 13: The term ''libraries'' (parametric technical databases) means a collection of technical information of a military nature, reference to which may enhance the performance of military equipment or systems.

Note 14: In order to utilize the authorized defense services under the Canadian exemption, the following must be complied with:

(a) The Canadian contractor and subcontractor must certify, in writing, to the U.S. exporter that the technical data and defense services being exported will be used only for an activity identified in Supplement No. 1 to part 126 of this subchapter and in accordance with § 126.5 of this subchapter; and

(b) A written arrangement between the U.S. exporter and the Canadian recipient must:

(1) Limit delivery of the defense articles being produced directly to an identified manufacturer in the United States registered in accordance with part 122 of this subchapter; a department or agency of the United States Federal Government; a Canadian-registered person authorized in writing to manufacture defense articles by and for the Government of Canada; a Canadian Federal, Provincial, or Territorial Government;

(2) Prohibit the disclosure of the technical data to any other contractor or subcontractor who is not a Canadian-registered person;

(3) Provide that any subcontract contain all the limitations of § 126.5 of this subchapter;

(4) Require that the Canadian contractor, including subcontractors, destroy or return to the U.S. exporter in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of the contract, unless for use by a Canadian or United States Government entity that requires in writing the technical data be maintained. The U.S. exporter must be provided written certification that the technical data is being retained or destroyed; and

(5) Include a clause requiring that all documentation created from U.S. origin technical data contain the statement that, ''This document contains technical data, the use of which is restricted by the U.S. Arms Export Control Act. This data has been provided in accordance with, and is subject to, the limitations specified in § 126.5 of the International Traffic in Arms Regulations (ITAR). By accepting this data, the consignee agrees to honor the requirements of the ITAR.''

(c) The U.S. exporter must provide the Directorate of Defense Trade Controls a semi-annual report of all their on-going activities authorized under § 126.5 of this subchapter. The report shall include the article(s) being produced; the end-user(s); the end-item into which the product is to be incorporated; the intended end-use of the product; the name and address of all the Canadian contractors and subcontractors.

Note 15: This exclusion does not apply to demining equipment in support of the clearance of landmines and unexploded ordnance for humanitarian purposes.

As used in this exclusion, ''anti-personnel landmine'' means any mine placed under, on, or near the ground or other surface area, or delivered by artillery, rocket, mortar, or similar means or dropped from an aircraft and which is designed to be detonated or exploded by the presence, proximity, or contact of a person; any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act; any manually-emplaced munition or device designed to kill, injure, or damage and which is actuated by remote control or automatically after a lapse of time.

Note 16: The cluster munitions that are subject to this exclusion are set forth below:

The Convention on Cluster Munitions, signed December 3, 2008, and entered into force on August 1, 2010, defines a ''cluster munition'' as:

A conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. Under the Convention, a ''cluster munition'' does not include the following munitions:

(a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defense role;

(b) A munition or submunition designed to produce electrical or electronic effects;

(c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

(1) Each munition contains fewer than ten explosive submunitions;

(2) Each explosive submunition weighs more than four kilograms;

(3) Each explosive submunition is designed to detect and engage a single target object;

(4) Each explosive submunition is equipped with an electronic self-destruction mechanism; and

(5) Each explosive submunition is equipped with an electronic self-deactivating feature.

Pursuant to U.S. law (Pub. L. 111–117, section 7055(b)), no military assistance shall be furnished for cluster munitions, no defense export license for cluster munitions may be issued, and no cluster munitions or cluster munitions technology shall be sold or transferred, unless:

(a) The submunitions of the cluster munitions, after arming, do not result in more than 1 percent unexploded ordnance across the range of intended operational environments; and

(b) The agreement applicable to the assistance, transfer or sale of such cluster munitions or cluster munitions technology specifies that the cluster munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians.

Note 17: The radar systems described are controlled in USML Category XI(a)(3)(i) through (v). As used in this entry, the term ''systems'' includes equipment, devices, software, assemblies, modules, components, practices, processes, methods, approaches, schema, frameworks, and models.

*An ''X'' in the chart indicates that the item is excluded from use under the exemption referenced in the top of the column. An item excluded in any one row is excluded regardless of whether other rows may contain a description that would include the item.

[79 FR 27, Jan. 2, 2014]

PART 127—VIOLATIONS AND PENALTIES

Sec.
127.1 Violations.

127.2 Misrepresentation and omission of facts.
127.3 Penalties for violations.
127.4 Authority of U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers.
127.5 Authority of the Defense Security Service.
126.6 Seizure and forfeiture in attempts at illegal exports.
127.7 Debarment.
127.8 [Reserved]
127.9 Applicability of orders.
127.10 Civil penalty.
127.11 Past violations.
127.12 Voluntary disclosures.

AUTHORITY: Sections 2, 38, and 42, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39316, July 22, 1993, unless otherwise noted.

§ 127.1 Violations.

(a) Without first obtaining the required license or other written approval from the Directorate of Defense Trade Controls, it is unlawful:

(1) To export or attempt to export from the United States any defense article or technical data or to furnish or attempt to furnish any defense service for which a license or written approval is required by this subchapter;

(2) To reexport or retransfer or attempt to reexport or retransfer any defense article, technical data, or defense service from one foreign end-user, end-use, or destination to another foreign end-user, end-use, or destination for which a license or written approval is required by this subchapter, including, as specified in § 126.16(h) and § 126.17(h) of this subchapter, any defense article, technical data, or defense service that was exported from the United States without a license pursuant to any exemption under this subchapter;

(3) To import or attempt to import any defense article whenever a license is required by this subchapter;

(4) To conspire to export, import, reexport, retransfer, furnish or cause to be exported, imported, reexported, retransferred or furnished, any defense article, technical data, or defense service for which a license or written approval is required by this subchapter; or

(5) To possess or attempt to possess any defense article with intent to export or transfer such defense article in violation of 22 U.S.C. 2778 and 2779, or any regulation, license, approval, or order issued thereunder.

(b) It is unlawful:

(1) To violate any of the terms or conditions of a license or approval granted pursuant to this subchapter, any exemption contained in this subchapter, or any rule or regulation contained in this subchapter;

(2) To engage in the business of brokering activities for which registration and a license or written approval is required by this subchapter without first registering or obtaining the required license or written approval from the Directorate of Defense Trade Controls. For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of engaging in an activity as reflected in § 129.2(b) of this subchapter.

(3) To engage in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services without complying with the registration requirements. For the purposes of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service.

(c) Any person who is granted a license or other approval or acts pursuant to an exemption under this subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the defense article, which includes technical data, has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article abroad. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and regardless of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor.

(d) A person who is ineligible pursuant to § 120.1(c)(2) of this subchapter, or a person with knowledge that another

person is ineligible pursuant to § 120.1(c)(2) of this subchapter, may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to and written authorization from the Directorate of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in § 127.2(b) for such ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction subject to this subchapter that may involve any defense article, which includes technical data, defense services, or brokering activities, where such ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(e) No person may knowingly or willfully attempt, solicit, cause, or aid, abet, counsel, demand, induce, procure, or permit the commission of any act prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

[77 FR 16641, Mar. 21, 2012, as amended at 78 FR 52688, Aug. 26, 2013; 79 FR 8088, Feb. 11, 2014]

§ 127.2 Misrepresentation and omission of facts.

(a) It is unlawful to use or attempt to use any export or temporary import control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting, transferring, reexporting, retransferring, obtaining, or furnishing any defense article, technical data, or defense service. Any false statement, misrepresentation, or omission of material fact in an export or temporary import control document will be considered as made in a matter within the jurisdiction of a department or agency of the United States for the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778, and 22 U.S.C. 2779.

(b) For the purpose of this subchapter, *export or temporary import control documents* include the following:

(1) An application for a permanent export, reexport, retransfer, or a temporary import license and supporting documents.

(2) Electronic Export Information filing.

(3) Invoice.

(4) Declaration of destination.

(5) Delivery verification.

(6) Application for temporary export.

(7) Application for registration.

(8) Purchase order.

(9) Foreign import certificate.

(10) Bill-of-lading.

(11) Airway bill.

(12) Nontransfer and use certificate.

(13) Any other document used in the regulation or control of a defense article, defense service, or brokering activity regulated by this subchapter.

(14) Any other shipping document that has information related to the export of the defense article or defense service.

[58 FR 39316, July 22, 1993, as amended at 77 FR 16642, Mar. 21, 2012; 78 FR 52689, Aug. 26, 2013]

§ 127.3 Penalties for violations.

Any person who willfully:

(a) Violates any provision of § 38 or § 39 of the Arms Export Control Act (22 U.S.C. 2778 and 2779) or any rule or regulation issued under either § 38 or § 39 of the Act, or any undertaking specifically required by part 124 of this subchapter; or

(b) In a registration, license application, or report required by § 38 or § 39 of the Arms Export Control Act (22 U.S.C. 2778 and 2779) or by any rule or regulation issued under either section, makes any untrue statement of a material fact or omits a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be subject to a fine or imprisonment, or both, as prescribed by 22 U.S.C. 2778(c).

[77 FR 16642, Mar. 21, 2012]

§ 127.4 Authority of U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers.

(a) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers may take appropriate action to ensure observance of this subchapter as to the export or the attempted export or the temporary import of any defense article or

technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft. This applies whether the export is authorized by license or by written approval issued under this subchapter or by exemption.

(b) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers have the authority to investigate, detain or seize any export or attempted export of defense articles or technical data contrary to this subchapter.

(c) Upon the presentation to a U.S. Customs and Border Protection Officer of a license or written approval, or claim of an exemption, authorizing the export of any defense article, the customs officer may require the production of other relevant documents and information relating to the final export. This includes an invoice, order, packing list, shipping document, correspondence, instructions, and the documents otherwise required by the U.S. Customs and Border Protection or U.S. Immigration and Customs Enforcement.

(d) If an exemption under this subchapter is used or claimed to export, transfer, reexport or retransfer, furnish, or obtain a defense article, technical data, or defense service, law enforcement officers may rely upon the authorities noted, additional authority identified in the language of the exemption, and any other lawful means or authorities to investigate such a matter.

[70 FR 50965, Aug. 29, 2005, as amended at 77 FR 16642, Mar. 21, 2012]

§ 127.5 Authority of the Defense Security Service.

In the case of exports involving classified technical data or defense articles, the Defense Security Service may take appropriate action to ensure compliance with the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). Upon a request to the Defense Security Service regarding the export of any classified defense article or technical data, the Defense Security Service official or a designated government transmittal authority may require the production of other relevant documents and information relating to the proposed export.

[71 FR 20549, Apr. 21, 2006]

§ 127.6 Seizure and forfeiture in attempts at illegal exports.

(a) An attempt to export from the United States any defense articles in violation of the provisions of this subchapter constitutes an offense punishable under section 401 of title 22 of the United States Code. Whenever it is known or there is probable cause to believe that any defense article is intended to be or is being or has been exported or removed from the United States in violation of law, such article and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition as provided in section 401 of title 22 of the United States Code.

(b) Similarly, an attempt to violate any of the conditions under which a temporary export or temporary import license was issued pursuant to this subchapter or to violate the requirements of § 123.2 of this subchapter also constitutes an offense punishable under section 401 of title 22 of the United States Code, and such article, together with any vessel, vehicle or aircraft involved in any such attempt is subject to seizure, forfeiture, and disposition as provided in section 401 of title 22 of the United States Code.

§ 127.7 Debarment.

(a) *Administrative debarment*. In implementing section 38 of the Arms Export Control Act, the Assistant Secretary of State for Political-Military Affairs may debar and thereby prohibit any person from participating directly or indirectly in any activities that are subject to this subchapter for any of the reasons listed below. Any such prohibition is referred to as an administrative debarment for purposes of this subchapter. The Assistant Secretary of State for Political-Military Affairs shall determine the appropriate period of time for administrative debarment, which generally shall be for a period of three years. Reinstatement is not automatic, however, and in all cases the

debarred persons must submit a request for reinstatement and be approved for reinstatement before engaging in any activities subject to this subchapter. (*See* part 128 of this subchapter for administrative procedures.)

(b) *Statutory debarment*. Section 38(g)(4) of the Arms Export Control Act prohibits the issuance of licenses to persons who have been convicted of violating the U.S. criminal statutes enumerated in section 38(g)(1) of the Arms Export Control Act. Discretionary authority to issue licenses is provided, but only if certain statutory requirements are met. It is the policy of the Department of State not to consider applications for licenses or requests for approvals involving any person who has been convicted of violating the Arms Export Control Act or convicted of conspiracy to violate that Act for a three year period following conviction. Such individuals shall be notified in writing that they are statutorily debarred pursuant to this policy. A list of persons who have been convicted of such offenses and debarred for this reason shall be published periodically in the FEDERAL REGISTER. Statutory debarment in such cases is based solely upon the outcome of a criminal proceeding, conducted by a court of the United States, that established guilt beyond a reasonable doubt in accordance with due process. The procedures of part 128 of this subchapter are not applicable in such cases.

(c) *Grounds*. (1) The basis for statutory debarment, as described in paragraph (b) of this section, is any conviction for violating the Arms Export Control Act (*see* §127.3) or any conspiracy to violate the Arms Export Control Act.

(2) The basis for administrative debarment, as described in paragraph (a) of this section and in part 128 of this subchapter, is any violation of 22 U.S.C. 2778 or any rule or regulation issued thereunder when such a violation is of such a character as to provide a reasonable basis for the Directorate of Defense Trade Controls to believe that the violator cannot be relied upon to comply with the statute or these rules or regulations in the future, and when such violation is established in accordance with part 128 of this subchapter.

(d) *Appeals*. Any person who is ineligible pursuant to paragraph (b) of this section may appeal to the Under Secretary of State for Arms Control and International Security for reconsideration of the ineligibility determination. The procedures specified in §128.13 of this subchapter will be used in submitting a reconsideration appeal.

[78 FR 52689, Aug. 26, 2013]

§127.8 [Reserved]

§127.9 Applicability of orders.

For the purpose of preventing evasion, orders of the Assistant Secretary of State for Political-Military Affairs debarring a person under §127.7 may be made applicable to any other person who may then or thereafter (during the term of the order) be related to the debarred person by affiliation, ownership, control, position of responsibility, or other commercial connection. Appropriate notice and opportunity to respond to the basis for the suspension will be given.

[78 FR 52689, Aug. 26, 2013]

§127.10 Civil penalty.

(a) The Assistant Secretary of State for Political-Military Affairs is authorized to impose a civil penalty in an amount not to exceed that authorized by 22 U.S.C. 2778, 2779a, and 2780 for each violation of 22 U.S.C. 2778, 2779a, and 2780, or any regulation, order, license, or written approval issued thereunder. This civil penalty may be either in addition to, or in lieu of, any other liability or penalty which may be imposed.

(b) The Directorate of Defense Trade Controls may make:

(1) The payment of a civil penalty under this section or

(2) The completion of any administrative action pursuant to this part 127 or 128 of this subchapter a prior condition for the issuance, restoration, or continuing validity of any export license or other approval.

[58 FR 39316, July 22, 1993, as amended at 62 FR 67276, Dec. 24, 1997; 71 FR 20550, Apr. 21, 2006; 77 FR 16642, Mar. 21, 2012]

§ 127.11 Past violations.

(a) *Presumption of denial.* Pursuant to section 38 of the Arms Export Control Act, licenses or other approvals may not be granted to persons who have been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or who are ineligible to receive any export licenses from any agency of the U.S. Government, subject to a narrowly defined statutory exception. This provision establishes a presumption of denial for licenses or other approvals involving such persons. This presumption is applied by the Directorate of Defense Trade Controls to all persons convicted or deemed ineligible in this manner since the effective date of the Arms Export Control Act (Public Law 94–329; 90 Stat. 729) (June 30, 1976).

(b) *Policy.* An exception to the policy of the Department of State to deny applications for licenses or other approvals that involve persons described in paragraph (a) of this section shall not be considered unless there are extraordinary circumstances surrounding the conviction or ineligibility to export, and only if the applicant demonstrates, to the satisfaction of the Assistant Secretary of State for Political-Military Affairs, that the applicant has taken appropriate steps to mitigate any law enforcement and other legitimate concerns, and to deal with the causes that resulted in the conviction, ineligibility, or debarment. Any person described in paragraph (a) of this section who wishes to request consideration of any application must explain, in a letter to the Deputy Assistant Secretary of State for Defense Trade Controls the reasons why the application should be considered. If the Assistant Secretary of State for Political-Military Affairs concludes that the application and written explanation have sufficient merit, the Assistant Secretary shall consult with the Office of the Legal Adviser and the Department of the Treasury regarding law enforcement concerns, and may also request the views of other departments, including the Department of Justice. If the Directorate of Defense Trade Controls does grant the license or other approval, subsequent applications from the same person need not repeat the information previously provided but should instead refer to the favorable decision.

(c) *Debarred persons.* Persons debarred pursuant to § 127.7(c) (statutory debarment) may not utilize the procedures provided by this section while the debarment is in force. Such persons may utilize only the procedures provided by § 127.7(d) of this part.

[71 FR 20550, Apr. 21, 2006, as amended at 79 FR 8088, Feb. 11, 2014]

§ 127.12 Voluntary disclosures.

(a) *General policy.* The Department strongly encourages the disclosure of information to the Directorate of Defense Trade Controls by persons (see § 120.14 of this subchapter) that believe they may have violated any export control provision of the Arms Export Control Act, or any regulation, order, license, or other authorization issued under the authority of the Arms Export Control Act. The Department may consider a voluntary disclosure as a mitigating factor in determining the administrative penalties, if any, that should be imposed. Failure to report a violation may result in circumstances detrimental to U.S. national security and foreign policy interests, and will be an adverse factor in determining the appropriate disposition of such violations.

(b) *Limitations.* (1) The provisions of this section apply only when information is provided to the Directorate of Defense Trade Controls for its review in determining whether to take administrative action under part 128 of this subchapter concerning a violation of the export control provisions of the Arms Export Control Act and these regulations.

(2) The provisions of this section apply only when information is received by the Directorate of Defense Trade Controls for review prior to such time that either the Department of State or any other agency, bureau, or department of the United States Government obtains knowledge of either the same or substantially similar information from another source and commences an investigation or inquiry that involves that information, and that is intended to determine whether the Arms Export Control Act or these

regulations, or any other license, order, or other authorization issued under the Arms Export Control Act has been violated.

(3) The violation(s) in question, despite the voluntary nature of the disclosure, may merit penalties, administrative actions, sanctions, or referrals to the Department of Justice to consider criminal prosecution. In the latter case, the Directorate of Defense Trade Controls will notify the Department of Justice of the voluntary nature of the disclosure, although the Department of Justice is not required to give that fact any weight. The Directorate of Defense Trade Controls has the sole discretion to consider whether ''voluntary disclosure,'' in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any, administrative action will be imposed. Some of the mitigating factors the Directorate of Defense Trade Controls may consider are:

(i) Whether the transaction would have been authorized, and under what conditions, had a proper license request been made;

(ii) Why the violation occurred;

(iii) The degree of cooperation with the ensuing investigation;

(iv) Whether the person has instituted or improved an internal compliance program to reduce the likelihood of future violation;

(v) Whether the person making the disclosure did so with the full knowledge and authorization of the person's senior management. (If not, then the Directorate will not deem the disclosure voluntary as covered in this section.)

(4) The provisions of this section do not, nor should they be relied on to, create, confer, or grant any rights, benefits, privileges, or protection enforceable at law or in equity by any person in any civil, criminal, administrative, or other matter.

(5) Nothing in this section shall be interpreted to negate or lessen the affirmative duty pursuant to §§126.1(e), 126.16(h)(5), and 126.17(h)(5) of this subchapter upon persons to inform the Directorate of Defense Trade Controls of the actual or final sale, export, transfer, reexport, or retransfer of a defense article, technical data, or defense service to any country referred to in §126.1 of this subchapter, any citizen of such country, or any person acting on its behalf.

(c) *Notification.* (1) Any person wanting to disclose information that constitutes a voluntary disclosure should, in the manner outlined below, initially notify the Directorate of Defense Trade Controls immediately after a violation is discovered and then conduct a thorough review of all defense trade transactions where a violation is suspected.

(i) If the notification does not contain all the information required by 127.12(c)(2) of this section, a full disclosure must be submitted within 60 calendar days of the notification, or the Directorate of Defense Trade Controls will not deem the notification to qualify as a voluntary disclosure.

(ii) If the person is unable to provide a full disclosure within the 60 calendar day deadline, an empowered official (see §120.25 of this subchapter) or a senior officer may request an extension of time in writing. A request for an extension must specify what information required by §127.12(c)(2) of this section could not be immediately provided and the reasons why.

(iii) Before approving an extension of time to provide the full disclosure, the Directorate of Defense Trade Controls may require the requester to certify in writing that they will provide the full disclosure within a specific time period.

(iv) Failure to provide a full disclosure within a reasonable time may result in a decision by the Directorate of Defense Trade Controls not to consider the notification as a mitigating factor in determining the appropriate disposition of the violation. In addition, the Directorate of Defense Trade Controls may direct the requester to furnish all relevant information surrounding the violation.

(2) Notification of a violation must be in writing and should include the following information:

(i) A precise description of the nature and extent of the violation (e.g., an unauthorized shipment, doing business with a party denied U.S. export privileges, etc.);

(ii) The exact circumstances surrounding the violation (a thorough explanation of why, when, where, and how the violation occurred);

(iii) The complete identities and addresses of all persons known or suspected to be involved in the activities giving rise to the violation (including mailing, shipping, and e-mail addresses; telephone and fax/facsimile numbers; and any other known identifying information);

(iv) Department of State license numbers, exemption citation, or description of any other authorization, if applicable;

(v) U.S. Munitions List category and subcategory, product description, quantity, and characteristics or technological capability of the hardware, technical data or defense service involved;

(vi) A description of corrective actions already undertaken that clearly identifies the new compliance initiatives implemented to address the causes of the violations set forth in the voluntary disclosure and any internal disciplinary action taken; and how these corrective actions are designed to deter those particular violations from occurring again;

(vii) The name and address of the person making the disclosure and a point of contact, if different, should further information be needed.

(3) Factors to be addressed in the voluntary disclosure include, for example, whether the violation was intentional or inadvertent; the degree to which the person responsible for the violation was familiar with the laws and regulations, and whether the person was the subject of prior administrative or criminal action under the AECA; whether the violations are systemic; and the details of compliance measures, processes and programs, including training, that were in place to prevent such violations, if any. In addition to immediately providing written notification, persons are strongly urged to conduct a thorough review of all export-related transactions where a possible violation is suspected.

(d) *Documentation.* The written disclosure should be accompanied by copies of substantiating documents. Where appropriate, the documentation should include, but not be limited to:

(1) Licensing documents (e.g., license applications, export licenses, and end-user statements), exemption citation, or other authorization description, if any;

(2) Shipping documents (e.g., Electronic Export Information filing, including the Internal Transaction Number, air waybills, and bills of laden, invoices, and any other associated documents); and

(3) Any other relevant documents must be retained by the person making the disclosure until the Directorate of Defense Trade Controls requests them or until a final decision on the disclosed information has been made.

(e) *Certification.* A certification must be submitted stating that all of the representations made in connection with the voluntary disclosure are true and correct to the best of that person's knowledge and belief. Certifications should be executed by an empowered official (See § 120.25 of this subchapter), or by a senior officer (e.g. chief executive officer, president, vice-president, comptroller, treasurer, general counsel, or member of the board of directors). If the violation is a major violation, reveals a systemic pattern of violations, or reflects the absence of an effective compliance program, the Directorate of Defense Trade Controls may require that such certification be made by a senior officer of the company.

(f) *Oral presentations.* Oral presentation is generally not necessary to augment the written presentation. However, if the person making the disclosure believes a meeting is desirable, a request should be included with the written presentation.

(g) Send voluntary disclosures to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls. Consult the Directorate of Defense Trade Controls Web site at *http://www.pmddtc.state.gov* for the appropriate street address.

[58 FR 39316, July 22, 1993, as amended at 70 FR 34655, June 15, 2005; 71 FR 20550, Apr. 21, 2006; 72 FR 70778, Dec. 13, 2007; 77 FR 16642, Mar. 21, 2012]

PART 128—ADMINISTRATIVE PROCEDURES

Sec.
128.1 Exclusion of functions from the Administrative Procedure Act.
128.2 Administrative Law Judge.
128.3 Institution of Administrative Proceedings.
128.4 Default.
128.5 Answer and demand for oral hearing.
128.6 Discovery.
128.7 Prehearing conference.
128.8 Hearings.
128.9 Proceedings before and report of Administrative Law Judge.
128.10 Disposition of proceedings.
128.11 Consent agreements.
128.12 Rehearings.
128.13 Appeals.
128.14 Confidentiality of proceedings.
128.15 Orders containing probationary periods.
128.16 Extension of time.
128.17 Availability of orders.

AUTHORITY: Sections. 2, 38, 40, 42, and 71, Arms Export Control Act. 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; E.O. 12291, 46 FR 1981; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39320, July 22, 1993, unless otherwise noted.

§ 128.1 Exclusion of functions from the Administrative Procedure Act.

The Arms Export Control Act authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign policy of the United States. It authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. It also authorizes the Secretary of State to revoke, suspend or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The administration of the Arms Export Control Act is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

[61 FR 48831, Sept. 17, 1996]

§ 128.2 Administrative Law Judge.

The Administrative Law Judge referred to in this part is an Administrative Law Judge appointed by the Department of State. The Administrative Law Judge is authorized to exercise the powers and perform the duties provided for in §§ 127.7 and 128.3 through 128.16 of this subchapter.

[78 FR 52689, Aug. 26, 2013]

§ 128.3 Institution of Administrative Proceedings.

(a) *Charging letters.* The Deputy Assistant Secretary of State for Defense Trade Controls or the Director, Office of Defense Trade Controls Compliance, with the concurrence of the Office of the Legal Adviser, Department of State, may initiate proceedings to impose debarment or civil penalties in accordance with § 127.7 or § 127.10 of this subchapter, respectively. Administrative proceedings shall be initiated by means of a charging letter. The charging letter will state the essential facts constituting the alleged violation and refer to the regulatory or other provision involved. It will give notice to the respondent to answer the charges within 30 days, as provided in § 128.5(a), and indicate that a failure to answer will be taken as an admission of the truth of the charges. It will inform the respondent that he or she is entitled to an oral hearing if a written demand for one is filed with the answer or within seven days after service of the answer. The respondent will also be informed that he or she may, if so desired, be represented by counsel of his or her choosing. Charging letters may be amended from time to time, upon reasonable notice.

(b) *Service.* A charging letter is served upon a respondent:

(1) If the respondent is a resident of the United States, when it is mailed postage prepaid in a wrapper addressed to the respondent at that person's last known address; or when left with the respondent or the agent or employee of

the respondent; or when left at the respondent's dwelling with some person of suitable age and discretion then residing herein; or

(2) If the respondent is a non-resident of the United States, when served upon the respondent by any of the foregoing means. If such methods of service are not practicable or appropriate, the charging letter may be tendered for service on the respondent to an official of the government of the country wherein the respondent resides, provided that there is an agreement or understanding between the United States Government and the government of the country wherein the respondent resident permitting this action.

[61 FR 48831, Sept. 17, 1996, as amended at 71 FR 20551, Apr. 21, 2006; 78 FR 52689, Aug. 26, 2013]

§ 128.4 Default.

(a) *Failure to answer*. If the respondent fails to answer the charging letter, the respondent may be held in default. The case shall then be referred to the Administrative Law Judge for consideration in a manner as the Administrative Law Judge may consider appropriate. Any order issued shall have the same effect as an order issued following the disposition of contested charges.

(b) *Petition to set aside defaults*. Upon showing good cause, any respondent against whom a default order has been issued may apply to set aside the default and vacate the order entered thereon. The petition shall be submitted to duplicate to the Assistant Secretary for Political-Military Affairs, U.S. Department of State, 2201 C Street, NW., Washington, DC 20520. The Director will refer the petition to the Administrative Law Judge for consideration and a recommendation. The Administrative law Judge will consider the application and may order a hearing and require the respondent to submit further evidence in support of his or her petition. The filing of a petition to set aside a default does not in any manner affect an order entered upon default and such order continues in full force and effect unless a further order is made modifying or terminating it.

[61 FR 48832, Sept. 17, 1996]

§ 128.5 Answer and demand for oral hearing.

(a) *When to answer*. The respondent is required to answer the charging letter within 30 days after service.

(b) *Contents of answer*. An answer must be responsive to the charging letter. It must fully set forth the nature of the respondent's defense or defenses. In the answer, the respondent must admit or deny specifically each separate allegation of the charging letter, unless the respondent is without knowledge, in which case the respondent's answer shall so state and the statement shall operate as denial. Failure to deny or controvert any particular allegation will be deemed an admission thereof. The answer may set forth such additional or new matter as the respondent believes support a defense or claim of mitigation. Any defense or partial defense not specifically set forth in an answer shall be deemed waived. Evidence offered thereon by the respondent at a hearing may be refused except upon good cause being shown. If the respondent does not demand an oral hearing, he or she shall transmit, within seven (7) days after the service of his or her answer, original or photocopies of all correspondence, papers, records, affidavits, and other documentary or written evidence having any bearing upon or connection with the matters in issue. If any such materials are in language other than English, translations into English shall be submitted at the same time.

(c) *Submission of answer*. The answer, written demand for oral hearing (if any) and supporting evidence required by paragraph (b) of this section shall be in duplicate and mailed or delivered to the designated Administrative Law Judge. A copy shall be simultaneously mailed to the Deputy Assistant Secretary of State for Defense Trade Controls, SA–1, Room 1200, Department of State, Washington, DC 20522–0112, or delivered to 2401 Street NW., Washington, DC addressed to the Deputy Assistant Secretary of State for Defense Trade Controls, SA–1, Room 1200, Department of State, Washington, DC 20037.

[58 FR 39320, July 22, 1993, as amended at 61 FR 48832, Sept. 17, 1996; 71 FR 20551, Apr. 21, 2006; 79 FR 8089, Feb. 11, 2014]

§ 128.6 Discovery.

(a) *Discovery by the respondent.* The respondent, through the Administrative Law Judge, may request from the Directorate of Defense Trade Controls any relevant information, not privileged or otherwise not authorized for release, that may be necessary or helpful in preparing a defense. The Directorate of Defense Trade Controls may provide any relevant information, not privileged or otherwise not authorized for release, that may be necessary or helpful in preparing a defense. The Directorate of Defense Trade Controls may supply summaries in place of original documents and may withhold information from discovery if the interests of national security or foreign policy so require, or if necessary to comply with any statute, executive order or regulation requiring that the information not be disclosed. The respondent may request the Administrative Law Judge to request any relevant information, books, records, or other evidence, from any other person or government agency so long as the request is reasonable in scope and not unduly burdensome.

(b) *Discovery by the Directorate of Defense Trade Controls.* The Directorate of Defense Trade Controls or the Administrative Law Judge may make reasonable requests from the respondent of admissions of facts, answers to interrogatories, the production of books, records, or other relevant evidence, so long as the request is relevant and material.

(c) *Subpoenas.* At the request of any party, the Administrative Law Judge may issue subpoenas, returnable before him, requiring the attendance of witnesses and the production of books, records, and other documentary or physical evidence determined by he Administrative Law Judge to be relevant and material to the proceedings, reasonable in scope, and not unduly burdensome.

(d) *Enforcement of discovery rights.* If the Directorate of Defense Trade Controls fails to provide the respondent with information in its possession which is not otherwise available and which is necessary to the respondent's defense, the Administrative Law Judge may dismiss the charges on her or his own motion or on a motion of the respondent. If the respondent fails to respond with reasonable diligence to the requests for discovery by the Directorate of Defense Trade Controls or the Administrative Law Judge, on her or his own motion or motion of the Directorate of Defense Trade Controls, and upon such notice to the respondent as the Administrative Law Judge may direct, may strike respondent's answer and declare the respondent in default, or make any other ruling which the Administrative Law Judge deems necessary and just under the circumstances. If a third party fails to respond to the request for information, the Administrative Law Judge shall consider whether the evidence sought is necessary to a fair hearing, and if it is so necessary that a fair hearing may not be held without it, the Administrative Law Judge shall determine whether substitute information is adequate to protect the rights of the respondent. If the Administrative Law Judge decides that a fair hearing may be held with the substitute information, then the proceedings may continue. If not, then the Administrative Law Judge may dismiss the charges.

[61 FR 48832, Sept. 17, 1996, as amended at 71 FR 20551, Apr. 21, 2006]

§ 128.7 Prehearing conference.

(a)(1) The Administrative Law Judge may, upon his own motion or upon motion of any party, request the parties or their counsel to a prehearing conference to consider:

(i) Simplification of issues;

(ii) The necessity or desirability of amendments to pleadings;

(iii) Obtaining stipulations of fact and of documents to avoid unnecessary proof; or

(iv) Such other matter as may expedite the disposition of the proceeding.

(2) The Administrative Law Judge will prepare a summary of the action agreed upon or taken at the conference, and will incorporate therein any written stipulations or agreements made by the parties.

(3) The conference proceedings may be recorded magnetically or taken by a reporter and transcribed, and filed with the Administrative Law Judge.

(b) If a conference is impracticable , the Administrative Law Judge may request the parties to correspond with the person to achieve the purposes of a conference. The Administrative Law Judge shall prepare a summary of action taken as in the case of a conference.

[61 FR 48832, Sept. 17, 1996, as amended at 71 FR 20551, Apr. 21, 2006]

§ 128.8 Hearings.

(a) A respondent who had not filed a timely written answer is not entitled to a hearing, and the case may be considered by the Administrative Law Judge as provided in § 128.4(a). If any answer is filed, but no oral hearing demanded, the Administrative Law Judge may proceed to consider the case upon the written pleadings and evidence available. The Administrative Law Judge may provide for the making of the record in such manner as the Administrative Law Judge deems appropriate. If respondent answers and demands an oral hearing, the Administrative Law Judge, upon due notice, shall set the case for hearing, unless a respondent has raised in his answer no issues of material fact to be determined. If respondent fails to appear at a scheduled hearing, the hearing nevertheless may proceed in respondent's absence. The respondent's failure to appear will not affect the validity of the hearing or any proceedings or action thereafter.

(b) The Administrative Law Judge may administer oaths and affirmations. Respondent may be represented by counsel. Unless otherwise agreed by the parties and the Administrative Law Judge the proceeding will be taken by a reporter or by magnetic recording, transcribed, and filed with the Administrative Law Judge. Respondent may examine the transcript and may obtain a copy upon payment of proper costs.

[61 FR 48833, Sept. 17, 1996]

§ 128.9 Proceedings before and report of Administrative Law Judge.

(a) The Administrative Law Judge may conform any part of the proceedings before him or her to the Federal Rules of Civil Procedure. The record may be made available in any other administrative or other proceeding involving the same respondent.

(b) The Administrative Law Judge, after considering the record, will prepare a written report. The report will include findings of fact, findings of law, a finding whether a law or regulation has been violated, and the Administrative Law Judge's recommendations. It shall be transmitted to the Assistant Secretary for Political-Military Affairs, Department of State.

[61 FR 48833, Sept. 17, 1996]

§ 128.10 Disposition of proceedings.

Where the evidence is not sufficient to support the charges, the Deputy Assistant Secretary of State for Defense Trade Controls or the Administrative Law Judge will dismiss the charges. Where the Administrative Law Judge finds that a violation has been committed, the Administrative Law Judge's recommendation shall be advisory only. The Assistant Secretary of State for Political-Military Affairs will review the record, consider the report of the Administrative Law Judge, and make an appropriate disposition of the case. The Deputy Assistant Secretary of State for Defense Trade Controls may issue an order debarring the respondent from participating in the export of defense articles or technical data or the furnishing of defense services as provided in § 127.7 of this subchapter, impose a civil penalty as provided in § 127.10 of this subchapter, or take such action as the Administrative Law Judge may recommend. Any debarment order will be effective for the period of time specified therein and may contain such additional terms and conditions as are deemed appropriate. A copy of the order together with a copy of the Administrative Law Judge's report will be served upon the respondent.

[79 FR 8089, Feb. 11, 2014]

§ 128.11 Consent agreements.

(a) The Directorate of Defense Trade Controls and the respondent may, by agreement, submit to the Administrative Law Judge a proposal for the issuance of a consent order. The Administrative Law Judge will review the

facts of the case and the proposal and may conduct conferences with the parties and may require the presentation of evidence in the case. If the Administrative Law Judge does not approve the proposal, the Administrative Law Judge will notify the parties and the case will proceed as though no consent proposal had been made. If the proposal is approved, the Administrative Law Judge will report the facts of the case along with recommendations to the Assistant Secretary of State for Political-Military Affairs. If the Assistant Secretary of State for Political-Military Affairs does not approve the proposal, the case will proceed as though no consent proposal had been made. If the Assistant Secretary of State for Political-Military Affairs approves the proposal, an appropriate order may be issued.

(b) Cases may also be settled prior to service of a charging letter. In such an event, a proposed charging letter shall be prepared, and a consent agreement and order shall be submitted for the approval and signature of the Assistant Secretary for Political-Military Affairs, and no action by the Administrative Law Judge shall be required. Cases which are settled may not be reopened or appealed.

[61 FR 48833, Sept. 17, 1996, as amended at 71 FR 20552, Apr. 21, 2006]

§ 128.12 Rehearings.

The Administrative Law Judge may grant a rehearing or reopen a proceeding at any time for the purpose of hearing any relevant and material evidence which was not known or obtainable at the time of the original hearing. A report for rehearing or reopening must contain a summary of such evidence, and must explain the reasons why it could not have been presented at the original hearing. The Administrative Law Judge will inform the parties of any further hearing, and will conduct such hearing and submit a report and recommendations in the same manner as provided for the original proceeding (Described in § 128.10).

[61 FR 48833, Sept. 17, 1996]

§ 128.13 Appeals.

(a) *Filing of appeals.* An appeal must be in writing, and be addressed to and filed with the Under Secretary of State for Arms Control and International Security, Department of State, Washington, DC 20520. An appeal from a final order denying export privileges or imposing civil penalties must be filed within 30 days after receipt of a copy of the order. If the Under Secretary cannot for any reason act on the appeal, he or she may designate another Department of State official to receive and act on the appeal.

(b) *Grounds and conditions for appeal.* The respondent may appeal from the debarment or from the imposition of a civil penalty (except the imposition of civil penalties pursuant to a consent order pursuant to § 128.11) upon the ground: (1) That the findings of a violation are not supported by any substantial evidence; (2) that a prejudicial error of law was committed: or (3) that the provisions of the order are arbitrary, capricious, or an abuse of discretion. The appeal must specify upon which of these grounds the appeal is based and must indicate from which provisions of the order the appeal is taken. An appeal from an order issued upon default will not be entertained if the respondent has failed to seek relief as provided in § 128.4(b).

(c) *Matters considered on appeal.* An appeal will be considered upon the basis of the assembled record. This record consists of (but is not limited to) the charging letter, the respondent's answer, the transcript or magnetic recording of the hearing before the Administrative Law Judge, the report of the Administrative Law Judge, the order of the Assistant Secretary of State for Political-Military Affairs, and any other relevant documents involved in the proceedings before the Administrative Law Judge. The Under Secretary of State for Arms Control and International Security may direct a rehearing and reopening of the proceedings before the Administrative Law Judge if he or she finds that the record is insufficient or that new evidence is relevant and material to the issues and was not known and was not reasonably available to the respondent at the time of the original hearings.

(d) *Effect of appeals.* The taking of an appeal will not stay the operation of any order.

(e) *Preparation of appeals*—(1) *General requirements.* An appeal shall be in letter form. The appeal and accompanying material should be filed in duplicate, unless otherwise indicated, and a copy simultaneously mailed to the Deputy Assistant Secretary of State for Defense Trade Controls, SA–1, Room 1200, Department of State, Washington, DC 20522–0112 or delivered to 2401 E Street NW., Washington, DC addressed to the Deputy Assistant Secretary of State for Defense Trade Controls, SA–1, Room 1200, Department of State, Washington, DC 20037.

(2) *Oral presentation.* The Under Secretary of State for Arms Control and International Security may grant the appellant an opportunity for oral argument and will set the time and place for oral argument and will notify the parties, ordinarily at least 10 days before the date set.

(f) *Decisions.* All appeals will be considered and decided within a reasonable time after they are filed. An appeal may be granted or denied in whole or in part, or dismissed at the request of the appellant. The decision of the Under Secretary of State for Arms Control and International Security will be final.

[58 FR 39320, July 22, 1993, as amended at 61 FR 48833, Sept. 17, 1996; 71 FR 20552, Apr. 21, 2006; 79 FR 8089, Feb. 11, 2014]

§ 128.14 Confidentiality of proceedings.

Proceedings under this part are confidential. The documents referred to in § 128.17 are not, however, deemed to be confidential. Reports of the Administrative Law Judge and copies of transcripts or recordings of hearings will be available to parties and, to the extent of their own testimony, to witnesses. All records are available to any U.S. Government agency showing a proper interest therein.

[61 FR 48834, Sept. 17, 1996]

§ 128.15 Orders containing probationary periods.

(a) *Revocation of probationary periods.* A debarment order may set a probationary period during which the order may be held in abeyance for all or part of the debarment period, subject to the conditions stated therein. The Deputy Assistant Secretary of State for Defense Trade Controls may apply, without notice to any person to be affected thereby, to the Administrative Law Judge for a recommendation on the appropriateness of revoking probation when it appears that the conditions of the probation have been breached. The facts in support of the application will be presented to the Administrative Law Judge, who will report thereon and make a recommendation to the Assistant Secretary of State for Political-Military Affairs. The latter will make a determination whether to revoke probation and will issue an appropriate order. The party affected by this action may request the Assistant Secretary of State for Political-Military Affairs to reconsider the decision by submitting a request within 10 days of the date of the order.

(b) *Hearings*—(1) *Objections upon notice.* Any person affected by an application upon notice to revoke probation, within the time specified in the notice, may file objections with the Administrative Law Judge.

(2) *Objections to order without notice.* Any person adversely affected by an order revoking probation, without notice may request that the order be set aside by filing his objections thereto with the Administrative Law Judge. The request will not stay the effective date of the order or revocation.

(3) *Requirements for filing objections.* Objections filed with the Administrative Law Judge must be submitted in writing and in duplicate. A copy must be simultaneously submitted to the Directorate of Defense Trade Controls. Denials and admissions, as well as any mitigating circumstances, which the person affected intends to present must be set forth in or accompany the letter of objection and must be supported by evidence. A request for an oral hearing may be made at the time of filing objections.

(4) *Determination.* The application and objections thereto will be referred to the Administrative Law Judge. An oral hearing if requested, will be conducted at an early convenient date, unless the

objections filed raise no issues of material fact to be determined. The Administrative Law Judge will report the facts and make a recommendation to the Assistant Secretary for Political-Military Affairs, who will determine whether the application should be granted or denied and will issue an appropriate order. A copy of the order and of the Administrative Law Judge's report will be furnished to any person affected thereby.

(5) *Effect of revocation on other actions.* The revocation of a probationary period will not preclude any other action concerning a further violation, even where revocation is based on the further violation.

[61 FR 48834, Sept. 17, 1996, as amended at 71 FR 20552, Apr. 21, 2006; 78 FR 52689, Aug. 26, 2013; 79 FR 8089, Feb. 11, 2014]

§ 128.16 Extension of time.

The Administrative Law Judge, for good cause shown, may extend the time within which to prepare and submit an answer to a charging letter or to perform any other act required by this part.

[61 FR 48834, Sept. 17, 1996]

§ 128.17 Availability of orders.

All charging letters, debarment orders, and orders imposing civil penalties and probationary periods are available for public inspection in the Public Reading Room of the Department of State.

[78 FR 52690, Aug. 26, 2013]

PART 129—REGISTRATION AND LICENSING OF BROKERS

Sec.
129.1 Purpose.
129.2 Definitions.
129.3 Requirement to register.
129.4 Requirement for approval.
129.5 Exemption from requirement for approval.
129.6 Procedures for obtaining approval.
129.7 Policy on embargoes and other proscriptions.
129.8 Submission of Statement of Registration, registration fees, and notification of changes in information furnished by registrants.
129.9 Guidance.
129.10 Reports.
129.11 Maintenance of brokering records by registrants.

AUTHORITY: Section 38, Pub. L. 104–164, 110 Stat. 1437, (22 U.S.C. 2778); E.O. 13637, 78 FR 16129.

SOURCE: 62 FR 67276, Dec. 24, 1997, unless otherwise noted.

§ 129.1 Purpose.

(a) Section 38(b)(1)(A)(ii) of the Arms Export Control Act (22 U.S.C. 2778) provides that persons engaged in the business of brokering activities shall register and pay a registration fee as prescribed in regulations, and that no person may engage in the business of brokering activities without a license issued in accordance with the Act.

(b) The brokering activities identified in this subchapter apply to those defense articles and defense services controlled for purposes of export on the U.S. Munitions List (*see* part 121 of this subchapter) or for purposes of permanent import on the U.S. Munitions Import List (*see* 27 CFR part 447).

[78 FR 52690, Aug. 26, 2013]

§ 129.2 Definitions.

As used in this part:

(a) *Broker* means any person (*see* § 120.14 of this subchapter) described below who engages in the business of brokering activities:

(1) Any U.S. person (*see* § 120.15 of this subchapter) wherever located;

(2) Any foreign person (*see* § 120.16 of this subchapter) located in the United States; or

(3) Any foreign person located outside the United States where the foreign person is owned or controlled by a U.S. person.

NOTE TO PARAGRAPH (A)(3): For purposes of this paragraph, ''owned by a U.S. person'' means more than 50 percent of the outstanding voting securities of the firm are owned by a U.S. person, and ''controlled by a U.S. person'' means one or more U.S. persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. U.S. person control is rebuttably presumed to exist where U.S. persons own 25 percent or more of the outstanding voting securities unless one foreign person controls an equal or larger percentage.

(b) *Brokering activities* means any action on behalf of another to facilitate the manufacture, export, permanent

import, transfer, reexport, or retransfer of a U.S. or foreign defense article or defense service, regardless of its origin.

(1) Such action includes, but is not limited to:

(i) Financing, insuring, transporting, or freight forwarding defense articles and defense services; or

(ii) Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.

(2) Such action does not include:

(i) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export);

(ii) Activities by employees of the U.S. Government acting in an official capacity;

(iii) Activities by regular employees (*see* §120.39 of this subchapter) acting on behalf of their employer, including those regular employees who are dual nationals or third-country nationals that satisfy the requirements of §126.18 of this subchapter;

NOTE TO PARAGRAPH (B)(2)(III): The exclusion does not apply to persons subject to U.S. jurisdiction with respect to activities involving a defense article or defense service originating in or destined for any proscribed country, area, or person identified in §126.1 of this subchapter.

(iv) Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, collecting product and pricing information to prepare a response to Request for Proposal, generally promoting company goodwill at trade shows, or activities by an attorney that do not extend beyond the provision of legal advice to clients;

(v) Activities performed by an affiliate, as defined in §120.40 of this subchapter, on behalf of another affiliate; or

(vi) Activities by persons, including their regular employees (*see* §120.39 of this subchapter), that do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or other approval under parts 123, 124, or 125 of this subchapter, or subsequently acting as a reexporter or retransferor of such article or service under such license or other approval, or under an approval pursuant to §123.9 of this subchapter.

(c) For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of brokering as described in paragraph (b) of this section.

[78 FR 52690, Aug. 26, 2013]

§ 129.3 Requirement to register.

(a) Except as provided in paragraph (b) of this section, any person who engages in brokering activities (*see* §129.2) is required to register with the Directorate of Defense Trade Controls. Registration under this section is generally a precondition for the issuance of approval for brokering activities required under this part 129 or the use of exemptions.

(b) *Exemptions.* Registration, approval, recordkeeping, and reporting under this section are not required for:

(1) Foreign governments or international organizations, including their employees, acting in an official capacity; or

(2) Persons exclusively in the business of financing, insuring, transporting, customs brokering, or freight forwarding, whose activities do not extend beyond financing, insuring, transporting, customs brokering, or freight forwarding. Examples include air carriers or freight forwarders that merely transport or arrange transportation for licensed defense articles, and banks or credit companies who merely provide commercially available lines or letters of credit to persons registered or required to register in accordance with parts 122 or 129 of this subchapter. However, banks, firms, or other persons providing financing for defense articles or defense services are required to register under certain circumstances, such as when the bank or its employees are directly involved in arranging transactions involving defense articles or defense services or hold title to defense articles, even when no physical custody of defense articles is involved. In such circumstances, the banks, firms, or other persons providing financing for defense articles or defense services are not exempt.

(c) Persons exempt from registration, approval, recordkeeping, and reporting as provided in § 129.3(b) are subject to the policy on embargoes and other proscriptions as outlined in § 129.7.

(d) U.S. persons who are registered as a manufacturer or exporter in accordance with part 122 of this subchapter, including their U.S. or foreign subsidiaries and other affiliates listed on their Statement of Registration who are required to register under this part, are not required to submit a separate broker registration or pay a separate broker registration fee when more than 50 percent of the voting securities are owned by the registrant or such subsidiaries and affiliates are otherwise controlled by the registrant (*see* § 120.40 of this subchapter), and they are listed and identified as brokers within their manufacturer or exporter Statement of Registration. All other requirements of this part apply to such brokers and their brokering activities.

(e) Registration under this section is a precondition for the issuance of approval for brokering activities required under this section or the use of exemptions, unless an exception is granted by the Directorate of Defense Trade Controls.

[78 FR 52690, Aug. 26, 2013]

§ 129.4 Requirement for approval.

(a) Except as provided in § 129.5, no person who is required to register as a broker pursuant to § 129.3 of this subchapter may engage in the business of brokering activities pursuant to § 129.2(b) without first obtaining the approval of the Directorate of Defense Trade Controls for the brokering of any of the following:

(1) Any foreign defense article or defense service (*see* § 120.44 of this subchapter, and § 129.5 for exemptions); or

(2) Any of the following U.S. origin defense articles or defense services:

(i) Firearms and other weapons of a nature described by Category I(a) through (d), Category II(a) and (d), and Category III(a) of § 121.1 of this subchapter;

(ii) Rockets, bombs, and grenades as well as launchers for such defense articles of a nature described by Category IV(a), and launch vehicles and missile and anti-missile systems of a nature described by Category IV(b) of § 121.1 of this subchapter (including man-portable air-defense systems);

(iii) Vessels of war described by Category VI of § 121.1 of this subchapter;

(iv) Tanks and military vehicles described by Category VII of § 121.1 of this subchapter;

(v) Aircraft and unmanned aerial vehicles described by Category VIII of § 121.1 of this subchapter;

(vi) Night vision-related defense articles and inertial platform, sensor, and guidance-related systems of a nature described by Category XII(c) and (d) of § 121.1 of this subchapter;

(vii) Chemical agents and precursors described by Category XIV(a), (c), and (e) of § 121.1 of this subchapter, biological agents and biologically derived substances described by Category XIV(b) of § 121.1 of this subchapter, and equipment described by Category XIV(f) of § 121.1 of this subchapter for dissemination of the chemical agents and biological agents described by Category XIV(a), (b), and (e) of § 121.1 of this subchapter;

(viii) Submersible vessels described by Category XX of § 121.1 of this subchapter; and

(ix) Miscellaneous articles of a nature described by Category XXI of § 121.1 of this subchapter.

(b) [Reserved]

[78 FR 52691, Aug. 26, 2013]

§ 129.5 Exemption from requirement for approval.

(a) Unless paragraph (c) of this section applies, brokering activities undertaken for an agency of the U.S. Government pursuant to a contract between the broker and that agency are exempt from the requirement for approval provided that:

(1) The brokering activities concern defense articles or defense services solely for the use of the agency; or

(2) The brokering activities are undertaken for carrying out a foreign assistance or sales program authorized by law and subject to control by the President by other means, as demonstrated by one of the following conditions being met:

(i) The U.S. Government agency contract with the broker contains an explicit provision stating the contract

supports a foreign assistance or sales program authorized by law and the contracting agency has established control of the activity covered by the contract by other means equivalent to that established under this subchapter; or

(ii) The Directorate of Defense Trade Controls provides written concurrence in advance that the condition is met.

(b) Unless paragraph (c) of this section applies, brokering activities regarding a foreign defense article or defense service (*see* §120.44 of this subchapter) are exempt from the requirement for approval when arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member country of that organization, Australia, Israel, Japan, New Zealand, or the Republic of Korea, except in the case of the defense articles or defense services specified in §129.4(a)(2), for which approval is required.

(c) Brokers engaging in brokering activities described in paragraph (a) or (b) of this section are not exempt from obtaining approval from the Directorate of Defense Trade Controls if:

(1) The broker is not registered as required by §129.3;

(2) The broker or any person who has a direct or indirect interest in or may benefit from the brokering activities, including any related defense article or defense service transaction, is ineligible as defined in §120.1(c)(2) of this subchapter; or

(3) A country or person referred to in §126.1 of this subchapter is involved in the brokering activities or such activities are otherwise subject to §129.7.

(d) Brokers who use the exemptions in this section must comply with all other provisions of this part 129.

[78 FR 52691, Aug. 26, 2013]

§129.6 Procedures for obtaining approval.

(a) All requests for approval of brokering activities must be made to the Directorate of Defense Trade Controls, be signed by an empowered official, and include the following information:

(1) The applicant's name, address and registration code;

(2) A certification on whether:

(i) The applicant or the chief executive officer, president, vice presidents, secretary, partner, member, other senior officers or officials (e.g., comptroller, treasurer, general counsel), or any member of the board of directors is the subject of an indictment or has been otherwise charged (e.g., by criminal information in lieu of indictment) for, or has been convicted of, violating any of the U.S. criminal statutes enumerated in §120.27 of this subchapter;

(ii) The applicant or the chief executive officer, president, vice presidents, secretary, partner, member, other senior officers or officials (e.g., comptroller, treasurer, general counsel), or any member of the board of directors is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government; and

(iii) To the best of the applicant's knowledge, any other person involved in the brokering activities enumerated in the request for approval as defined in §129.2 is the subject of an indictment or has been otherwise charged (e.g., charged by criminal information in lieu of indictment) for or has been convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this subchapter, or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government.

(b) The request for approval shall describe fully the brokering activities that will be undertaken, including:

(1) The action to be taken by the applicant to facilitate the manufacture, export, import, or transfer of a defense article or defense service (which may be referred to as a ''defense article or defense service transaction'');

(2) The name, nationality, address, and place of business of all persons who may participate in the brokering activities;

(3) A description of each defense article or defense service that may be involved, including:

(i) The U.S. Munitions List category and sub-category for each article;

(ii) The name or military nomenclature of each defense article;

(iii) Whether the defense article is significant military equipment;

(iv) Estimated quantity of each defense article;

(v) Estimated U.S. dollar value of defense articles and defense services;

(vi) Security classification; and

(vii) End-user and end-use; and

(4) A statement whether the brokering activities are related to a sale through direct commercial sale or under the U.S. Foreign Military Sales program or other activity in support of the U.S. Government.

(c) The empowered official signing the request for approval shall include a certification that the request is complete and accurate.

(d) If at the time of submission certain information required by paragraph (b) of this section is not yet available, this fact must be stated and explained in the certification required by paragraph (c) of this section. The Directorate of Defense Trade Controls will take any such explanation into account in deciding whether to approve the request.

(e) The period of validity for an approval may not exceed four years.

[78 FR 52691, Aug. 26, 2013]

§ 129.7 Policy on embargoes and other proscriptions.

(a) This section applies to brokering activities defined in § 129.2, regardless of whether the person involved in such activities has registered or is exempt from registration under § 129.3. The exemptions in § 129.5 from the requirement for approval are not applicable to brokering activities subject to this section.

(b) No person may engage in or make a proposal to engage in brokering activities that involve any country, area, or person referred to in § 126.1 of this subchapter without first obtaining the approval of the Directorate of Defense Trade Controls.

(c) No person may engage in or make a proposal to engage in brokering activities without first obtaining approval of the Directorate of Defense Trade Controls if such activities involve countries or persons identified by the Department of State through notice in the FEDERAL REGISTER, with respect to which certain limitations on defense articles or defense services are imposed for reasons of U.S. national security, foreign policy, or law enforcement interests (e.g., an individual subject to debarment pursuant to § 127.7 of this subchapter). (*See* § 127.1(c) of this subchapter for additional disclosure and approval requirements applicable to brokering activities.)

(d) It is the policy of the Department of State to deny requests for approval of brokering activities or proposals to engage in brokering activities involving the countries or persons referred to in paragraph (b) or (c) of this section. Any person who knows or has reason to know of brokering activities involving such countries or persons must immediately inform the Directorate of Defense Trade Controls.

[78 FR 52692, Aug. 26, 2013]

§ 129.8 Submission of Statement of Registration, registration fees, and notification of changes in information furnished by registrants.

(a) An intended registrant must submit a Department of State form DS–2032 (Statement of Registration) to the Office of Defense Trade Controls Compliance by following the submission guidelines available on the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov*. The Statement of Registration must be signed by a U.S. person senior officer (e.g., chief executive officer, president, secretary, partner, member, treasurer, general counsel) who has been empowered by the intended registrant to sign such documents, with the exception that a foreign senior officer may sign the Statement of Registration if the intended registrant seeks only to register as a foreign broker. The Statement of Registration may include subsidiaries and affiliates when more than 50 percent of the voting securities are owned by the registrant or the subsidiaries and affiliates are otherwise controlled by the registrant (*see* § 120.40 of this subchapter). The intended registrant, whether a U.S. or foreign person, shall submit documentation that demonstrates it is incorporated or otherwise authorized to do business in its respective country. Foreign persons who

are required to register shall provide information that is substantially similar in content to that which a U.S. person would provide under this provision (e.g., foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration (form DS–2032) is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package.

(b)(1) *Frequency of registration and fee.* A person who is required to register must do so on an annual basis by submitting a completed Statement of Registration (form DS–2032) and a fee following the fee guidelines available on the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov.* Registrants are not required to submit a separate statement of registration and pay an additional fee when provisions in § 129.3(d) are met.

(2) *Expiration of registration.* A registrant must submit its request for registration renewal at least 30 days, but no earlier than 60 days, prior to the expiration date.

(3) *Lapse in registration.* A registrant who fails to renew a registration and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of brokering defense articles or defense services.

(c) *Statement of Registration Certification.* The Statement of Registration (form DS–2032) of the intended registrant shall include a certification by an authorized senior officer of the following:

(1) Whether the intended registrant or its parent, subsidiary, or other affiliate listed in the Statement of Registration, or any of its chief executive officers, presidents, vice presidents, secretaries, partners, members, other senior officers or officials (e.g., comptroller, treasurer, general counsel), or any member of the board of directors of the intended registrant, or of any parent, subsidiary, or other affiliate listed in the Statement of Registration:

(i) Has ever been indicted or otherwise charged (e.g., charged by criminal information in lieu of indictment) for or has been convicted of violating any U.S. criminal statutes enumerated in § 120.27 of this subchapter or violating a foreign criminal law on exportation of defense articles where conviction of such law carries a minimum term of imprisonment of greater than 1 year; or

(ii) Is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government; and

(2) Whether the intended registrant is foreign owned or foreign controlled (*see* § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of the foreign person or persons who ultimately own or control the registrant. This requirement applies to a registrant who is a U.S. person and is owned or controlled by a foreign person. It also applies to a registrant who is a foreign person and is owned or controlled by a foreign person from the same country or a foreign person from another country.

(d) A registrant must, within five days of the event, provide to the Directorate of Defense Trade Controls a written notification, signed by a senior officer (e.g., chief executive officer, president, secretary, partner, member, treasurer, general counsel), if:

(1) Any of the persons referred to in § 129.8(c) is indicted or otherwise charged (e.g., charged by criminal information in lieu of indictment) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or violating a foreign criminal law on exportation of defense articles where conviction of such law carries a minimum term of imprisonment of greater than 1 year; or becomes ineligible to contract with, or to receive a license or other approval to export or import defense articles or defense services from, any agency of the U.S. government; or

(2) There is a change in the following information contained in the Statement of Registration (form DS–2032):

(i) Registrant's name;

(ii) Registrant's address;

(iii) Registrant's legal organization structure;

(iv) Ownership or control;

(v) The establishment, acquisition or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in brokering activities or otherwise required to be listed in registrant's Statement of Registration; or

(vi) Board of directors, senior officers, partners and owners.

NOTE 1 TO PARAGRAPH (d): All other changes in the Statement of Registration must be provided as part of annual registration renewal.

NOTE 2 TO PARAGRAPH (d): For one year from October 25, 2013, ''Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions,'' RIN 1400–AC37, the following changes must be provided as part of the annual registration renewal: pursuant to § 129.3(d), changes to combine an existing broker registration with an existing manufacturer/exporter registration, and pursuant to § 129.8(a), changes to an existing registration to remove partially owned and not otherwise controlled subsidiaries or affiliates, which are not the subject of an internal reorganization, merger, acquisition, or divestiture.

(e) A U.S. or foreign registrant must provide written notification to the Directorate of Defense Trade Controls at least sixty (60) days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any parent, subsidiary, or other affiliate listed and covered in its Statement of Registration. Such notice does not relieve the registrant from obtaining any prior approval required under this subchapter.

(f) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company, shall advise the Directorate of Defense Trade Controls of the following:

(1) The new firm name and all previous firm names;

(2) The registration number that will continue and those that are to be discontinued (if any); and

(3) The numbers of all approvals for brokering activities under the continuing registration number, since any approval not the subject of notification will be considered invalid.

(g) A registrant whose registration lapses because of failure to renew and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of brokering activities.

[78 FR 52692, Aug. 26, 2013]

§ 129.9 Guidance.

(a) Any person desiring guidance on whether an activity constitutes a brokering activity within the scope of this part 129 may request in writing guidance from the Directorate of Defense Trade Controls. The request for guidance shall identify the applicant and registrant code (if applicable) and describe fully the activities that will be undertaken, including:

(1) The specific activities to be undertaken by the applicant and any other U.S. or foreign person;

(2) The name, nationality, and geographic location of all U.S. and foreign persons who may participate in the activities;

(3) A description of each defense article or defense service that may be involved, including:

(i) The U.S. Munitions List category and sub-category for each article;

(ii) The name or military nomenclature of each defense article;

(iii) Whether the defense article is significant military equipment;

(iv) Estimated quantity of each defense article;

(v) Estimated U.S. dollar value of defense articles and defense services; and

(vi) Security classification;

(4) End-user and end-use; and

(5) A copy of any agreement or documentation, if available, between or among the requester and other persons who will be involved in the activity or related transactions that describes the activity to be taken by such persons.

(b) If at the time of submission certain information is not yet available, this circumstance must be stated and explained. The Directorate of Defense Trade Controls will take the completeness of the information into account in providing guidance on whether the activities constitute brokering activities. The guidance will constitute an official determination by the Department of

State. The guidance shall not substitute for approval when required under § 129.4.

(c) Persons desiring guidance on other aspects of this part may also request guidance from the Directorate of Defense Trade Controls in a similar manner by submitting a description of the relevant facts or copies of relevant documentation.

[78 FR 52693, Aug. 26, 2013]

§ 129.10 Reports.

(a) Any person required to register under this part (including those registered in accordance with § 129.3(d)) shall provide to the Directorate of Defense Trade Controls on an annual basis a report of its brokering activities in the previous twelve months. Such report shall be submitted along with the registrant's annual renewal submission or, if not renewing, within 30 days after expiration of registration.

(b) The report shall include brokering activities that received or were exempt from approval as follows:

(1) The report shall identify the broker's name, address, and registration code and be signed by an empowered official who shall certify that the report is complete and accurate. The report shall describe each of the brokering activities, including the number assigned by the Directorate of Defense Trade Controls to the approval or the exemption claimed; and

(2) For each of the brokering activities, the report shall identify all persons who participated in the activities, including each person's name, address, nationality, and country where located and role or function; the quantity, description, and U.S. dollar value of the defense articles or defense services; the type and U.S. dollar value of any consideration received or expected to be received, directly or indirectly, by any person who participated in the brokering activities, and the source thereof.

(c) If there were no brokering activities, the report shall certify that there were no such activities.

[78 FR 52694, Aug. 26, 2013]

§ 129.11 Maintenance of brokering records by registrants.

A person who is required to register pursuant to this part (including those registered in accordance with § 129.3(d)) must maintain records concerning brokering activities in accordance with § 122.5 of this subchapter.

[78 FR 52694, Aug. 26, 2013]

PART 130—POLITICAL CONTRIBUTIONS, FEES AND COMMISSIONS

Sec.

130.1 Purpose.
130.2 Applicant.
130.3 Armed forces.
130.4 Defense articles and defense services.
130.5 Fee or commission.
130.6 Political contribution.
130.7 Supplier.
130.8 Vendor.
130.9 Obligation to furnish information to the Directorate of Defense Trade Controls.
130.10 Information to be furnished by applicant or supplier to the Directorate of Defense Trade Controls.
130.11 Supplementary reports.
130.12 Information to be furnished by vendor to applicant or supplier.
130.13 Information to be furnished to applicant, supplier or vendor by a recipient of a fee or commission.
130.14 Recordkeeping.
130.15 Confidential business information.
130.16 Other reporting requirements.
130.17 Utilization of and access to reports and records.

AUTHORITY: Sec. 39, Pub. L. 94–329, 90 Stat. 767 (22 U.S.C. 2779); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

SOURCE: 58 FR 39323, July 22, 1993, unless otherwise noted.

§ 130.1 Purpose.

Section 39(a) of the Arms Export Control Act (22 U.S.C. 2779) provides that the Secretary of State shall prescribe regulations with respect to reporting on certain payments relating to sales of defense articles and defense services. The provisions of this part implement that requirement. Definitions which apply to this part are contained in §§ 130.2 through 130.8.

§ 130.2 Applicant.

Applicant means any person who applies to the Directorate of Defense Trade Controls for any license or approval required under this subchapter for the export of defense articles or defense services valued in an amount of $500,000 or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization. This term also includes a person to whom the required license or approval has been given.

[71 FR 20554, Apr. 21, 2006]

§ 130.3 Armed forces.

Armed forces means the army, navy, marine, air force, or coast guard, as well as the national guard and national police, of a foreign country. This term also includes any military unit or military personnel organized under or assigned to an international organization.

§ 130.4 Defense articles and defense services.

Defense articles and defense services have the meaning given those terms in paragraphs (3), (4) and (7) of section 47 of the Arms Export Control Act (22 U.S.C. 2794 (3), (4), and (7)). When used with reference to commercial sales, the definitions in §§ 120.6 and 120.9 of this subchapter apply.

§ 130.5 Fee or commission.

(a) *Fee or commission* means, except as provided in paragraph (b) of this section, any loan, gift, donation or other payment of $1,000 or more made, or offered or agreed to be made directly or indirectly, whether in cash or in kind, and whether or not pursuant to a written contract, which is:

(1) To or at the direction of any person, irrespective of nationality, whether or not employed by or affiliated with an applicant, a supplier or a vendor; and

(2) For the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization.

(b) The term fee or commission does not include:

(1) A political contribution or a payment excluded by § 130.6 from the definition of political contribution;

(2) A normal salary (excluding contingent compensation) established at an annual rate and paid to a regular employee of an applicant, supplier or vendor;

(3) General advertising or promotional expenses not directed to any particular sale or purchaser; or

(4) Payments made, or offered or agreed to be made, solely for the purchase by an applicant, supplier or vendor of specific goods or technical, operational or advisory services, which payments are not disproportionate in amount with the value of the specific goods or services actually furnished.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20554, Apr. 21, 2006]

§ 130.6 Political contribution.

Political contribution means any loan, gift, donation or other payment of $1,000 or more made, or offered or agreed to be made, directly or indirectly, whether in cash or in kind, which is:

(a) To or for the benefit of, or at the direction of, any foreign candidate, committee, political party, political faction, or government or governmental subdivision, or any individual elected, appointed or otherwise designated as an employee or officer thereof; and

(b) For the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization. Taxes, customs duties, license fees, and other charges required to be paid by applicable law or regulation are not regarded as political contributions.

§ 130.7 Supplier.

Supplier means any person who enters into a contract with the Department of Defense for the sale of defense articles or defense services valued in an amount of $500,000 or more under section 22 of the Arms Export Control Act (22 U.S.C. 2762).

§ 130.8 Vendor.

(a) *Vendor* means any distributor or manufacturer who, directly or indirectly, furnishes to an applicant or supplier defense articles valued in an amount of $500,000 or more which are end-items or major components as defined in § 121.8 of this subchapter. It also means any person who, directly or indirectly, furnishes to an applicant or supplier defense articles or services valued in an amount of $500,000 or more when such articles or services are to be delivered (or incorporated in defense articles or defense services to be delivered) to or for the use of the armed forces of a foreign country or international organization under:

(1) A sale requiring a license or approval from the Directorate of Defense Trade Controls under this subchapter; or

(2) A sale pursuant to a contract with the Department of Defense under section 22 of the Arms Export Control Act (22 U.S.C. 2762).

(b) [Reserved]

[58 FR 39323, July 22, 1993, as amended at 71 FR 20554, Apr. 21, 2006]

§ 130.9 Obligation to furnish information to the Directorate of Defense Trade Controls.

(a)(1) Each applicant must inform the Directorate of Defense Trade Controls as to whether the applicant or its vendors have paid, or offered or agreed to pay, in respect of any sale for which a license or approval is requested:

(i) Political contributions in an aggregate amount of $5,000 or more, or

(ii) Fees or commissions in an aggregate amount of $100,000 or more. If so, applicant must furnish to the Directorate of Defense Trade Controls the information specified in § 130.10. The furnishing of such information or an explanation satisfactory to the Director of the Office of Defense Trade Controls Licensing as to why all the information cannot be furnished at that time is a condition precedent to the granting of the relevant license or approval.

(2) The requirements of this paragraph do not apply in the case of an application with respect to a sale for which all the information specified in § 130.10 which is required by this section to be reported shall already have been furnished.

(b) Each supplier must inform the Directorate of Defense Trade Controls as to whether the supplier or its vendors have paid, or offered or agreed to pay, in respect of any sale:

(1) Political contributions in an aggregate amount of $5,000 or more, or

(2) Fees or commissions in an aggregate amount of $100,000 or more. If so, the supplier must furnish to the Directorate of Defense Trade Controls the information specified in § 130.10. The information required to be furnished pursuant to this paragraph must be so furnished no later than 30 days after the contract award to such supplier, or such earlier date as may be specified by the Department of Defense. For purposes of this paragraph, a contract award includes a purchase order, exercise of an option, or other procurement action requiring a supplier to furnish defense articles or defense services to the Department of Defense for the purposes of § 22 of the Arms Export Control Act (22 U.S.C. 2762).

(c) In determining whether an applicant or its vendors, or a supplier or its vendors, as the case may be, have paid, or offered or agreed to pay, political contributions in an aggregate amount of $5,000 or more in respect of any sale so as to require a report under this section, there must be included in the computation of such aggregate amount any political contributions in respect of the sale which are paid by or on behalf of, or at the direction of, any person to whom the applicant, supplier or vendor has paid, or offered or agreed to pay, a fee or commission in respect of the sale. Any such political contributions are deemed for purposes of this part to be political contributions by the applicant, supplier or vendor who paid or offered or agreed to pay the fee or commission.

(d) Any applicant or supplier which has informed the Directorate of Defense Trade Controls under this section that neither it nor its vendors have paid, or offered or agreed to pay, political contributions or fees or commissions in an aggregate amount requiring the information specified in § 130.10 to be furnished, must subsequently furnish such information within 30 days

after learning that it or its vendors had paid, or offered or agreed to pay, political contributions or fees or commissions in respect of a sale in an aggregate amount which, if known to applicant or supplier at the time of its previous communication with the Directorate of Defense Trade Controls, would have required the furnishing of information under § 130.10 at that time. Any report furnished under this paragraph must, in addition to the information specified in § 130.10, include a detailed statement of the reasons why applicant or supplier did not furnish the information at the time specified in paragraph (a) or paragraph (b) of this section, as applicable.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20554, Apr. 21, 2006; 79 FR 8089, Feb. 11, 2014]

§ 130.10 Information to be furnished by applicant or supplier to the Directorate of Defense Trade Controls.

(a) Every person required under § 130.9 to furnish information specified in this section in respect to any sale must furnish to the Directorate of Defense Trade Controls:

(1) The total contract price of the sale to the foreign purchaser;

(2) The name, nationality, address and principal place of business of the applicant or supplier, as the case may be, and, if applicable, the employer and title;

(3) The name, nationality, address and principal place of business, and if applicable, employer and title of each foreign purchaser, including the ultimate end-user involved in the sale;

(4) Except as provided in paragraph (c) of this section, a statement setting forth with respect to such sale:

(i) The amount of each political contribution paid, or offered or agreed to be paid, or the amount of each fee or commission paid, or offered or agreed to be paid;

(ii) The date or dates on which each reported amount was paid, or offered or agreed to be paid;

(iii) The recipient of each such amount paid, or intended recipient if not yet paid;

(iv) The person who paid, or offered or agreed to pay such amount; and

(v) The aggregate amounts of political contributions and of fees or commission, respectively, which shall have been reported.

(b) In responding to paragraph (a)(4) of this section, the statement must:

(1) With respect to each payment reported, state whether such payment was in cash or in kind. If in kind, it must include a description and valuation thereof. Where precise amounts are not available because a payment has not yet been made, an estimate of the amount offered or agreed to be paid must be provided;

(2) With respect to each recipient, state:

(i) Its name;

(ii) Its nationality;

(iii) Its address and principal place of business;

(iv) Its employer and title; and

(v) Its relationship, if any, to applicant, supplier, or vendor, and to any foreign purchaser or end-user.

(c) In submitting a report required by § 130.9, the detailed information specified in paragraph (a)(4) and (b) of this section need not be included if the payments do not exceed:

(1) $2,500 in the case of political contributions; and

(2) $50,000 in the case of fees or commissions.

In lieu of reporting detailed information with respect to such payments, the aggregate amount thereof must be reported, identified as miscellaneous political contributions or miscellaneous fees or commissions, as the case may be.

(d) Every person required to furnish the information specified in paragraphs (a) and (b) of this section must respond fully to each subdivision of those paragraphs and, where the correct response is ''none'' or ''not applicable,'' must so state.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20554, Apr. 21, 2006]

§ 130.11 Supplementary reports.

(a) Every applicant or supplier who is required under § 130.9 to furnish the information specified in § 130.10 must submit a supplementary report in connection with each sale in respect of which applicant or supplier has previously been required to furnish information if:

(1) Any political contributions aggregating $2,500 or more or fees or commissions aggregating $50,000 or more not previously reported or paid, or offered or agreed to be paid by applicant or supplier or any vendor;

(2) Subsequent developments cause the information initially reported to be no longer accurate or complete (as in the case where a payment actually made is substantially different in amount from a previously reported estimate of an amount offered or agreed to be paid); or

(3) Additional details are requested by the Directorate of Defense Trade Controls with respect to any miscellaneous payments reported under § 130.10(c).

(b) Supplementary reports must be sent to the Directorate of Defense Trade Controls within 30 days after the payment, offer or agreement reported therein or, when requested by the Directorate of Defense Trade Controls, within 30 days after such request, and must include:

(1) Any information specified in § 130.10 required or requested to be reported and which was not previously reported; and

(2) The Directorate of Defense Trade Controls license number, if any, and the Department of Defense contract number, if any, related to the sale.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20554, Apr. 21, 2006]

§ 130.12 Information to be furnished by vendor to applicant or supplier.

(a) In order to determine whether it is obliged under § 130.9 to furnish the information specified in § 130.10 with respect to a sale, every applicant or supplier must obtain from each vendor, from or through whom the applicant acquired defense articles or defense services forming the whole or a part of the sale, a full disclosure by the vendor of all political contributions or fees or commission paid, by vendor with respect to such sale. Such disclosure must include responses to all the information pertaining to vendor required to enable applicant or supplier, as the case may be, to comply fully with §§ 130.9 and 130.10. If so required, they must include the information furnished by each vendor in providing the information specified.

(b) Any vendor which has been requested by an applicant or supplier to furnish an initial statement under paragraph (a) of this section must, except as provided in paragraph (c) of this section, furnish such statement in a timely manner and not later than 20 days after receipt of such request.

(c) If the vendor believes that furnishing information to an applicant or supplier in a requested statement would unreasonably risk injury to the vendor's commercial interests, the vendor may furnish in lieu of the statement an abbreviated statement disclosing only the aggregate amount of all political contributions and the aggregate amount of all fees or commissions which have been paid, or offered or agreed to be paid, or offered or agreed to be paid, by the vendor with respect to the sale. Any abbreviated statement furnished to an applicant or supplier under this paragraph must be accompanied by a certification that the requested information has been reported by the vendor directly to the Directorate of Defense Trade Controls. The vendor must simultaneously report fully to the Directorate of Defense Trade Controls all information which the vendor would otherwise have been required to report to the applicant or supplier under this section. Each such report must clearly identify the sale with respect to which the reported information pertains.

(d)(1) If upon the 25th day after the date of its request to vendor, an applicant or supplier has not received from the vendor the initial statement required by paragraph (a) of this section, the applicant or supplier must submit to the Directorate of Defense Trade Controls a signed statement attesting to:

(i) The manner and extent of applicant's or supplier's attempt to obtain from the vendor the initial statement required under paragraph (a) of this section;

(ii) Vendor's failure to comply with this section; and

(iii) The amount of time which has elapsed between the date of applicant's or supplier's request and the date of the signed statement;

(2) The failure of a vendor to comply with this section does not relieve any applicant or supplier otherwise required by § 130.9 to submit a report to the Directorate of Defense Trade Controls from submitting such a report.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20555, Apr. 21, 2006]

§ 130.13 Information to be furnished to applicant, supplier or vendor by a recipient of a fee or commission.

(a) Every applicant or supplier, and each vendor thereof;

(1) In order to determine whether it is obliged under § 130.9 or § 130.12 to furnish information specified in § 130.10 with respect to a sale; and

(2) Prior to furnishing such information, must obtain from each person, if any, to whom it has paid, or offered or agreed to pay, a fee or commission in respect of such sale, a timely statement containing a full disclosure by such a person of all political contributions paid, or offered or agreed to be paid, by it or on its behalf, or at its direction, in respect of such sale. Such disclosure must include responses to all the information required to enable the applicant, supplier or vendor, as the case may be, to comply fully with §§ 130.9, 130.10, and 130.12.

(b) In obtaining information under paragraph (a) of this section, the applicant, supplier or vendor, as the case may be, must also require each person to whom a fee or commission is paid, or offered or agreed to be paid, to furnish from time to time such reports of its political contributions as may be necessary to enable the applicant, supplier or vendor, as the case may be, to comply fully with §§ 130.9, 130.10, 130.11, and 130.12.

(c) The applicant supplier or vendor, as the case may be, must include any political contributions paid, or offered or agreed to be paid, by or on behalf of, or at the direction of, any person to whom it has paid, or offered or agreed to pay a fee or commission in determining whether applicant, supplier or vendor is required by §§ 130.9, 130.11, and 130.12 to furnish information specified in § 130.10.

§ 130.14 Recordkeeping.

Each applicant, supplier and vendor must maintain a record of any information it was required to furnish or obtain under this part and all records upon which its reports are based for a period of not less than five years following the date of the report to which they pertain.

§ 130.15 Confidential business information.

(a) Any person who is required to furnish information under this part may identify any information furnished hereunder which the person considers to be confidential business information. No person, including any applicant or supplier, shall publish, divulge, disclose, or make known in any manner, any information so identified by a vendor or other person unless authorized by law or regulation.

(b) For purposes of this section, *confidential business information* means commercial or financial information which by law is entitled to protection from disclosure. (See, e.g., 5 U.S.C. 552(b) (3) and (4); 18 U.S.C. 1905; 22 U.S.C. 2778(e); Rule 26(c)(7), Federal Rules of Civil Procedure.)

§ 130.16 Other reporting requirements.

The submission of reports under this part does not relieve any person of any requirements to furnish information to any federal, state, or municipal agency, department or other instrumentality as required by law, regulation or contract.

§ 130.17 Utilization of and access to reports and records.

(a) All information reported and records maintained under this part will be made available, upon request for utilization by standing committees of the Congress and subcommittees thereof, and by United States Government agencies, in accordance with § 39(d) of the Arms Export Control Act (22 U.S.C. 2779(d)), and reports based upon such information will be submitted to Congress in accordance with sections 36(a)(7) and 36(b)(1) of that Act (22 U.S.C. 2776(a)(7) and (b)(1)) or any other applicable law.

(b) All confidential business information provided pursuant to this part

shall be protected against disclosure to the extent provided by law.

(c) Nothing in this section shall preclude the furnishing of information to foreign governments for law enforcement or regulatory purposes under international arrangements between the United States and any foreign government.

[58 FR 39323, July 22, 1993, as amended at 71 FR 20555, Apr. 21, 2006]

SUBCHAPTER N—MISCELLANEOUS

PART 131—CERTIFICATES OF AUTHENTICATION

Sec.
131.1 Certification of documents.
131.2 Refusal of certification for unlawful purpose.

§ 131.1 Certification of documents.

The Authentication Officer, Acting Authentication Officer, or any Assistant Authentication Officer designated by either of the former officers may, and is hereby authorized to, sign and issue certificates of authentication under the seal of the Department of State for and in the name of the Secretary of State or the Acting Secretary of State. The form of authentication shall be as follows:

In testimony whereof, I, _____, Secretary of State have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer, Acting Authentication Officer, or an Assistant Authentication Officer, of the said Department, at_____. in _____, this _____ day of _____ 19____

(Secretary of State)

By _____

(_____ Authentication Officer, Department of State)

(22 U.S.C. 2651a)

[61 FR 39585, July 30, 1996]

§ 131.2 Refusal of certification for unlawful purpose.

(a) The Department will not certify to a document when it has good reason to believe that the certification is desired for an unlawful or improper purpose. It is therefore the duty of the Authentication Officer to examine not only the document which the Department is asked to authenticate, but also the fundamental document to which previous seals or other certifications may have been affixed by other authorities. The Authentication Officer shall request such additional information as may be necessary to establish that the requested authentication will serve the interests of justice and is not contrary to public policy.

(b) In accordance with section 3, paragraph 5 of the Export Administration Act of 1969 (83 Stat. 841, Pub. L. 91–184) approved December 30, 1969, documents which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by foreign countries against countries friendly to the United States shall be considered contrary to public policy for purposes of these regulations.

(R.S. 203. sec. 4, 63 Stat. 111, as amended, sec. 1733, 62 Stat. 946, secs. 104, 332, 66 Stat. 174, 252; 22 U.S.C. 2657, 2658, 28 U.S.C. 1733, 8 U.S.C. 1104, 1443)

[22 FR 10882, Dec. 27, 1957, as amended at 30 FR 12732, Oct. 6, 1965; Dept. Reg. 108.621, 35 FR 8887, June 9, 1970]

PART 132—BOOKS, MAPS, NEWSPAPERS, ETC.

§ 132.1 Purchase.

The purchase by the Department of State of books, maps, newspapers, periodicals, and other publications shall be made without regard to the provisions of the act approved March 3, 1933 (sec. 2, 47 Stat. 1520; 41 U.S.C. 10a), since determination has been made by the Secretary, as permitted by the provisions of the act, that such purchase is inconsistent with the public interest.

(80 Stat. 379; 5 U.S.C. 301)

[22 FR 10883, Dec. 27, 1957]

PART 133—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Subpart A—Purpose and Coverage

Sec.
133.100 What does this part do?
133.105 Does this part apply to me?
133.110 Are any of my Federal assistance awards exempt from this part?
133.115 Does this part affect the Federal contracts that I receive?

Subpart B—Requirements for Recipients Other Than Individuals

133.200 What must I do to comply with this part?
133.205 What must I include in my drug-free workplace statement?
133.210 To whom must I distribute my drug-free workplace statement?
133.215 What must I include in my drug-free awareness program?
133.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
133.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
133.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

133.300 What must I do to comply with this part if I am an individual recipient?
133.301 [Reserved]

Subpart D—Responsibilities of Department of State Awarding Officials

133.400 What are my responsibilities as a Department of State awarding official?

Subpart E—Violations of This Part and Consequences

133.500 How are violations of this part determined for recipients other than individuals?
133.505 How are violations of this part determined for recipients who are individuals?
133.510 What actions will the Federal Government take against a recipient determined to have violated this part?
133.515 Are there any exceptions to those actions?

Subpart F—Definitions

133.605 Award.
133.610 Controlled substance.
133.615 Conviction.
133.620 Cooperative agreement.
133.625 Criminal drug statute.
133.630 Debarment.
133.635 Drug-free workplace.
133.640 Employee.
133.645 Federal agency or agency.
133.650 Grant.
133.655 Individual.
133.660 Recipient.
133.665 State.
133.670 Suspension.

AUTHORITY: 22 U.S.C. 2658; 41 U.S.C. 701, *et seq.*

SOURCE: 68 FR 66557, 66582, Nov. 26, 2003, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 133 appear at 68 FR 66582, Nov. 26, 2003.

Subpart A—Purpose and Coverage

§ 133.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 133.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the Department of State; or

(2) A Department of State awarding official. (See definitions of award and recipient in §§ 133.605 and 133.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A Department of State awarding official	A, D and E.

§ 133.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Procurement Executive determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 133.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or sus-

pended for a violation of the requirements of this part, as described in § 133.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 133.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 133.205 through 133.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 133.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 133.230).

§ 133.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 133.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 133.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 133.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 133.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 133.205 and an ongoing awareness program as described in § 133.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more ...	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the Department of State awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 133.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 133.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must__

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either__

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 133.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each Department of State award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces__

(1) To the Department of State official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by Department of State officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the Department of State awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the Department of State awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 133.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a Department of State award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the Department of State awarding official or other designee for each award that you currently have, unless § 133.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

§ 133.301 [Reserved]

Subpart D—Responsibilities of Department of State Awarding Officials

§ 133.400 What are my responsibilities as a Department of State awarding official?

As a Department of State awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 133.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Procurement Executive determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 133.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Procurement Executive determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 133.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 133.500 or § 133.505, the Department of State may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 2 CFR part 601, for a period not to exceed five years.

[68 FR 66557, 66582, Nov. 26, 2003, as amended at 72 FR 10035, Mar. 7, 2007]

§ 133.515 Are there any exceptions to those actions?

The Procurement Executive may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Procurement Executive determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 133.605 Award.

Award means an award of financial assistance by the Department of State or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 22 CFR part 135 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

§ 133.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 133.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 133.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 133.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 133.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 133.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 133.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 133.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 133.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 133.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 133.655 Individual.

Individual means a natural person.

§ 133.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 133.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 133.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PART 134—EQUAL ACCESS TO JUSTICE ACT; IMPLEMENTATION

Subpart A—General Provisions

Sec.
134.1 Purpose of these rules.
134.2 When the Act applies.
134.3 Proceedings covered.
134.4 Eligibility of applicants.
134.5 Standard for awards.
134.6 Allowable fees and expenses.
134.7 Rulemaking on maximum rates for attorney fees.
134.8 Official authorized to take final action under the Act.

Subpart B—Information Required From Applicants

134.11 Contents of application.
134.12 Net worth exhibit.
134.13 Documentation of fees and expenses.
134.14 When application may be filed.

Subpart C—Procedures for Considering Applications

134.21 Filing and service of documents.
134.22 Answer to application.
134.23 Reply.
134.24 Comments by other parties.
134.25 Settlement.
134.26 Further proceedings.
134.27 Decision.
134.28 Further Department of State review.
134.29 Judicial review.
134.30 Payment of award.

AUTHORITY: Sec. 203(a)(1), Pub. L. 96–481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)).

SOURCE: 46 FR 58301, Dec. 1, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 134.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called ''the Act'' in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department of State. An eligible party may receive an award when it prevails over the Department of State, unless the Department of State's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Department will observe to make them.

§ 134.2 When the Act applies.

The Act applies to any adversary adjudication pending before the Department of State at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were

initiated or when final agency action occurs.

§ 134.3 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Department of State. These are adjudications under 5 U.S.C. 554 in which the position of the Department of State is presented by an attorney or other representative who enters an appearance and participates in the proceeding. For the Department of State, the type of proceeding covered are proceedings relative to controlling export of defense articles through administrative sanctions pursuant to 22 U.S.C. 2778 and 50 U.S.C. App. 2410 (c)(2)(B).

(b) The Department of State may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 134.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term ''party'' is defined in 5 U.S.C. 551(3). The applicant must show by clear and convincing evidence that it meets all conditions of eligibility set out in this subpart and in subpart B and must submit additional information to verify its eligibility upon order by the adjudicative officer.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an ''individual'' rather than a ''sole owner of an unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 134.5 Standard for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the Department of State which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 134.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department of State pays expert witnesses, which is generally $50.00 per hour. However, an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) the time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

§ 134.7 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department of State may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. The Department of State will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may request the Department of State to initiate a rulemaking proceeding to increase the maximum rate for attorney fees. The request should identify the rate the person believes the Department of State should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Department of State will respond to the request within 60 days after it is filed, by determining to initiate a rulemaking proceeding, denying the request, or taking other appropriate action.

§ 134.8 Official authorized to take final action under the Act.

The Department of State official who renders the final agency decision in a covered proceeding is authorized to take final action on matters pertaining

to the Equal Access to Justice Act as applied to the proceeding.

Subpart B—Information Required From Applicants

§ 134.11 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Department of State in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualfies under such section; or

(2) It states on the application that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Department of State to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of prejury that the information provided in the application is true and correct.

§ 134.12 Net worth exhibit.

(a) Each applicant except a qualifed tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 960.4(f)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in his part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information'', accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 551(b) (1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Department of State established procedures under the Freedom of Information Act, part 6 of this title.

§ 134.13 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 134.14 When application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Department of State's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer or intermediate review board becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of the Department of State's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration or to a petition for judicial review; or (5) completion of judicial action on the underlying controversy and any subsequent Department of State action pursuant to judicial mandate.

Subpart C—Procedures for Considering Applications

§ 134.21 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 134.12(b) for confidential financial information.

§ 134.22 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Department of State may file an answer to the application. Unless the Department of State counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30 day period may be treated as a consent to the award requested.

(b) If the Department of State counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by Department of State counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Department of State position. If the answer is based on any alleged facts not already in the record of the proceeding the Department of State shall include with the answer either supporting affidavits or a request for further proceedings under § 134.26.

§ 134.23 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts

not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 134.26.

§ 134.24 Comments by other parties.

Any party to a proceeding other than the applicant and Department of State may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comment.

§ 134.25 Settlement.

The applicant and the Department of State may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and Department of State counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 134.26 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or Department of State counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 134.27 Decision.

The adjudicative officer shall issue an initial decision on the application as promptly as possible after completion of proceedings on the application. The decision shall include written fundings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Department of State position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against the Department of State and another agency, the decision shall allocate responsibility for payment of any award made between the Department of State and the other agency, and shall explain the reasons for the allocation made.

§ 134.28 Further Department of State review.

Either the applicant or Department of State counsel may seek review of the initial decision. If neither the applicant nor the Department of State counsel seeks review, the initial decision shall become a final decision of the Department of State 30 days after it is issued. If review is taken the Judicial Officer will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

§ 134.29 Judicial review.

Judicial review of final Department of State decisions on awards as may be sought as provided in 5 U.S.C. 504(c)(2).

§ 134.30 Payment of award.

An applicant seeking payment of an award shall submit to the Comptroller or other disbursing official of the Department of State a copy of the final decision granting the award accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Requests for payment should be sent to: Executive Director, Office of the Comptroller, Room 1328, Department of

State, 2201 C Street, NW., Washington, DC 20520. The Department of State will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 135—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A—General

Sec.
135.1 Purpose and scope of this part.
135.2 Scope of subpart.
135.3 Definitions.
135.4 Applicability.
135.5 Effect on other issuances.
135.6 Additions and exceptions.

Subpart B—Pre-Award Requirements

135.10 Forms for applying for grants.
135.11 State plans.
135.12 Special grant or subgrant conditions for ''high-risk'' grantees.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

135.20 Standards for financial management systems.
135.21 Payment.
135.22 Allowable costs.
135.23 Period of availability of funds.
135.24 Matching or cost sharing.
135.25 Program income.
135.26 Non-Federal audit.

CHANGES, PROPERTY, AND SUBAWARDS

135.30 Changes.
135.31 Real property.
135.32 Equipment.
135.33 Supplies.
135.34 Copyrights.
135.35 Subawards to debarred and suspended parties.
135.36 Procurement.
135.37 Subgrants.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

135.40 Monitoring and reporting program performance.
135.41 Financial reporting.
135.42 Retention and access requirements for records.
135.43 Enforcement.
135.44 Termination for convenience.

Subpart D—After-the-Grant Requirements

135.50 Closeout.
135.51 Later disallowances and adjustments.
135.52 Collection of amounts due.

Subpart E—Entitlements [Reserved]

AUTHORITY: 22 U.S.C. 2658.

SOURCE: 53 FR 8049, 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 135.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 135.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 135.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation,

taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from ''programmatic'' requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for ''grant'' and ''subgrant'' in this section and except where qualified by ''Federal'') a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report); (2) for construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by

the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of ''grant'' in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than ''equipment'' as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. ''Termination'' does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 135.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 135.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under title V, subtitle D, chapter 2, section 583—the Secretary's discretionary grant program) and titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L.

96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 135.4(a)(3) through (8) are subject to subpart E.

§ 135.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 135.6.

§ 135.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart B—Pre-Award Requirements

§ 135.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 135.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan

that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations or;

(2) A material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 135.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 135.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source

and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 135.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance

basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 135.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 135.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A–87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.	OMB Circular A–122.

For the costs of a—	Use the principles in—
Educational institutions	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 135.23 Period of availability of funds.

(a) *General*. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations*. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§ 135.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable*. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements*. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing*. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements*. Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income*. Costs financed by program income, as defined in § 135.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 135.25(g).)

(5) *Services or property financed by income earned by contractors*. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records*. Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions*. (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay

for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind

contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 135.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition*. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property*. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 135.25 Program income.

(a) *General*. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income*. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. ''During the grant period'' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income*. If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues*. Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties*. Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 135.34.)

(f) *Property*. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 135.31 and 135.32.

(g) *Use of program income*. Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction*. Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal

agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition*. When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching*. When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period*. There are no Federal requirements governing the disposition of program income earned after the end of the award period (*i.e.*, until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 135.26 Non-Federal audit.

(a) *Basic rule*. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees*. State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection*. In arranging for audit services, § 135.36 shall be followed.

[53 FR 8049, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45941, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 135.30 Changes.

(a) *General*. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles*. The applicable cost principles (see § 135.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects*. Except as stated in other regulations or an award document,

grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (*i.e.*, from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 135.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 135.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 135.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 135.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 135.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition*. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment*. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title*. The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow§ 135.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 135.33 Supplies.

(a) *Title*. Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition*. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 135.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 135.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.''

§ 135.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and

conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §135.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly

restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §135.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) *Procurement by noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, *i.e.*, verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders,

unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §135.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

[53 FR 8049, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19642, Apr. 19, 1995]

§ 135.37 Subgrants.

(a) *States*. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 135.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees*. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions*. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 135.10;

(2) Section 135.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 135.21; and

(4) Section 135.50.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 135.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees*. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports*. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a

justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 135.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees

in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §135.41(e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §135.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requesters for reimbursement under

construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 135.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 135.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 135.41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 135.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 135.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 135.41(b)(2).

§ 135.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 135.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support.

Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 135.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the

case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see § 135.35).

§ 135.44 Termination for convenience.

Except as provided in § 135.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 135.43 or paragraph (a) of this section.

Subpart D—After-The-Grant Requirements

§ 135.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).

(3) Final request for payment (SF–270) (if applicable).

(4) Invention disclosure (if applicable).

(5) Federally-owned property report. In accordance with § 135.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 135.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 135.42;

(d) Property management requirements in §§ 135.31 and 135.32; and

(e) Audit requirements in § 135.26.

§ 135.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlements [Reserved]

PART 136—PERSONAL PROPERTY DISPOSITION AT POSTS ABROAD

Sec.
136.1 Purpose.
136.2 Authority.
136.3 Definitions.
136.4 Restrictions on dispositions of personal property.
136.5 Chief of mission policies, rules or procedures.
136.6 Contractors.

AUTHORITY: 22 U.S.C. 4341.

SOURCE: 53 FR 23188, June 20, 1988, unless otherwise noted.

§ 136.1 Purpose.

The primary purpose of these regulations is to ensure that employees and members of their families do not profit personally from sales or other transactions with persons who are not themselves entitled to exemption from import restrictions, duties, or taxes.

§ 136.2 Authority.

Section 303(a) of the State Department Basic Authorities Act of 1956 authorizes the Secretary of State to issue regulations to carry out the purposes of title III of that Act.

§ 136.3 Definitions.

(a) *Basis* of an item shall include the initial price paid (or retail value at the time of acquisition if acquired by gift), inland and overseas transportation costs (if not reimbursed by the United States Government), shipping insurance, taxes, customs fees, duties or other charges, and capital improvements, but shall not include insurance on an item while in use or storage, maintenance, repair or related costs, or financing charges.

(b) *Charitable contribution* means a contribution or gift as defined in section 170(c) of the Internal Revenue Code, or other similar contribution or gift to a bona fide charitable foreign entity as determined pursuant to policies, rules or procedures issued by the chief of mission pursuant to § 136.5(b).

(c) *Chief of mission* has the meaning given such term by section 102(e) of the Foreign Service Act of 1980 (22 U.S.C. 2902(3).

(d) *Contractor* means: (1) An individual employed by personal services contract pursuant to section 2(c) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2669(c)), pursuant to section 636(a)(3) of the Foreign Assistance Act of 1961 (22 U.S.C. 2396(a)(3)), or pursuant to any other similar authority including, in the case of an organization performing services under such authority, an individual involved in the performance of such service; and (2) any other individual or firm that enjoys exemptions from import limitations, customs duties or taxes on personal property from a foreign country in connection with performance of a contract for goods or services when such contract is with the United States Government or an agency or instrumentality thereof or when such contract is directly financed by grant assistance from the United States Government or an agency or instrumentality thereof and the individual or firm is a party to the contract, a subcontractor, or an employee of a contractor or subcontractor.

(e) *Employee* means an individual who is under the jurisdiction of a chief of mission to a foreign country as provided under section 207 of the Foreign Service Act of 1980. (22 U.S.C. 3927) and who is—

(1) An employee as defined by section 2105 of title 5, United States Code;

(2) An officer or employee of the United States Postal Service or of the Postal Rate Commission;

(3) A member of a uniformed service who is not under the command of an area military commander, or

(4) An expert or consultant as authorized pursuant to section 3109 of title 5, United States Code, with the United States or any agency, department, or establishment thereof; but is not a national or permanent resident of the foreign country in which employed.

(f) *Family member* means any member of the family of an employee who is entitled to exemption from import limitation, customs duties, or taxes which would otherwise apply by virtue of his or her status as a dependent or member of the household of the employee.

(g) *Foreign country* means any country or territory, excluding the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, American Samoa, Guam, the Virgin Islands, and other territories and possessions of the United States.

(h) Except as otherwise provided by a chief of mission in policies, rules or procedures issued pursuant to § 136.5(b), an item shall be deemed of ''minimal value'' if its acquisition cost in U.S. dollars (or retail value if received as a gift) is within the limit determined by the Administrator of General Services for ''minimal value'' of foreign gifts under 5 U.S.C. 7342, currently $180. For purposes of determining ''minimal value,'' all constitutent parts of components of an audio or visual system, automobile, boat, computer system, or other integrated machine, system or item of equipment must be valued as a single item even if acquired separately, except that spare or superseded parts (e.g., an old set of tires that has been replaced on vehicle) may be valued as separate items.

(i) *Personal property* means any item of personal property, including automobiles, computers, boats, audio and video equipment and any other items acquired for personal use, except that items properly determined to be of ''minimal value'' shall not be subject to limitations on disposition except for purposes of § 136.4(d) or as prescribed in policies, rules or procedures issued by a chief of mission.

(j) *Profit* means any proceeds (including cash and other valuable consideration but not including amounts of such proceeds given as charitable contributions) for the sale, disposition or assignment of personal property in excess of the basis for such property.

§ 136.4 Restrictions on dispositions of personal property.

(a) An employee or family member shall not sell, assign or otherwise dispose of personal property within a foreign country except with the prior written approval of the chief of mission or designee, except where the category of dispositions has been authorized to be undertaken without prior written approval in policies, rules or procedures issued by the chief of mission (cf. § 136.5(b)(1)).

(b) An employee or family member shall not retain any profit from the sale, assignment or other disposition within a foreign country of personal property that was imported into or purchased in that foreign country and that, by virtue of the official status of the employee, was exempt from import restrictions, customs duties, or taxes which would otherwise apply, when such sale, assignment or other disposition is made to persons not entitled to exemptions from import restrictions, duties, or taxes. An employee or family member shall not profit from an indirect disposition to persons not entitled to such exemptions, such as sale through a third country diplomat acting as a middleman, where the employee or family member knows or should know that the property is being acquired by the third party for resale to persons not entitled to exemptions, except that this restriction shall not apply to sales of personal property to official agencies of the foreign country in accordance with the laws or regulations of that country.

(c) Profits obtained from dispositions of personal property by an employee or family member that cannot be retained under paragraph (b) of this section including any interest earned by the employee or family member on such profits, shall be disposed of within 90 days of receipt by contribution or gift as defined in section 170(c) of the Internal Revenue Code or by other similar contribution or gift to a bona fide charitable foreign entity as designated by the chief of mission pursuant to § 136.5(b)(11) of this part.

(d) Except as authorized in advance by the chief of mission on a case-by-case basis, no employee or family member shall sell, assign or otherwise dispose of personal property within a foreign country that was not acquired for bona fide personal use. There shall be a presumption that property that is new, unused or held by the employer or family member in unusual or commercial quantities was not acquired for bona fide personal use. For purposes of this subsection, there is no exemption for items of minimal value § 136.3(h)).

(e) No employee or family member shall import, sell, assign or otherwise dispose of personal property within a foreign country in a manner that violates the law or regulations of that country or governing international law.

(f) Violations of the restrictions or requirements of paragraphs (a) through (e) of this section shall be grounds for disciplinary actions against the employee in accordance with the employing agency's procedures and regulations. Employees shall be responsible for ensuring compliance with these regulations by family members.

(g) For purposes of computing profits on personal property dispositions subject to these regulations, where acquisition and disposition of the property were transacted in different currencies, proceeds received and costs incurred in a foreign currency shall be valued in United States dollars at the time of receipt or payment at the rate of exchange that was in effect for reverse accommodation exchanges at U.S. missions at the time of such receipt or payment. Where property was acquired and sold in the same currency, no conversion is required.

§ 136.5 Chief of mission policies, rules or procedures.

(a) Each chief of mission shall establish a procedure under which employees may request approval for the sale of personal property and for conversion of proceeds of such sale from local currency into U.S. dollars, if applicable. This procedure may be modified to meet local conditions, but must produce a documentary record to be held by the post of the following:

(1) The employee's signed request for permission to sell personal property, and, if applicable, to convert local currency proceeds to U.S. dollars;

(2) A description of each item of personal property having more than minimal value, and the cost basis and actual sales price for each item;

(3) All profits received and whether profit is retainable;

(4) Donation to charities or other authorized recipients of non-retainable profits;

(5) Approvals to sell and, if applicable, to exchange proceeds, with any restrictions or refusals of the employee's request noted, signed by the chief of mission or designee; and

(6) For privately owned vehicle transactions, data on purchaser and statement that customs requirements have been met and title has been transferred or arranged with an agent identified on document.

(b) In order to ensure that due account is taken of local conditions, including applicable laws, markets, exchange rate factors, and accommodation exchange facilities, the chief of mission to each foreign country is authorized to establish policies, rules, and procedures governing the disposition of personal property by employees and family members in that country under the chief of mission's jurisdiction. Policies, rules and procedures issued by the chief of mission shall be consistent with the general restrictions set forth in § 136.4 and may include at least the following:

(1) Identification of categories of dispositions (e.g., sales of minimal value items) that may be made without prior written approval;

(2) Identification of categories of individuals or entities to whom sales of personal property can be made without restrictions on profits (e.g., other employees, third country diplomats), individuals or entities to whom sales can be made but profits not retained, and individuals or entities to whom sales may not be made;

(3) Requirements to report the total estimated and actual proceeds for all minimal value items, even if such items are otherwise exempted from limitations on profits of sale;

(4) Categories of items of personal property excluded from restrictions on disposition because generally exempt from taxation and import duties under local law;

(5) More restrictive definition of ''minimal value'' (see §136.3(h) of this part);

(6) Limitations on manner of disposition (e.g., restrictions on advertising or yard sales);

(7) Limitations on total proceeds that may be generated by dispositions of personal property, including limitations on proceeds from disposition of ''minimal value'' items;

(8) Limitations on total profits that may be generated by dispositions of personal property, including limitations on profits from dispositions of ''minimal value'' items;

(9) Limitations on total proceeds from dispositions of personal property that may be converted into dollars by reverse accommodation exchange;

(10) Limitations on the timing and number of reverse accommodation exchanges permitted for proceeds of dispositions of personal property (e.g., only in last six months of tour and no more than two exchange conversions);

(11) Designation of bona fide charitable foreign entities to whom an employee or family member may donate profits that cannot be retained under these regulations.

(12) Designation of post officials authorized to approve on behalf of chief of mission employee requests for permission to sell personal property and requests to convert local currency proceeds of sale to U.S. dollars by reverse accommodation exchange.

(c) All policies, rules, and procedures that are issued by the chief of mission pursuant to paragraphs (a) and (b) of this section shall be announced by notice circulated to all affected mission employees and copies of all such policies, rules and procedures shall be made readily accessible to all affected employees and family members.

(d) Violations of restrictions or requirements established by a chief of mission in policies, rules, or procedures issued by a chief of mission pursuant to paragraphs (a) and (b) of this section shall be grounds for disciplinary actions against the employee in accordance with the employing agency's procedures and regulations. Employees shall ensure compliance by family members with policies, rules or procedures issued by the chief of mission.

§136.6 Contractors.

To the extent that contractors enjoy importation or tax privileges in a foreign country because of their contractual relationship to the United States Government, contracting agencies shall include provisions in their contracts that require the contractors to observe the requirements of these regulations and all policies, rules, and procedures issued by the chief of mission in that foreign country.

PART 138—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
138.100 Conditions on use of funds.
138.105 Definitions.
138.110 Certification and disclosure.

Subpart B—Activities by Own Employees

138.200 Agency and legislative liaison.
138.205 Professional and technical services.
138.210 Reporting.

Subpart C—Activities by Other Than Own Employees

138.300 Professional and technical services.

Subpart D—Penalties and Enforcement

138.400 Penalties.
138.405 Penalty procedures.
138.410 Enforcement.

Subpart E—Exemptions

138.500 Secretary of Defense.

Subpart F—Agency Reports

138.600 Semi-annual compilation.
138.605 Inspector General report.
APPENDIX A TO PART 138—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 138—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 101–121 (31 U.S.C. 1352); 22 U.S.C. 2658.

SOURCE: 55 FR 6737 and 6749, Feb. 26, 1990, unless otherwise noted.

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

Subpart A—General

§ 138.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 138.105 Definitions.

For purposes of this part:

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

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

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

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

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

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

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

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct

appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

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

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

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

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

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

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

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

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

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

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

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

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

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

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

soon as he or she is employed by such person for 130 working days.

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

§ 138.110 Certification and disclosure.

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

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

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

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

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

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

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

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

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

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

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

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

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

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

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

Subpart B—Activities by Own Employees

§ 138.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 138.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

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

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

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

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

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

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

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

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

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

§ 138.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 138.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

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

his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

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

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

§ 138.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 138.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 138.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 138.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

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

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

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

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

Subpart D—Penalties and Enforcement

§ 138.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

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

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

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

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

§ 138.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 138.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 138.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 138.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 138.605 Inspector General report.

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

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

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

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

APPENDIX A TO PART 138—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

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

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

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

Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 138—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

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

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

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

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 139—IRISH PEACE PROCESS CULTURAL AND TRAINING PROGRAM

Sec.
139.1 Purpose.
139.2 Definitions.
139.3 Responsibilities of the Department.
139.4 Responsibilities of the Program Administrator.
139.5 Qualifications required for selection as a trainee.
139.6 Requesting participation in the IPPCTP.
139.7 Qualifications for participation as an employer in the United States.
139.8 Target economic sectors.

AUTHORITY: Pub. L. 105–319, 112 Stat. 3013; 22 U.S.C. 2651a.

SOURCE: 65 FR 14766, Mar. 17, 2000, unless otherwise noted.

§ 139.1 Purpose.

(a) The regulations set forth in this part implement, in part, the ''Irish Peace Process Cultural and Training Program Act of 1998 (the ''IPPCTPA''), Public Law 105–319, 112 Stat. 3013. The purpose of the IPPCTPA is to establish a program to ''allow young people from disadvantaged areas of designated counties suffering from sectarian violence and high structural unemployment to enter the United States for the purpose of developing job skills and conflict resolution abilities in a diverse, cooperative, peaceful, and prosperous environment, so that those young people can return to their homes better able to contribute toward economic regeneration and the Irish peace process.'' This part describes the Irish Peace Process Cultural and Training Program (the ''IPPCTP'') hereby established by the Department, the procedures for its operation and the requirements for participation.

(b) The Department, in consultation with the Immigration and Naturalization Service (''INS''), will implement the program specified in the IPPCTPA by working with the relevant governmental authorities in the Republic of Ireland and in Northern Ireland to further the goals of the IPPCTPA, by selecting a Program Administrator to carry out the day-to-day operation of the IPPCTP, by approving, upon the recommendation of the Program Administrator, employers in the United States to carry out the training and employment elements of the IPPTCP and by providing general oversight of the IPPCTP.

§ 139.2 Definitions.

The following definitions apply to this part:

Accompanying family members means the spouse and minor children of the principal alien.

Applicant sponsor means FAS, T&EA, or an employer in the border counties or in Northern Ireland who has nominated an employee to participate in the IPPCTP.

Border counties means the counties of Louth, Monaghan, Cavan, Leitrim, Sligo and Donegal in the Republic of Ireland.

FAS means the Training and Employment Authority of the Republic of Ireland.

IPPCTP means the Irish Peace Process Cultural and Training Program.

Program Administrator means the organization selected by the Department to carry out the Department's responsibilities for the day-to-day management of the IPPCTP.

Program Participant means an individual selected to participate in the IPPCTP.

T&EA means the Training and Employment Agency of Northern Ireland.

United States employer means an employer with operations in the United States that has been recommended by the Program Administrator and approved by the Department of State for participation in the IPPCTP.

§ 139.3 Responsibilities of the Department.

The Department of State retains overall authority for all IPPCTP activities, including, but not limited to:

(a) The design of the program mandated by IPPCTPA;

(b) The formulation of policies and procedures concerning the IPPCTP;

(c) The selection and oversight of the Program Administrator;

(d) Coordination with other U.S. Government agencies and representatives of the governments of the Republic of Ireland and Northern Ireland;

(e) Establishment of the requirements for and approval of the United

States employers who will participate in the program;

(f) Upon recommendation of the Program Administrator or on its own motion, the Department may add or remove employers from the approved list and may authorize change of economic sector and geographic area for participants; and

(g) By public notice in the FEDERAL REGISTER, will add or delete preferred target economic sectors and geographic areas for job/training opportunities.

[65 FR 14766, Mar. 17, 2000, as amended at 66 FR 52504, Oct. 16, 2001]

§ 139.4 Responsibilities of the Program Administrator.

The Program Administrator will be responsible for the following:

(a) Identifying job/training opportunities in designated economic sectors, and recommending to the Department employers in the United States who meet the criteria of § 139.7 and who wish to participate in the IPPCTP. Job/training opportunities will be located in a number of geographic areas across the United States, depending on the availability of jobs, relative cost of living, support infrastructure, and other relevant factors. The Program Administrator, from time to time, will recommend to the Department of State the addition or deletion of, or exceptions to, designated economic sectors and geographic areas for participants.

(b) Making available, through electronic or other means, information about job/training openings to potential program participants and assisting them in securing job placements in the United States.

(c) Certifying in writing to a United States consular officer in the United States Embassy in Dublin or the United States Consulate General in Belfast, or to an officer of the INS, that a principal alien has been selected to participate in the IPPCTP. This certification will be used only to assist in:

(1) Nonimmigrant visa issuance to and adjudication of an application for admission made by the principal alien and accompanying family members; or

(2) Adjudicating a request made by the principal alien to change employers under the IPPCTP while in the United States. Unless otherwise authorized, the Program Administrator may approve only one change of approved employer per participant per period of stay.

(d) Providing pre-departure and pre-employment orientation seminars to program participants, as appropriate, and otherwise assisting participants in a smooth transition to life in the United States.

(e) Monitoring participants' compliance with Program requirements while in the United States, and verifying that participants are receiving the agreed training and skills. Issuing replacement certification documents to participants whose original has been lost, stolen, or mutilated. In addition, making available training in personal and professional development to participants and verifying that such training has been undertaken; arranging with approved employers as a condition of assignment of participants that each such employer: will give the Program Administrator advance notice of intention to discharge a participant for cause and the reasons therefor, will permit the Program Administrator an opportunity to mediate between the employer and the participant; and give the Program Administrator written notice when employment of a participant is terminated and the reason. The Program Administrator, if mediation is not successful and the participant is terminated for cause in the judgment of the employer, will promptly (normally within two business days after termination of employment) reach a decision on validity of the cause for the employer's decision and, if the decision is favorable to the participant, may assist in finding another approved employment.

(f) Cooperating with FAS and T&EA in all aspects of the program, including assisting participants in finding jobs in their home countries upon completion of their U.S. training.

(g) Reporting to the Department and INS on various aspects of the program and on program participants as directed. In particular, promptly (normally within five business days) giving a written report to the Department of

State and the Immigration and Naturalization Service upon each occurrence of any of the following: termination or change of approved employment of a participant, withdrawal from participation in the program, results of an exit interview with the participant, and the departure from the United States of any participant upon conclusion of participation in the program.

(h) Developing and maintaining a computerized database and website to underpin all of the functions in paragraphs (a) through (g) of this section. The Program Administrator will retain this data base for at least five years after termination of the Program, or transfer the data base to the Department of State, and provide the Department of State and the Immigration and Naturalization Service access to that data base while under its control.

(i) The Program Administrator within 5 business days is to terminate a participant from the program when: the participant is terminated from approved employment for cause or fails to obtain another approved employment within 30 days of leaving current employment (not having been separated for cause); the participant, without good cause, fails to comply with program regulations, including rules of the Program Administrator and the code of code of conduct; or the participant engages in employment that has not been authorized under the program or fails to maintain adequate, continuous health coverage (see §139.5). The Program Administrator shall promptly (normally within five business days) give written notice to the Department of State, the Immigration and Naturalization Service, FAS or T & EA as appropriate, and to the consulate that issued a visa to the participant, that the participant has been terminated and the reason therefor. The Program Administrator shall conduct an exit interview with any participant leaving the program to assess the experience and to obtain return of the participant's certification letter.

[65 FR 14766, Mar. 17, 2000, as amended at 66 FR 52504, Oct. 16, 2001]

§ 139.5 Qualifications required for selection as a trainee.

To be a program participant in the IPPCTP, a person must:

(a) Be between 18 and 35 years of age; and

(b) Have been physically resident in Northern Ireland or one of the border counties for at least five months prior to the date of certification; and

(c) Meet United States immigration/visa requirements, including being in receipt of a job offer certified by the Program Administrator, and able to demonstrate satisfactorily to a Consular Officer that he/she has a residence abroad that he/she has no intention of abandoning; and

(d)(1) Be unemployed for at least 3 months, or have completed or currently be enrolled in a training/program sponsored by T&EA or FAS, or by other such publicly funded programs, or have been made redundant in their employment (*i.e.*, lost his/her job) or have received a notice of redundancy (termination of employment); or

(2) Be a currently employed person whose employer has at least 90 days (unless otherwise authorized) of employment relationship with that person, whose nomination is in writing and contains the following: the employer in the United States, the length and type of occupational training contemplated, a justification for why the length of stay requested is necessary, and the benefits to the nominee and the nominator, including a job offer for the participant upon return to Northern Ireland or Ireland; provided, however, that the Program Administrator may waive the requirements of at least 90 days of employment and for a job offer upon return from a sponsor that is a Northern Ireland institution of further or higher learning for a student in that institution who needs on the job experience to qualify for a degree or certificate from the institution.

(e) Has read, understood, and signed a ''participant code of conduct'' prepared by the Program Administrator in consultation with the Department of State and the Immigration and Naturalization Service and with FAS and T & EA; obtains and maintains adequate, continuous health insurance; is expected to remain with his or her original or

other approved employer; and is expected to depart the United States promptly upon termination of participation in the program.

(f) A participant who has been terminated from the program may apply to the Program Administrator for reinstatement, except in the following cases: termination of approved employment for cause, knowingly or willfully failed to obtain or maintain the required adequate and continuous health insurance, engaged in unapproved employment, or has been outside the United States in excess of three consecutive months. In any such case the physical residence requirement may be waived for participants who have been admitted to the United States for the program, and personal and professional development training previously completed need not be repeated; however, all other application requirements for a participant do apply, and the Program Administrator, with the approval of the Department of State in consultation with the Immigration and Naturalization Service, and upon being satisfied that reinstatement serves the purpose of the program, may issue a new or amended certification letter.

[65 FR 14766, Mar. 17, 2000, as amended at 66 FR 52505, Oct. 16, 2001]

§ 139.6 Requesting participation in the IPPCTP.

Requests for participation as a trainee in the IPPCTP must be made to FAS or T&EA in the case of § 139.5(d)(1); or, in the case of § 139.5(d)(2), directly to the Program Administrator by the prospective participant's employer having at least 90 days (unless otherwise authorized) of employment relationship with that participant. Neither FAS, T & EA, nor the Program Administrator are to consider requests from a former participant.

[65 FR 14766, Mar. 17, 2000, as amended at 66 FR 52505, Oct. 16, 2001]

§ 139.7 Qualifications for participation as an employer in the United States.

To participate in the Irish Peace Process Cultural and Training Program, U.S. employers must:

(a) Provide job/training opportunities that:

(1) Correspond to one of the occupational areas identified by the governments of Northern Ireland and the Republic of Ireland except as otherwise approved by the Program Administrator under § 139.5(d)(2); and

(2) Include a career path comprising work assignment rotations, and/or training opportunities, which offer promotion potential if job performance is satisfactory.

(b) Offer health insurance, which, at a minimum, provides:

(1) Medical benefits of at least $50,000 per accident or illness (major medical); and

(2) A deductible not to exceed $500 per accident or illness.

(c) Pay participants at least the minimum wage and at the same rate as American workers doing the same or similar work.

(d) Agree not to petition for a change of immigration status or non-immigrant status for any participant.

(e) Grant permission to the Program Administrator to conduct on-site visits and take other measures necessary to verify that each employer's job/training contract is being followed.

(f) Notify the Program Administrator in the event of the termination of a participant from employment, or departure of the participant from the Program. As a condition of qualification as an employer, undertakes to provide advance notice to the Program Administrator of intention to terminate a participant for cause, with a written statement of reasons, and to provide the Program Administrator a reasonable opportunity to mediate between the employer and the participant, if possible before actual termination, and to offer employment to any selected participant for at least six months. The employer must also undertake in writing to provide no less than the Federal minimum wage and a 40 hour work week or equivalent.

(g) Prepare a written record describing the work experience gained, and make it available to each participant.

[65 FR 14766, Mar. 17, 2000, as amended at 66 FR 52506, Oct. 16, 2001]

§ 139.8 Target economic sectors.

Job/Training under the IPPCTP will be authorized for preferred economic

sectors prescribed by the Department of State, upon agreement of FAS and/or T&EA. As noted in § 139.3, the list will be published in the FEDERAL REGISTER, as will additions or deletions. In the case of participants under § 139.5(d)(2), the Program Administrator, with the approval of the Department of State, is authorized to approve different employers in different economic sectors.

[66 FR 52506, Oct. 16, 2001]

PART 140—PROHIBITION ON ASSISTANCE TO DRUG TRAFFICKERS

Subpart A—General

Sec.
140.1 Purpose.
140.2 Authorities.
140.3 Definitions.

Subpart B—Applicability

140.4 Applicability.

Subpart C—Enforcement

140.5 Overview.
140.6 Foreign government entities.
140.7 Multilateral institutions and international organizations.
140.8 Recipients of scholarships, fellowships, and participant training.
140.9 Other non-governmental entities and individuals.
140.10 Intermediate credit institutions.
140.11 Minimum enforcement procedures.
140.12 Interagency review procedures.
140.13 Notification to foreign entities and individuals.
140.14 Special procedures for U.S. entities and individuals.

AUTHORITY: 22 U.S.C. 2651a(a)(4).

SOURCE: 63 FR 36574, July 7, 1998, unless otherwise noted.

Subpart A—General

§ 140.1 Purpose.

(a) This part implements Section 487 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. Sec. 2291f).

(b) Section 487(a) directs the President to ''take all reasonable steps'' to ensure that assistance under the Foreign Assistance Act of 1961 (FAA) and the Arms Export Control Act (AECA) ''is not provided to or through any individual or entity that the President knows or has reason to believe'':

(1) Has been convicted of a violation of, or a conspiracy to violate, any law or regulation of the United States, a State or the District of Columbia, or a foreign country relating [to] narcotic or psychotropic drugs or other controlled substances; or

(2) Is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking in any such substance.

§ 140.2 Authorities.

Authority to implement FAA Section 487 was delegated by the President to the Secretary of State by E.O. 12163, as amended, and further delegated by the Secretary to the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs by Delegation of Authority No. 145, dated Feb. 4, 1980 (45 FR 11655), as amended.

§ 140.3 Definitions.

The following definitions shall apply for the purpose of this part:

(a) *Convicted*. The act of being found guilty of or legally responsible for a criminal offense, and receiving a conviction or judgment by a court of competent jurisdiction, whether by verdict or plea, and including convictions entered upon a plea of nolo contendere.

(b) *Country Narcotics Coordinator*. The individual assigned by the Chief of Mission of a U.S. diplomatic post, in consultation with the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, in each foreign country to coordinate United States government policies and activities within a country related to counternarcotics efforts.

(c) *Covered assistance*. Any assistance provided by an agency of the United States government under the FAA or AECA, except that it does *not* include:

(1) Assistance that by operation of the law is not subject to FAA Section 487, such as:

(i) Disaster relief and rehabilitation provided under Chapter 9 of Part I of the FAA; and

(ii) Assistance provided to small farmers when part of a community-

based alternative development program under Part I or Chapter 4 of Part II of the FAA;

(2) Assistance in a total amount less than $100,000 regarding a specific activity, program, or agreement, except that the procedures in § 140.8 for recipients of scholarships, fellowships, and participant training shall apply regardless of amount. However, assistance shall be deemed covered assistance regardless of amount if the agency providing assistance has reasonable grounds to suspect that a covered individual or entity may be or may have been involved in drug trafficking; or

(3) Payments of dues or other assessed contributions to an international organization.

(d) *Covered country*. A country that has been determined by the President to be either a ''major illicit drug producing'' or ''major drug-transit'' country under Chapter 8 of Part I of the FAA. The list of covered countries is submitted to Congress annually and set forth in the International Narcotics Control Strategy Report.

(e) *Drug trafficking*. Any activity undertaken illicitly to cultivate, produce, manufacture, distribute, sell, finance or transport, or to assist, abet, conspire, or collude with others in illicit activities, including money laundering, relating to narcotic or psychotropic drugs, precursor chemicals, or other controlled substances.

(f) *Money laundering*. The process whereby proceeds of criminal activity are transported, transferred, transformed, converted, or intermingled with legally acquired funds, for the purpose of concealing or disguising the true nature, source, disposition, movement, or ownership of those proceeds. The goal of money laundering is to make funds derived from or associated with illicit activity appear to have been acquired legally.

(g) *Narcotics offense*. A violation of, or a conspiracy to violate, any law or regulation of the United States, a State or the District of Columbia, or a foreign country relating to narcotic or psychotropic drugs or other controlled substances.

Subpart B—Applicability

§ 140.4 Applicability.

Except as otherwise provided herein or as otherwise specially determined by the Secretary of State or the Secretary's designee (except that decisions on notification and/or disclosure shall in all cases be subject to the provisions of §§ 140.13 through 140.14), the procedures prescribed by this part apply to any ''covered individual or entity,'' *i.e.*, any individual or entity, including a foreign government entity, a multilateral institution or international organization, or a U.S. or foreign non-governmental entity:

(a)(1) That is receiving or providing covered assistance as a party to a grant, loan, guarantee, cooperative agreement, contract, or other direct agreement with an agency of the United States (a ''first-tier'' recipient); or

(2) That is receiving covered assistance

(A) Beyond the first tier if specifically designated to receive such assistance by a U.S. government agency; or

(B) In the form of a scholarship, fellowship, or participant training, except certain recipients funded through a multilateral institution or international organization, as provided in § 140.7(c); and

(b)(1) That is located in or providing covered assistance within a covered country or within any other country, or portion thereof, that the Secretary of State or the Secretary's designee may at any time determine should be treated, in order to fulfill the purpose of this part, as if it were a covered country; or

(2) As to which the agency providing assistance or any other interested agency has reasonable grounds to suspect current or past involvement in drug trafficking or conviction of a narcotics offense, regardless of whether the assistance is provided within a covered country.

Examples: (1) Under a $500,000 bilateral grant agreement with the Agency for International Development providing covered assistance, Ministry Y of Government A, the government of a covered country, enters into

a $150,000 contract with Corporation X. Ministry Y is a covered entity. However, Corporation X is *not* a covered entity because the contract is *not* a direct contract with an agency of the United States.

(2) Under a $1,000,000 grant from the Department of State providing covered assistance, Corporation B makes a $120,000 subgrant to University Y for the training of 12 individuals. If Corporation B is located in or providing assistance within a covered country, it is a covered entity and the 12 individuals receiving participant training are covered individuals. University Y is *not* a covered entity.

(3) University C, which is not located in a covered country, receives a $1 million regional assistance research project grant from the Agency for International development, $80,000 of which is provided for research in covered countries. University C is *not* a covered entity. (However, if $100,000 or more were provided for research in a covered country or countries, or if University C were located in a covered country, then University C would be a covered entity.)

Subpart C—Enforcement

§ 140.5 Overview.

This subpart sets forth the enforcement procedures applicable pursuant to § 140.4 to the various types of covered individuals and entities with respect to covered assistance. Section 140.6 establishes the procedures applicable to foreign government entities, including any such entity that is covered by the definition of a ''foreign state'' set forth in the Foreign Sovereign Immunities Act, 28 U.S.C. Sec. 1603(a). Section 140.7 establishes the procedures applicable to multilateral institutions and international organizations. Section 140.8 establishes the procedures applicable to recipients of scholarships and fellowships and participant trainees. Section 140.9 establishes the procedures applicable to non-governmental entities. Section 140.10 sets forth additional procedures applicable to intermediate credit institutions. Sections 140.11 through 140.14 contain general provisions related to the enforcement process.

§ 140.6 Foreign government entities.

(a) *Determination Procedures.* (1) The Country Narcotics Coordinator shall be responsible for establishing a system for reviewing available information regarding narcotics offense convictions and drug trafficking of proposed assistance recipients under this section and, except under the circumstances described in § 140.6(a)(6), determining whether a proposed recipient is to be denied such assistance or other measures are to be taken as a result of the application of FAA Section 487.

(2) Prior to providing covered assistance to or through a proposed recipient, the agency providing the assistance shall provide the Country Narcotics Coordinator in the country in which the proposed recipient is located or, as appropriate, where assistance is to be provided, the information specified in § 140.6(a)(3) in order that the Country Narcotics Coordinator may carry out his or her responsibilities under this part.

(3) In each case, the agency proposing the assistance shall provide to the Country Narcotics Coordinator the name of each key individual within the recipient entity who may be expected to control or benefit from assistance as well as other relevant identifying information (e.g., address, date of birth) that is readily available. If a question arises concerning who should be included within the group of key individuals of an entity, the agency providing the assistance shall consult with the Country Narcotics Coordinator, and the decision shall be made by the Country Narcotics Coordinator. If the agency proposing the assistance disagrees with the Country Narcotics Coordinator's decision regarding who should be included within the group of key individuals, the agency may request that the decision be reviewed by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs in consultation with other appropriate bureaus and agencies. Any such review undertaken by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs shall be completed expeditiously.

(4) Within fourteen calendar days after receiving the name of a proposed recipient and other relevant information, the Country Narcotics Coordinator shall determine whether any available information may warrant withholding assistance or taking other measures under this part, based on the

criteria set forth in §140.6(b). If, during that period, the Country Narcotics Coordinator determines that available information does not so indicate, he or she shall notify the proposing agency that the assistance may be provided to the proposed recipient.

(5) If, during the initial fourteen-day period, the Country Narcotics Coordinator determines that information exists that may warrant withholding assistance or taking other measures under this part, then the Country Narcotics Coordinator shall have another fourteen calendar days to make a final determination whether the assistance shall be provided or withheld or such other measures taken.

(6) A decision to withhold assistance or to take other measures based on information or allegations that a key individual who is a senior government official of the host nation has been convicted of a narcotics offense or has been engaged in drug trafficking shall be made by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, or by a higher ranking official of the Department of State, in consultation with other appropriate bureaus and agencies. For the purpose of this part, ''senior government official'' includes host nation officials at or above the vice minister level, heads of host nation law enforcement agencies, and general or flag officers of the host nation armed forces.

(b) *Criteria to be Applied.* (1) A decision to withhold assistance or take other measures shall be based on knowledge or reason to believe that the proposed recipient, within the past ten years, has:

(i) Been *convicted* of a narcotics offense as defined in this part; or

(ii) Been *engaged* in drug trafficking, regardless of whether there has been a conviction.

(2) Factors that may support a decision to withhold assistance or take other measures based on reason to believe that the proposed recipient has been engaged in drug trafficking activities within the past ten years when there has been no conviction of such an offense may include, but are not limited to, the following:

(i) Admission of participation in such activities;

(ii) A long record of arrests for drug trafficking activities with an unexplained failure to prosecute by the local government;

(iii) Adequate reliable information indicating involvement in drug trafficking.

(3) If the Country Narcotics Coordinator knows or has reason to believe that a key individual (as described in §140.6(a)(3)) within a proposed recipient entity has been convicted of a narcotics offense or has been engaged in drug trafficking under the terms of this part, the Country Narcotics Coordinator must then decide whether withholding assistance from the entity or taking other measures to structure the provision of assistance to meet the requirements of section 487 is warranted. This decision shall be made in consultation with the agency proposing the assistance and other appropriate bureaus and agencies. In making this determination, the Country Narcotics Coordinator shall take into account:

(i) The extent to which such individual would have control over assistance received;

(ii) The extent to which such individual could benefit personally from the assistance;

(iii) Whether such individual has acted alone or in collaboration with others associated with the entity;

(iv) The degree to which financial or other resources of the entity itself have been used to support drug trafficking; and

(v) Whether the provision of assistance to the entity can be structured in such a way as to exclude from the effective control or benefit of the assistance any key individuals with respect to whom a negative determination has been made.

(c) *Violations Identified Subsequent to Obligation.* The foregoing procedures provide for a determination before funds are obligated. If, however, subsequent to an obligation of funds an assistance recipient or a key individual of such recipient is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking (e.g., the head of a recipient entity changes during the course of an activity and the new head is found to have

been engaged in drug trafficking), appropriate action should be taken, including, if necessary, termination of the assistance. Agreements shall be written to permit termination of assistance in such circumstances.

§ 140.7 Multilateral institutions and international organizations.

Assistance provided to or through multilateral institutions or international organizations is subject to this part as follows:

(a) Where the government agency providing assistance has reasonable grounds to suspect that a recipient multilateral institution or international organization may be or may have been involved in drug trafficking, the provisions of § 140.6 shall apply.

(b) Where the government agency providing assistance designates the recipient of assistance from the multilateral institution or international organization and the designated recipient is a covered individual or entity, the provisions of this part shall apply as if the assistance were provided directly to the designated recipient.

(c) Where the government agency providing assistance does not designate the recipient of assistance from the multilateral institution or international organization, this part do not apply, other than as provided in paragraph (a) of this section, except that the agency's agreement with the multilateral institution or international organization shall stipulate that such entity is to make reasonable efforts, as necessary, to ensure that the assistance is not diverted in support of drug trafficking.

Example: The State Department provides $600,000 to the United Nations for the United Nations Drug Control Program, specifically designating that Government D of a covered country receive $150,000 and Corporation E receive $60,000 for training programs in a covered country. Individuals who will receive training are not specifically designated by the State Department. The United Nations is a covered entity based on § 140.4(a)(1); Government D is a covered entity based on §§ 140.4(b) and 140.7(b); Corporation E is not a covered entity under §§ 140.4(b) and 140.7(b) because it has been designated to receive less than $100,000 in assistance (§ 140.3(c)(2)). Participant trainees are not covered individuals because they fall under the exception contained in § 140.7(c) (see also § 140.4(a)(2)).

§ 140.8 Recipients of scholarships, fellowships, and participant training.

(a) *Procedures.* Individuals who are located in a covered country and who are proposed recipients of scholarships, fellowships, or participant training, except those falling under the exception contained in § 140.7(c), are subject to the review procedures, criteria, and procedures concerning violations identified subsequent to obligation of funds set forth in § 140.6. Such review of recipient individuals is in addition to the provisions applicable to the recipient entity providing the assistance.

(b) *Certifications.* Individuals who are located in a covered country and who are proposed recipients of scholarships, fellowships, or participant training shall also be required to certify prior to approval that, within the last ten years, they have not been convicted of a narcotics offense, have not been engaged in drug trafficking, and have not knowingly assisted, abetted, conspired, or colluded with others in drug trafficking. False certification may subject the assistance recipient to U.S. criminal prosecution under 18 U.S.C. Sec. 1001 and to withdrawal of assistance under this part.

§ 140.9 Other non-governmental entities and individuals.

(a) *Procedures.* Section 140.9 applies to private voluntary agencies, educational institutions, for-profit firms, other non-governmental entities and private individuals. A non-governmental entity that is not organized under the laws of the United States shall be subject to the review procedures and criteria set forth in § 140.6(a) and (b). A non-governmental entity that is organized under the laws of the United States shall not be subject to such review procedures and criteria. However, an agency providing assistance shall follow such review procedures and criteria, as modified by section § 140.14, if the agency has reasonable grounds to suspect that a proposed U.S. non-governmental entity or a key individual of such entity may be or may have been involved in drug trafficking or may have been convicted of a narcotics offense. Procedures set forth in § 140.6(c) concerning violations identified subsequent to obligation

shall apply to both U.S. and foreign non-governmental entities.

Examples: (1) A $100,000 grant to a covered U.S. university for participant training would not be subject to the review procedures and criteria in §140.6(a) and (b). However, a proposed participant would be subject to the review procedures and criteria in §140.6(a) and (b) as part of the agency's approval process.

(2) A $100,000 grant to a covered foreign private voluntary agency for participant training would be subject to the review procedures and criteria in §140.6(a) and (b). In addition, each proposed participant would be subject to the review procedures and criteria in §140.6(a) and (b) as part of the agency's approval process.

(b) *Refunds.* A clause shall be included in grants, contracts, and other agreements with both U.S. and foreign non-governmental entities requiring that assistance provided to or through such an entity that is subsequently found to have been engaged in drug trafficking, as defined in this part, shall be subject to refund or recall.

(c) *Certifications.* Prior to approval of covered assistance, key individuals (as described in §140.6(a)(3)) in both U.S. and foreign non-governmental entities shall be required to certify that, within the last ten years, they have not been convicted of a narcotics offense, have not been engaged in drug trafficking and have not knowingly assisted, abetted, conspired, or colluded with others in drug trafficking. False certification may subject the signatory to U.S. criminal prosecution under 18 U.S.C. Sec. 1001.

§ 140.10 Intermediate credit institutions.

(a) *Treatment as non-governmental entity or as a foreign government entity.* Intermediate credit institutions (''ICIs'') shall be subject to either the procedures applicable to foreign government entities or those applicable to non-governmental entities, depending on the nature of the specific entity. The Assistant Secretary of State for International Narcotics and Law Enforcement Affairs or the Assistant Secretary's designee, in consultation with the agency proposing the assistance and other appropriate bureaus and agencies, shall determine (consistent with the definition of ''foreign state'' set forth in the Foreign Sovereign Immunities Act, 28 U.S.C. 1603(a) and made applicable by §140.5) whether the ICI will be treated as a non-governmental entity or a foreign government entity.

(b) *Refunds.* In addition to measures required as a consequence of an ICI's treatment as a non-governmental entity or a foreign government entity, a clause shall be included in agreements with all ICIs requiring that any loan greater than $1,000 provided by the ICI to an individual or entity subsequently found to have been convicted of a narcotics offense or engaged in drug trafficking, as defined in this part, shall be subject to refund or recall.

§ 140.11 Minimum enforcement procedures.

Sections 140.6 through 140.10 represent the minimum procedures that each agency providing assistance must apply in order to implement FAA Section 487. Under individual circumstances, however, additional measures may be appropriate. In those cases, agencies providing assistance are encouraged to take additional steps, as necessary, to ensure that the statutory restrictions are enforced.

§ 140.12 Interagency review procedures.

If the agency proposing the assistance disagrees with a determination by the Country Narcotics Coordinator to withhold assistance or take other measures, the agency may request that the determination be reviewed by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs in coordination with other appropriate bureaus and agencies. Unless otherwise determined by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, the assistance shall continue to be withheld pending resolution of the review.

§ 140.13 Notification to foreign entities and individuals.

(a) Unless otherwise determined under §140.13(b), if a determination has been made that assistance to a foreign entity or individual is to be withheld, suspended, or terminated under this

part, the agency administering such assistance shall so inform the affected entity or individual. Except as the agency administering such assistance, the Country Narcotics Coordinator, and the agency or agencies that are the source of information that formed the basis for withholding, suspending, or terminating assistance may otherwise agree, the entity or individual shall be notified solely of the statutory basis for withholding, suspending, or terminating assistance.

(b) Before such notification, the Country Narcotics Coordinator shall be responsible for ascertaining, in coordination with the investigating agency, that notification would not interfere with an on-going criminal investigation. If the investigating agency believes that there is a significant risk of such interference, the Country Narcotics Coordinator, in coordination with the investigating agency, shall determine the means of compliance with this statute that best minimizes such risk.

§ 140.14 Special procedures for U.S. entities and individuals.

(a) If the Country Narcotics Coordinator makes a preliminary decision that evidence exists to justify withholding, suspending, or terminating assistance to a U.S. entity, U.S. citizen, or permanent U.S. resident, the matter shall be referred immediately to the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs for appropriate action, to be taken in consultation with the agency proposing the assistance and the agency or agencies that provided information reviewed or relied upon in making the preliminary decision.

(b) If a determination is made that assistance is to be withheld, suspended, or terminated under this part, the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, or the Assistant Secretary's designee, shall notify the affected U.S. entity, U.S. citizen, or permanent U.S. resident and provide such entity or individual with an opportunity to respond before action is taken. In no event, shall this part be interpreted to create a right to classified information or law enforcement investigatory information by such entity or individual.

SUBCHAPTER O—CIVIL RIGHTS

PART 141—NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS OF THE DEPARTMENT OF STATE—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.
141.1 Purpose.
141.2 Application of this part.
141.3 Discrimination prohibited.
141.4 Assurances required.
141.5 Compliance information.
141.6 Conduct of investigation.
141.7 Procedure for effecting compliance.
141.8 Hearings.
141.9 Decisions and notices.
141.10 Judicial review.
141.11 Effect on other regulations; forms and instructions.
141.12 Definitions.

APPENDIX A TO PART 141—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS PART APPLIES

AUTHORITY: Sec. 602, 78 Stat. 252, sec. 4, 63 Stat. 111, as amended; 42 U.S.C. 2000d–1, 22 U.S.C. 2658.

SOURCE: 30 FR 314, Jan. 9, 1965, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 141 appear at 68 FR 51358, Aug. 26, 2003.

§ 141.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the ''Act'') to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of State.

§ 141.2 Application of this part.

This part applies to any program for which Federal financial assistance, as defined in this part, is authorized under a law administered by the Department including, but not limited to, the types of Federal financial assistance listed in appendix A of this part. It applies to Federal financial assistance of any form, including property which may be acquired as a result of and in connection with such assistance, extended program after the effective date of this regulation, even if the application is approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance of guaranty contracts; (b) money paid, property transferred, or other assistance extended before the effective date of this regulation; (c) any assistance to any individual who is the ultimate beneficiary; or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 141.3 (d), or (e) any assistance to an activity carried on outside the United States by a person, institution, or other entity not located in the United States. The fact that a type of Federal financial assistance is not listed in appendix A of this part shall not mean, if title VI of the Act is otherwise applicable, that a program is not covered. Transfers of surplus property in the United States are subject to regulations issued by the Administrator of General Services (41 CFR 101–6.2).

[38 FR 17945, July 5, 1973]

§ 141.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this part applies may not, directly or through contractual or other arrangements on ground of race, color or national origin:

(i) Deny an individual any service, financial aid, or other benefits provided under the program;

(ii) Provide any service, financial aid, or other benefits to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual 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 an individual 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 an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him an opportunity to do so which is different from that afforded others under the program, including the opportunity to participate in the program as an employee in accordance with paragraph (d) of this section.

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the location or site of any facilities, or services, or the class of individuals 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 individuals 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 or select locations or sites for any facilities or services, which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(4) 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.

(5)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Special benefits.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

(d) *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 may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is: (i) To reduce the unemployment of such individuals or to help them through employment to meet subsistence needs; (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training; (iii) to provide work experience which contributes to the education or training of such individuals;

or (iv) to provide remunerative activity to such individuals who because of severe handicaps cannot be readily absorbed in the competitive labor market.

(2) 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, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (d)(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.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17946, July 5, 1973; 68 FR 51358, Aug. 26, 2003]

§ 141.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, shall 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. The assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application.

(2) In any case where the Federal assistance is to provide, or is in the form of personal property, or real property or structures or any interest therein, or such property is acquired as a result of and in connection with such assistance, the assurance shall obligate the recipient, or, in case of subsequent transfers, the transferees, for the period during which the property is used for a purpose for which the Federal assistance was, or is extended, or for another purpose involving the provision of similar services and benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. Any assurance relating to property provided under or acquired as a result of or in connection with such assistance shall as appropriate require any instrument effecting or recording transfer, title or other evidence of ownership or right to possession, to include a covenant or condition assuring nondiscrimination for the period of obligation of the recipient or any transferee, which may contain a right to be reserved to the Department to revert title or right to possession. Where no transfer of property is involved, but property is improved or any interest of the recipient or transferee therein is increased as a result of Federal financial assistance, the recipient or transferee shall agree to include such covenant or condition in any subsequent transfer of such property. Failure to comply with any such conditions or requirements contained in such assurances shall render the recipient and the transferees, where appropriate, presumptively in noncompliance.

(3) The responsible Departmental official 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.

(b) *Assurances 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 a special training project, 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, 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, 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.

(c) *Elementary and secondary schools.* The requirements of paragraph (a)(1) of this section, with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, or (2) submits a plan the desegregation of such school or school system which the responsible official of the Department of Health, Education, and Welfare determines is adequate to accomplish the purposes of the Act and this part within the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible official of the Department of Health, Education and Welfare may reserve the right to redetermine, after such period as may be specified by him the adequacy of the plan to accomplish the purposes of the Act and this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17946, July 5, 1973; 68 FR 51358, Aug. 26, 2003]

§ 141.5 Compliance information.

(a) *Cooperation and assistance.* Each responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this regulation 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 responsible Departmental official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as a responsible Departmental official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of Federally assisted programs. In the case 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 his obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse 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 responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17947, July 5, 1973]

§ 141.6 Conduct of investigation.

(a) *Periodic compliance reviews.* The responsible Department official or his designee 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 himself or any specific class of individual to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Departmental official a

written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Departmental official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should 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 responsible Department official or his designee 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 § 141.7.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the responsible Department official or his designee 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.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17947, July 5, 1973]

§ 141.7 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 reference to 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 § 141.4.* If an applicant fails or refused to furnish an assurance required under § 141.4 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 except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary pursuant to § 141.9(e), and (4)

the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other 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 by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Deputy Under Secretary for Administration, (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (4) 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 this part and to take such corrective action as may be appropriate.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17947 July 5, 1973]

§ 141.8 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 141.7(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 or such notice within which the applicant or recipient may request of the responsible Department official 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 § 141.7(c) of this part 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 normally be held at the offices of the Department in Washington, DC, at a time fixed by the responsible Department official. Hearings shall be held before an official designated by the Secretary other than the responsible Department official, in accordance with 5 U.S.C. 3105 and 3344 (formerly Section 11 of the Administrative Procedure Act).

(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 with as much conformity as is practicable with 5 U.S.C. 554–557 (formerly sections 5–8 of the Administrative Procedure Act) and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the 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 shall not apply to hearings conducted pursuant to this part, but rules or principles

designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The office presiding at the hearing 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; hearings before other agencies.* 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 regulations of one or more other Federal departments or agencies issued under title VI of the Act, the Secretary may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part, except that procedural requirements of the hearing agency if other than this Department may be adopted insofar as it is determined by the Secretary that variations from the procedures described in this section or elsewhere as may be required under this part do not impair the rights of the parties. The Secretary may also transfer the hearing of any complaint to any other department or agency, with the consent of that Department or Agency (1) where Federal financial assistance to the applicant or recipient of the other Department or Agency is substantially greater than that of the Department of State, or (2) upon determination by the Secretary that such transfer would be in the best interests of the Government of effectuating this part. Final decisions in all such cases, insofar as this part is concerned, shall be made in accordance with § 141.9.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17947, July 5, 1973]

§ 141.9 Decisions and notices.

(a) *Decisions on record or review by the responsible Department official.* The applicant or recipient shall be given reasonable opportunity to file with the officer presiding at the hearing briefs or other written statements of its contentions, and a copy of the final decision shall be given in writing to the applicant or recipient and to the complainant, if any. The officer presiding at the hearing shall render a decision on the matter.

(b) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 141.8(a) a decision shall be made by the responsible Departmental official on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(c) *Rulings required.* Each decision of an officer presiding at the hearing 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.

(d) *Appeal.* Either party may appeal from a decision of the officer presiding at the hearing to the responsible Department official within 30 days of the mailing of the officer's decision. In the absence of such an appeal the decision of the officer presiding at the hearings shall constitute the final decision of the Department subject to paragraph (e) of this section.

(e) *Approval by Secretary.* Any final decision by an officer (other than the Secretary) which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part or the Act, shall promptly be transmitted to the Secretary who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, 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 responsible Department official 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 regulation and provides reasonable assurance that it will fully comply with this regulation.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Departmental official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information establishing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Departmental official determines that those requirements have been satisfied, he shall restore such eligibility, but such determination shall be in writing and shall be supported by evidence and findings of fact which shall be retained by the Department.

(3) If the responsible Departmental official 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 of procedure issued by the responsible Departmental official. The burden of substantiating compliance with the requirements of paragraph (g)(1) of this section shall be on the applicant or recipient. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17947, July 5, 1973]

§ 141.10 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 141.11 Effect on other regulations; forms and instructions.

Nothing in this part shall be deemed to supersede: Executive Orders 10925 and 11114 and regulations issued thereunder, or any other regulations or instructions, insofar as such regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground.

(a) *Forms and instructions.* Each responsible Department official shall issue, and promptly make available to 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.

(b) *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 department or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this part including the achievement of effectiveness 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 subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

[22 FR 10882, Dec. 27, 1957, as amended at 38 FR 19748, July 5, 1973]

§ 141.12 Definitions.

As used in this part—

(a) The term *Department* means the Department of State and includes each of its operating agencies and other organizational units except the Agency for International Development.

(b) The term *Secretary* means the Secretary of State.

(c) The term *responsible Department official* with respect to any program receiving Federal financial assistance means the official of the Department having responsibility within the Department for such assistance or such official of the Department as the Secretary designates.

(d) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term *State* means any one of the foregoing.

(e) The term *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, and (4) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance or other benefits to individuals whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient.

(f) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (f)(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. 7801), 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 (f)(1), (2), or (3) of this section.

(g) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State to whom Federal financial assistance is extended directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary.

(h) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(i) The term *applicant* means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to

eligibility for Federal financial assistance, and the term *application* means such an application, request, or plan.

(j) The term *facility* includes all or any portion 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.

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973; 68 FR 51358, Aug. 26, 2003]

APPENDIX A TO PART 141—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS PART APPLIES

1. Mutual understanding between people of the United States and the people of other countries by educational and cultural exchange—studies, research, instruction and other educational activities—cultural exchanges (Mutual Educational and Cultural Exchange Act of 1961—75 Stat. 527–538).

2. Center for Cultural and Technical Interchange Between East and West—grant to State of Hawaii (Pub. L. 86–472, 74 Stat. 141).

3. Assistance to or in behalf of refugees designated by the President (Migration and Refugee Assistance Act of 1962—76 Stat. 121–124).

4. Donations of certain foreign language tapes and other training material to public and private institutions (Regulations of Administrator of General Services relating to surplus property—41 CFR 101–6.2).

[30 FR 314, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973]

PART 142—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Sec.
142.1 Purpose.
142.2 Application.
142.3 Definitions.
142.4 Discrimination prohibited.
142.5 Assurances required.
142.6 Remedial action, voluntary action, and self-evaluation.
142.7 Designation of responsible employee and adoption of grievance procedures.
142.8 Notice.
142.9 Administrative requirements for small recipients.
142.10 Effect of state and local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

142.11 Discrimination prohibited.
142.12 Reasonable accommodation.
142.13 Employment criteria.
142.14 Preemployment inquiries.

Subpart C—Accessibility

142.15 Discrimination prohibited.
142.16 Existing facilities.
142.17 New construction.
142.18–142.40 [Reserved]

Subpart D—Postsecondary Education

142.41 Application of this subpart.
142.42 Admissions and recruitment.
142.43 Treatment of students; general.
142.44 Academic adjustments.
142.45 Housing.
142.46 Financial and employment assistance to students.
142.47 Nonacademic services.
142.48–142.60 [Reserved]

Subpart E—Health, Welfare, Social, and Other Services

142.61 Application of this subpart.
142.62 Health, welfare, social, and other services.
142.63 Drug and alcohol addicts.

Subpart F—Procedures

142.70 Procedures.
APPENDIX A TO PART 142—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS PART APPLIES

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Subpart A—General Provisions

§ 142.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 142.2 Application.

This part applies to all programs or activities directly affecting handicapped individuals in the United States

carried on by recipients of Federal financial assistance pursuant to any authority held or delegated by the Secretary of State, including the types of Federal financial assistance listed in appendix A of this part. (appendix A may be revised from time-to-time by notice in the FEDERAL REGISTER.) It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this regulation, even if the application for such assistance is approved prior to such effective date. This part does not apply to:

(a) Any Federal financial assistance by way of insurance or guaranty contracts;

(b) Money paid, property transferred or other assistance extended before the effective date of this part;

(c) Any assistance to any individual who is the ultimate beneficiary; and

(d) Any procurement of goods or services, including the procurement of training. This part does not bar selection and treatment reasonably related to the foreign affairs objective or such other authorized purpose as the Federal assistance may have. It does not bar selections which are limited to particular groups where the purpose of the Federal financial assistance calls for such a limitation, nor does it bar special treatment including special courses of training, orientation or counseling consistent with such purpose.

§ 142.3 Definitions.

As used in this part, the term:

(a) *Executive order* means Executive Order 11914, entitled ''Nondiscrimination with Respect to the Handicapped in Federally-Assisted Programs,'' issued April 28, 1976.

(b) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, and the Rehabilitation Act of Amendments of 1978, Pub. L. 95–602.

(c) *Section 504* means section 504 of the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794: amendments of 1978, Pub. L. 95–602.

(d) *Department* means the Department of State and includes each of its organizational units. It does not include the Agency for International Development.

(e) *Secretary* means the Secretary of State or any officer or employee of the Department to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate, the authority to act under the regulations in this part.

(f) *Recipient* means any State or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance and any sovereign foreign government.

(g) *Applicant for Assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition or becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), cooperative agreement, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person*. (1) means any person who: (i) has a physical or mental impairment which substantially

limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and drug addiction and alcoholism.

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

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

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments, or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public pre-school, elementary, secondary, or adult educational services, a handicapped person, (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under State law to provide such services to handicapped persons, or (iii) to whom a State is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standard requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the recipient of such services.

(l) *Handicap* means any conditions or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

(m) *Program or activity* means all of the operations of any entity described in paragraphs (m)(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. 7801), 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 (m)(1), (2), or (3) of this section.

[45 FR 69438, Oct. 21, 1980, as amended at 68 FR 51359, Aug. 26, 2003]

§ 142.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

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

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

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

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

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity;

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

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

(2) For purposes of this part, aids, benefits, and services to be effective, are not required to produce identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped person 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 person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination with respect to another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location or a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination

under any program or activity that receives Federal financial assistance of (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of a handicapped person from aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

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

(e) Recipients shall ensure that communications with their applicants, employees, and handicapped persons participating in their programs or activities, or receiving aids, or benefits of services, are available to persons with impaired vision and hearing in appropriate modes, including braille, enlarged type, sign language and telecommunication devices for the deaf.

§ 142.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance on a form specified by the Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligations.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purposes for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided by the Department in the form of real property or interest in real property, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing facilities on the property for the purposes for which the property was transferred, the Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as the Secretary deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 142.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 of the Act or this part, the recipient shall take such remedial action as the Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 of the Act or this part and where another recipient exercises control over the recipient that has discriminated, the Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 of the Act or this part, require a recipient to take action (i) with respect to

handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred, or (ii), with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within six months of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Secretary upon request: (i) A list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 142.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs 15 or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs 15 or more persons shall adopt grievance procedures that incorporate appropriate due process for the prompt and equitable resolution of complaints alleging any action prohibited by this part.

§ 142.8 Notice.

(a) A recipient shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 of the Act or this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 142.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include but are not limited to the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, distribution of memoranda or other written communications; and with persons with impaired vision and hearing, through appropriate modes including braille, enlarged type, sign language, and telecommunication devices for the deaf.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of the paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 142.9 Administrative requirements for small recipients.

The Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with § 142.7, in whole or in part, when the Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 142.10 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any State or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 142.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity receiving Federal financial assistance.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. This includes relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this part apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right to return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classification, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 142.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program or activity.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices,

the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program with respect to number and type of facilities, and size of budget;

(2) Job restructuring, part-time or modified work schedules, acquisition and or modification of equipment of devices such as telecommunication devices for the deaf, the provision of readers or interpreters and other similar actions including the use of braille, enlarged type, and sign language, when appropriate.

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 142.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Secretary to be available.

(b) A recipient shall select and administer tests concerning employment to ensure that when administered to any applicant or employee who has a handicap that impairs sensory, manual, speaking, or other skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever factor the test purports to measure, rather then reflecting the applicant's impaired sensory, manual, speaking, or other skills (except where those skills are the factors that the test purports to measure).

§ 142.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 142.6(a), when a recipient is taking voluntary action to overcome the effect of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 142.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped: *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that is will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty. *Provided,* That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirement of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained

on separate forms that shall be accorded confidentiality as medical records except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodation;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C—Accessibility

§ 142.15 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which the part applies.

§ 142.16 Existing facilities.

(a) *Accessibility*. A recipient shall operate each program or activity to which this part applies so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirement of paragraph (a) of this section through such means as the addition of equipment (e.g., telecommunication device for the deaf) redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirement of § 142.18, or any other method that results in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Time period*. A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

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

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under paragraph (a) of 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;

(4) Indicate the person responsible for implementation of the plan; and

(5) A list of all handicapped persons and organizations consulted in the plan formulation process.

(e) *Notice*. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing,

can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

[45 FR 69438, Oct. 21, 1980, as amended at 68 FR 51359, Aug. 26, 2003]

§ 142.17 New construction.

(a) *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed, constructed, and operated in a manner so that the facility or part of the facility is accessible to and usable by persons with handicaps, if the construction was commenced after the effective date of this part.

(b) *Alteration*. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that effects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered so that the altered portion of the facility is readily accessible to and usable by persons with handicaps.

(c) *Conformance with Uniform Federal Accessibility Standards*. (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[55 FR 52138, 52140, Dec. 19, 1990]

§§ 142.18–142.40 [Reserved]

Subpart D—Postsecondary Education

§ 142.41 Application of this subpart.

Subpart D applies to postsecondary education programs and activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance from the Department of State, and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 142.42 Admissions and recruitment.

(a) *General*. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions*. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program of activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Secretary to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, speaking or other skills (except where

those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, speaking or other skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §142.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §142.6(b), the recipient may invite applicants for admissions to indicate whether and to what extent they are handicapped; *Provided,* That: (1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (c)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§142.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational, training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs or activities in the most integrated setting appropriate.

§142.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discrimination, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose

upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, speaking or other skills as will best ensure that the results of the evaluation represent the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, speaking or other skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, speaking or other skills.

(2) Auxiliary aids may include taped texts, interpreters, telecommunication devices for the deaf or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 142.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C of this part, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodation is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 142.46 Financial and employment assistance to students.

(a) *Provisions of financial assistance.* (1) In providing financial assistance of qualified handicapped persons, a recipient to which this subpart applies may not:

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate; or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 142.47 Non-academic services.

(a) *Physical education and athletics.* (1) In providing physical education courses, athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separate or differentiation is consistent with the requirements of § 142.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factural information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 142.48–142.60 [Reserved]

Subpart E—Health, Welfare, Social, and Other Services

§ 142.61 Application of this subpart.

Subpart E applies to health, welfare, social and other programs or activities that receive Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of such programs or activities.

§ 142.62 Health, welfare, social, and other services.

(a) *General.* In providing health, welfare, social and other services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that are not equal to those offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 142.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs 15 or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, speaking or other skills (where necessary) to afford such persons an equal opportunity to benefit from the service in question.

(2) The Secretary may require recipients with fewer than 15 employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(e) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 142.63 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

Subpart F—Procedures

§ 142.70 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 22 CFR subchapter O, part 141.

APPENDIX A TO PART 142—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS PART APPLIES

Types of Federal Financial Assistance Administered by the Department of State Subject to Handicap Discrimination Regulations.

1. Resettlement of Refugees in the United States Under the Migration and Refugee Assistance Act of 1962, as amended (22 U.S.C. 2601 *et seq.* (1976)).

2. Non-reimbursable assignment of Foreign Service officers to State or local governments, public schools, community colleges, and other public or private nonprofit organizations designated by the Secretary of State (section 576 of the Foreign Service Act of 1946, as amended; 22 U.S.C. 966 (1976)).

3. Diplomat-in-Residence Program of the Foreign Service Institute under Title VII of the Foreign Service Act of 1946, as amended (22 U.S.C. 1041, *et seq.* (1976)).

[45 FR 69438, Oct. 21, 1980, as amended at 68 FR 51359, Aug. 26, 2003]

PART 143—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Sec.
143.1 What is the purpose of age discrimination regulations?
143.2 To what programs or activities do these regulations apply?
143.3 Definitions.

Subpart B—Standards for Determining Age Discrimination

143.11 Standards.

Subpart C—Duties of Agency Recipients

143.21 General responsibilities.
143.22 Notice to subrecipients.
143.23 Self-evaluation.
143.24 Information requirements.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

143.31 Compliance reviews.
143.32 Complaints.
143.33 Mediation.
143.34 Investigation.
143.35 Prohibition against intimidation or retaliation.
143.36 Compliance procedure.
143.37 Hearings, decisions, post-termination proceedings.
143.38 Remedial action by recipient.
143.39 Alternate funds disbursal procedure.
APPENDIX A TO PART 143—LIST OF AFFECTED FEDERAL FINANCIAL ASSISTANCE
APPENDIX B TO PART 143—LIST OF AFFECTED FEDERAL FINANCIAL ASSISTANCE
APPENDIX C TO PART 143—LIST OF AFFECTED PROGRAMS

AUTHORITY: Age Discrimination Act of 1975, as amended, (42 U.S.C. 6101 *et seq.*); 22 U.S.C. 2658; 45 CFR part 90.

SOURCE: 45 FR 31713, May 14, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 143 appear at 68 FR 51360, Aug. 26, 2003.

Subpart A—General

§ 143.1 What is the purpose of the age discrimination regulations?

The purpose of these regulations is to set out the policies and procedures for the three foreign affairs agencies (State, USICA and AID) under the Age

Discrimination Act of 1975 and the government-wide age discrimination regulations at 45 CFR part 90 (published at 44 FR 33768, June 12, 1979). The Act and the government-wide regulations prohibit discrimination on the basis of age in programs or activities in the United States receiving federal financial assistance. The Act and the government-wide regulations permit federally assisted programs and activities, and recipients of federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and the government-wide regulations.

§ 143.2 To what programs or activities do these regulations apply?

These regulations apply to each foreign affairs agency recipient and to each program or activity in the United States operated by the recipient which receives or benefits from federal financial assistance provided by any of these agencies.

§ 143.3 Definitions.

(a) The following terms used in this part are defined in the government-wide regulations (45 CFR 90.4, 44 FR 33768):

Act
Action
Age
Age distinction
Age-related term
Federal financial assistance
Recipient (including subrecipients)
United States

(b) As used in this part:

(1) *Agency* means the Department of State, the U.S. International Communication Agency, and the Agency for International Development.

(2) *Program or activity* means all of the operations of any entity described in paragraphs (b)(2)(i) and (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. 7801), 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 which is established by two or more of the entities described in paragraph (b)(2)(i), (ii), or (iii) of this section.

(3) *Secretary* means the Secretary of State, the Director of the U.S. International Communication Agency, and the Administrator of the Agency for International Development, or the designee of such officer.

(4) *Subrecipient* means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

[45 FR 31713, May 14, 1980, as amended at 68 FR 51360, Aug. 26, 2003]

Subpart B—Standards for Determining Age Discrimination

§ 143.11 Standards.

The standards each agency uses to determine whether an age distinction or age-related term is prohibited are set out in part 90 (primarily subpart B) of 45 CFR.

Subpart C—Duties of Agency Recipients

§ 143.21 General responsibilities.

Each agency recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act, the government-wide regulations, and these regulations.

§ 143.22 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from an agency to subrecipients, the recipient shall provide the subrecipients written notice to their obligations under these regulations.

§ 143.23 Self-evaluation.

(a) Each recipient employing the equivalent of 15 or more full-time employees shall complete a one-time written self-evaluation of its compliance under the Act within 18 months of the effective date of these regulations.

(b) In its self-evaluation each recipient shall identify each age distinction it uses and justify each age distinction it imposes on the program or activity receiving Federal financial assistance from an agency.

(c) Each recipient shall take corrective action whenever a self-evaluation indicates a violation of these regulations.

(d) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of three years following its completion.

§ 143.24 Information requirements.

Each recipient shall:

(a) Make available upon request to the agency information necessary to determine whether the recipient is complying with the regulations.

(b) Permit reasonable access by the agency to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether a recipient is in compliance with these regulations.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 143.31 Compliance reviews.

(a) The agency may conduct compliance reviews and pre-award reviews of recipients that will permit it to investigate and correct violations of these regulations. The agency may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review or pre-award review indicates a violation of this part, the agency will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, the agency will arrange for enforcement as described in § 143.36.

§ 143.32 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with an agency, alleging discrimination prohibited by these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, the agency may extend this time limit.

(b) The agency will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights under the complaint procedure, including the right to have a representative at all stages of the complaint process.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact the agency for information and assistance regarding the complaint resolution process.

(c) The agency will return to the complainant any complaint outside the jurisdiction of these regulations and will state the reason(s) why it is outside the jurisdiction of these regulations.

§ 143.33 Mediation.

(a) *Referral of complaints for mediation.* The agency will refer to the Federal Mediation and Conciliation Service all complaints that:

(1) Fall within the jurisdiction of these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator, before the agency will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it. The mediator shall send a copy of the agreement to the agency. The agency shall take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) The agency will use the mediation process for a maximum of 60 days after receiving a complaint. Mediation ends if:

(1) Sixty days elapse from the time the agency receives the complaint; *or*

(2) Prior to the end of that 60-day period, an agreement is reached; *or*

(3) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(f) The mediator shall return unresolved complaints to the agency.

§ 143.34 Investigation.

(a) *Informal investigation.* (1) The agency will investigate complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation, the agency will use informal fact finding methods, including joint or separate discussions with the complainant and recipient to establish the facts, and, if possible, settle the complaint on terms that are mutually agreeable. The agency may seek the assistance of any involved State program agency.

(3) The agency will put any agreement in writing and have it signed by the parties and an authorized official of the agency.

(4) The settlement shall not affect the operation of any other enforcement efforts of the agency, including compliance reviews and other individual complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal investigation.* If the agency cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, the agency will attempt to obtain voluntary compliance. If the agency cannot obtain voluntary compliance, it will begin enforcement as described in § 143.36.

§ 143.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.

§ 143.36 Compliance procedure.

(a) An agency may enforce the Act and these regulations through:

(1) Termination of a recipient's Federal financial assistance from the agency under the program or activity involved where the recipient has violated the Act and these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. Therefore, cases which are settled in mediation or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from the agency.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations by the Act and these regulations.

(ii) Use of any requirement of or referral to any Federal, state, or local government agency which will have the effect of correcting a violation of the Act or these regulations.

(b) The agency will limit any termination under §143.36(a)(1) to the particular recipient and particular program or activity the agency finds in violation of these regulations. The agency will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from the agency.

(c) The agency will take no action under paragraph (a) of this section until:

(1) The agency head has advised the recipient of its failure to comply with these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have lapsed after the agency head has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the Federal program or activity involved. The agency head shall file a report whenever any action is taken under paragraph (a) of this section.

(d) The agency head also may defer granting new Federal financial assistance from the agency to a recipient when a hearing under §143.36(a)(1) is initiated.

(1) New Federal financial assistance from the agency includes all assistance for which the agency requires an application or approval, including renewal or continuation of existing activities, or authorization of the new activities, during the deferral period. New Federal financial assistance from the agency does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under §143.36(a)(1).

(2) The agency will not begin a deferral until the recipient has received a notice of opportunity for a hearing under §143.36(a)(1). The agency will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the agency head. The agency will not continue a deferral for more than 30 days after the close of a hearing unless the hearing results in a finding against the recipient.

§ 143.37 Hearings, decisions, post-termination proceedings.

Certain procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to enforcement of this part. They are 22 CFR 141.8 through 141.10.

§ 143.38 Remedial action by recipient.

Where the agency head finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that the agency head may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, the agency head may require both recipients to take remedial action.

§ 143.39 Alternate funds disbursal procedure.

(a) When an agency withholds funds from a recipient under these regulations, the agency head may disburse the withheld funds directly to an alternate recipient, any public or non-profit private organization or agency, or

State or political subdivision of the State.

(b) The agency head will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or activity.

APPENDIX A TO PART 143—LIST OF AFFECTED FEDERAL FINANCIAL ASSISTANCE

TYPES OF FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE DEPARTMENT OF STATE SUBJECT TO AGE DISCRIMINATION REGULATIONS

Resettlement of Refugees in the United States Under the Migration and Refugee Assistant Act of 1962, as amended (22 U.S.C. 2601 *et seq.*).

Diplomat in Residence Program of the Foreign Service Institute Under Title VII of the Foreign Service Act of 1946, as amended (22 U.S.C. 1041 *et seq.*).

Assignments under section 576 of the Foreign Service Act of 1946, as amended (22 U.S.C. 966)

APPENDIX B TO PART 143—LIST OF AFFECTED FEDERAL FINANCIAL ASSISTANCE

TYPES OF FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE UNITED STATES INTERNATIONAL COMMUNICATION AGENCY SUBJECT TO AGE DISCRIMINATION REGULATIONS

Educational and Cultural Exchanges under the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 1431–1479).

APPENDIX C TO PART 143—LIST OF AFFECTED PROGRAMS

TYPES OF FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY AID SUBJECT TO AGE DISCRIMINATION REGULATIONS

1. Grants to research and educational institutions in the United States to strengthen their capacity to develop and carry out programs concerned with the economic and social development of developing countries (Section 122(d), Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151(d)).

2. Grants to land grant and other qualified agricultural universities and colleges in the United States to develop their capabilities to assist developing countries in agricultural teaching, research and extension services (Section 297, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2220(b)).

3. Grants to private and voluntary agencies, non-profit organizations, educational institutions, and other qualified organizations for programs in the United States to promote the economic and social development of developing countries (Sections 103–106, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151a–2151d).

PART 144—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE UNITED STATES DEPARTMENT OF STATE

Sec.

144.101 Purpose.
144.102 Application.
144.103 Definitions.
144.104–144.109 [Reserved]
144.110 Self-evaluation.
144.111 Notice.
144.112–144.129 [Reserved]
144.130 General prohibitions against discrimination.
144.131–144.139 [Reserved]
144.140 Employment.
144.141–144.148 [Reserved]
144.149 Program accessibility: Discrimination prohibited.
144.150 Program accessibility: Existing facilities.
144.151 Program accessibility: New construction and alterations.
144.152–144.159 [Reserved]
144.160 Communications.
144.161–144.169 [Reserved]
144.170 Compliance procedures.
144.171–144.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 22890, 22896, June 23, 1986, unless otherwise noted.

§ 144.101 Purpose.

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

§ 144.102 Application.

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

§ 144.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

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

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

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

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

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

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

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

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

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

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

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

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

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute,

regulation, or agency policy to receive education services from the agency.

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

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

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 144.140.

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

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 144.104–144.109 [Reserved]

§ 144.110 Self-evaluation.

(a) The agency shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

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

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

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

(2) A description of any modifications made.

§ 144.111 Notice.

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

§§ 144.112–144.129 [Reserved]

§ 144.130 General prohibitions against discrimination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

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

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

§§ 144.131–144.139 [Reserved]

§ 144.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 144.141–144.148 [Reserved]

§ 144.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 144.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 144.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and

usable by handicapped persons. This paragraph does not—

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

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 144.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General*. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs*. In meeting the requirements of § 144.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of § 144.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance*. The agency shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan

shall be made available for public inspection. The plan shall, at a minimum—

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

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

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

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

§ 144.151 Program accessibility: New construction and alterations.

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

§§ 144.152–144.159 [Reserved]

§ 144.160 Communications.

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

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

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

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

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

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

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

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and adminstrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 144.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 144.161–144.169 [Reserved]

§ 144.170 Compliance procedures.

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

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

(c) The Deputy Assistant Secretary for Equal Employment Opportunity and Civil Rights shall be responsible for coordinating implementation of this section. Complaints may be sent to Deputy Assistant Secretary for Equal Employment Opportunity and Civil Rights, Department of State, 2201 C Street, NW., Room 3214, Washington, DC 20520.

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

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

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

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

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §144.170(g). The agency may extend this time for good cause.

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

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

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

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

[51 FR 22890, 22896, June 23, 1986, as amended at 51 FR 22890, June 23, 1986]

§§ 144.171–144.999 [Reserved]

PART 145—GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

Subpart A—General

Sec.
145.1 Purpose.
145.2 Definitions.
145.3 Effect on other issuances.
145.4 Deviations.
145.5 Subawards.

Subpart B—Pre-Award Requirements

145.10 Purpose.
145.11 Pre-award policies.
145.12 Forms for applying for Federal assistance.
145.13 Debarment and suspension.
145.14 Special award conditions.
145.15 Metric system of measurement.
145.16 Resource Conservation and Recovery Act.
145.17 Certifications and representations.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

145.20 Purpose of financial and program management.

145.21 Standards for financial management systems.
145.22 Payment.
145.23 Cost sharing or matching.
145.24 Program income.
145.25 Revision of budget and program plans.
145.26 Non-Federal audits.
145.27 Allowable costs.
145.28 Period of availability of funds.

PROPERTY STANDARDS

145.30 Purpose of property standards.
145.31 Insurance coverage.
145.32 Real property.
145.33 Federally-owned and exempt property.
145.34 Equipment.
145.35 Supplies and other expendable property.
145.36 Intangible property.
145.37 Property trust relationship.

PROCUREMENT STANDARDS

145.40 Purpose of procurement standards.
145.41 Recipient responsibilities.
145.42 Code of conduct.
145.43 Competition.
145.44 Procurement procedures.
145.45 Cost and price analysis.
145.46 Procurement records.
145.47 Contract administration.
145.48 Contract clauses.

REPORTS AND RECORDS

145.50 Purpose of reports and records.
145.51 Monitoring and reporting program performance.
145.52 Financial reporting.
145.53 Retention and access requirements for records.

TERMINATION AND ENFORCEMENT

145.60 Purpose of termination and enforcement.
145.61 Termination.
145.62 Enforcement.

Subpart D—After-the-Award Requirements

145.70 Purpose.
145.71 Closeout procedures.
145.72 Subsequent adjustments and continuing responsibilities.
145.73 Collection of amounts due.

APPENDIX A TO PART 145—CLAUSES FOR CONTRACTS AND SMALL PURCHASES AWARDED BY RECIPIENT

AUTHORITY: 22 U.S.C. 2658.1; OMB Circular A–110 (64 FR 54926, October 8, 1999).

SOURCE: 59 FR 18731, Apr. 20, 1994, unless otherwise noted.

Subpart A—General

§ 145.1 Purpose.

This regulation establishes uniform administrative requirements for Department of State grants and cooperative agreements awarded to institutions of higher-education, hospitals, other nonprofit organizations, and commercial organizations, except that § 145.36(d)(1) shall not apply to commercial organizations. Non-profit organizations that implement Federal programs for the States are also subject to State requirements. Copies of the OMB circulars mentioned in this part may be ordered from the Office of Management and Budget Publications Office (202) 395–7000.

[59 FR 18731, Apr. 20, 1994, as amended at 65 FR 14409, Mar. 16, 2000]

§ 145.2 Definitions.

(a) *Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

(b) *Accrued income* means the sum of:

(1) Earnings during a given period from—

(i) Services performed by the recipient, and

(ii) Goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) *Acquisition cost of equipment* means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(d) *Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

(e) *Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: Technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

(f) *Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

(g) *Closeout* means the process by which an awarding agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and awarding agency.

(h) *Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(i) *Cooperative agreement,* as defined in 31 U.S.C. 6305, means a legal instrument reflecting a relationship between the United States Government and a recipient when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law, instead of acquiring property or services for the direct use of the United States Government, and substantial involvement is expected between the awarding agency and the recipient when carrying out the activity contemplated in the agreement.

(j) *Cost sharing or matching* means that portion of project or program costs not borne by the Federal Government.

(k) *Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

(l) *Disallowed costs* means those charges to an award that the awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

(m) *Equipment* means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

(n) *Excess property* means property under the control of any awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

(o) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

(p) *Federal awarding agency or awarding agency* means the Federal agency that provides an award to the recipient.

(q) *Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

(r) *Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(s) *Funding period* means the period of time when Federal funding is available for obligation by the recipient.

(t) *Grant,* as defined in 31 U.S.C. 6304, means a legal instrument reflecting a relationship between the United States Government and a recipient when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law, instead of acquiring property or services for the direct use of the United States Government, and substantial involvement is not expected between the awarding agency and the recipient when carrying out the activity contemplated in the agreement.

(u) *Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

(v) *Obligations* means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

(w) *Outlays or expenditures* means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

(x) *Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

(y) *Prior approval* means written approval by an authorized official evidencing prior consent.

(z) *Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §145.24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

(aa) *Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

(bb) *Project period* means the period established in the award document during which Federal sponsorship begins and ends.

(cc) *Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(dd) *Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

(ee) *Recipient* means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program.

(1) The term includes public and private institutions of higher education; public and private hospitals; other quasi-public and private non-profit organizations such as, but not limited to,

community action agencies, research institutes, educational associations, and health centers; and commercial organizations receiving grants or cooperative agreements from the Department.

(2) The term does not include any of the following which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients:

(i) Foreign organizations (governmental or non-governmental);

(ii) International organizations (such as agencies of the United Nations); or

(iii) Organizations whose assistance agreement is for work to be performed outside the United States.

(3) The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

(ff) *Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(gg) *Small awards* means a grant or cooperative agreement not exceeding $100,000 or the small purchase limitation fixed at 41 U.S.C. 403(11), whichever is greater.

(hh) *Small purchase limitation*, for procurements transactions awarded by recipients, means $100,000 or the small purchase limitation fixed at 41 U.S.C. 403(11), whichever is greater.

(ii) *Subaward* means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of ''award'' in § 145.2(e).

(jj) *Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the awarding agency.

(kk) *Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

(ll) *Suspension* means an action by an awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing E.O.s 12549 and 12689, ''Debarment and Suspension.''

(mm) *Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(nn) *Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting

and specifically identifiable to the project or program.

(oo) *Unliquidated obligations,* for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

(pp) *Unobligated balance* means the portion of the funds authorized by the awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(qq) *Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

(rr) *Working capital advance* means a procedure where by funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 145.3 Effect on other issuances.

For awards subject to this regulation, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this regulation are superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 145.4.

§ 145.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this regulation when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this regulation shall be permitted only in unusual circumstances. The Department may apply more restrictive requirements to a class of recipients when approved by OMB. The Department may apply less restrictive requirements when issuing small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the Department. Deviation requests shall be submitted to the Office of the Procurement Executive (A/OPE) for approval or transmittal to OMB.

§ 145.5 Subawards.

Unless sections of this regulation specifically exclude subrecipients from coverage, the provisions of this regulation shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of part 135 of this chapter implementing the grants management common rule, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.''

Subpart B—Pre-Award Requirements

§ 145.10 Purpose.

Sections 145.11 through 145.17 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 145.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, the awarding agency shall decide on the appropriate award instrument (*i.e.*, grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government. The Department may not

award grants or cooperative agreements unless specific statutory authority exists for a program allowing the award of Federal assistance.

(b) *Public notice and priority setting.* (1) The Department shall notify the public of its intended funding priorities for discretionary grant programs, except for:

(i) Awards for which funding priorities are established by Federal statute,

(ii) Small awards, and

(iii) Awards for which program purposes would not be served by public notice.

(2) In the case of the exception in paragraph (b)(1)(iii) of this section, the award file shall be documented with the rationale for not issuing a public notice.

§ 145.12 Forms for applying for Federal assistance.

(a) Department Grants Officers shall comply with the applicable report clearance requirements of 5 CFR part 1320, ''Controlling Paperwork Burdens on the Public,'' with regard to all forms used by the awarding agency in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by the Grants Officer and approved by the Office of the Procurement Executive (A/OPE).

(c) For Federal programs covered by Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the awarding agency or the Catalog of Federal Domestic Assistance. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Department Grants Officers who do not use the SF–424 form should indicate whether the application is subject to review by the State under Executive Order 12372.

§ 145.13 Debarment and suspension.

The Department and recipients shall comply with the nonprocurement debarment and suspension common rule implementing Executive Orders 12549 and 12689, ''Debarment and Suspension,'' as implemented in 2 CFR 601. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[59 FR 18731, Apr. 20, 1994, as amended at 72 FR 10035, Mar. 7, 2007]

§ 145.14 Special award conditions.

If an applicant or recipient: has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this regulation, has not conformed to the terms and conditions of a previous award, or is not otherwise responsible, the Department may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: The nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 145.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially

impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Federal awarding agencies shall follow the provisions of E.O. 12770, ''Metric Usage in Federal Government Programs.''

§ 145.16 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 145.17 Certifications and representations.

Unless prohibited by statute or codified regulation, the Department is authorized to accept and encourages recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the Department. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 145.20 Purpose of financial and program management.

Sections 145.21 through 145.28 prescribe standards for financial management systems, methods for making payments and rules for: Satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 145.21 Standards for financial management systems.

(a) The Department shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 145.52. If the Department requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal

agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Department, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Department may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

§ 145.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain: Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and financial management systems that meet the standards for fund control and accountability as established in § 145.21. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the Department to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB (e.g., SF–1034). This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Department instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) cannot be met. The Department may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Department shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Department has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Department may provide cash on a working capital advance basis. Under this procedure, the Department shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Department shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, the Department shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraphs (h) (1) or (2) of this section apply.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Managing Federal Credit Programs.'' Under such conditions, the Department may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2), the Department shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraphs (k) (1), (2) or (3) of this section apply.

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to the Department for submission to Treasury. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Department, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this regulation, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. The Department shall not require more than an original and two copies of these forms except if OMB approval is obtained.

(1) *SF–270, Request for Advance or Reimbursement.* The Department shall use the SF–270 as a standard form for all

nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. Grants Officers may use forms equivalent to the SF–270 if approved in writing by the Office of the Procurement Executive (A/OPE). The Department has the option of using the SF–270 for construction programs in lieu of the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) *SF–271, Outlay Report and Request for Reimbursement for Construction Programs.* The Department shall use the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, the Department may substitute the SF–270 when the Department determines that it provides adequate information to meet Federal needs.

§ 145.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other Federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Department.

(7) Conform to other provisions of this regulation, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Department Grants Officer.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If the Department authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraphs (c) (1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) *The current fair market value.* However, when there is sufficient justification, the Department may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the

award, if paragraph (g) (1) or (2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Department has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 145.24 Program income.

(a) The Department shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with the terms and conditions of the award, shall be used in one or more of the ways listed in the following.

(1) Added to funds committed to the project by the Department and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When the award authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2), program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3).

(d) In the event that the Department does not specify in the terms and conditions of the award how program income is to be used, paragraph (b)(3) shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in § 145.14.

(e) Unless the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the

requirements of the Property Standards (See §§ 145.30 through 145.37).

(h) Unless the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 145.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Department requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section, unless, at the discretion of the Grants Officer, a small percentage variance is allowed by the terms of the grant or cooperative agreement.

(c) For nonconstruction awards, recipients shall request prior approvals from the Department for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Department.

(6) The inclusion, unless waived by the Department, of costs that require prior approval in accordance with OMB Circular A–21, ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122, ''Cost Principles for Non-Profit Organizations,'' or 45 CFR part 74 appendix E, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items described by this regulation may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, Grants Officers are authorized, at their option, to waive cost-related and administrative prior written approvals required by this regulation and OMB Circulars A–21 and A–122. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Department. All pre-award costs are incurred at the recipient's risk (*i.e.*, the Department is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Department in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award.

This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Department provides otherwise in the award, the prior approval requirements described in paragraph (e) are automatically waived (*i.e.*, recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Department may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Grants Officer. Grants Officers shall not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j), do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the Grants Officer for budget revisions whenever paragraphs (h) (1), (2) or (3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 145.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When the Department makes an award that provides support for both construction and nonconstruction work, the Department may require the recipient to request prior approval from the Department before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, the Department shall require recipients to notify the Department in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Grants Officer indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Grants Officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Grants Officer shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 145.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit hospitals not covered by the audit provisions of revised OMB

Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of the Department or the prime recipient as incorporated into the award document.

[59 FR 18731, Apr. 20, 1994, as amended at 62 FR 45939, 45941, Aug. 29, 1997]

§ 145.27 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, ''Cost Principles for State and Local Governments.'' The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.'' The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, ''Cost Principles for Educational Institutions.'' The allowability of costs incurred by hospitals is determined in accordance with the provisions of appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.'' The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 145.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Department, unless otherwise provided in the grant or cooperative agreement.

PROPERTY STANDARDS

§ 145.30 Purpose of property standards.

Sections 145.31 through 145.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. The Department shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 145.31 through 145.37.

§ 145.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 145.32 Real property.

Each award shall prescribe any applicable requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following:

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Department.

(b) The recipient shall obtain written approval by the Department for the use of real property in other Federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under Federally-sponsored projects (*i.e.*, awards) or programs that have purposes consistent with those authorized for support by the Department.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b), the recipient shall request disposition instructions from the cognizant Grants Officer. The Department shall observe one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Department and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 145.33 Federally-owned and exempt property.

(a) *Federally-owned property.* (1) Title to Federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of Federally-owned property in their custody to the Department. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Department for further Federal agency utilization.

(2) If the Department has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Department has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with Executive Order 12821, ''Improving Mathematics and Science Education in Support of the National Education Goals.'') Appropriate instructions shall be issued to the recipient by the Department.

(b) *Exempt property.* When statutory authority exists, the Department has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Department considers appropriate. Such property is ''exempt property.'' Should the Department not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 145.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the Department. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority: First, Activities sponsored by the Department which funded the original project, then activities sponsored by other the Department.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use

will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the Department that financed the equipment; second preference shall be given to projects or programs sponsored by other the Department. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Department. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Department.

(f) The recipient's property management standards for equipment acquired with Federal funds and Federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Department for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Department.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Department. The Department shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be

reported to the General Services Administration by the Department to determine whether a requirement for the equipment exists in other Federal agencies. The Department shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Department an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the Department for such costs incurred in its disposition.

(4) The Department may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(i) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) The Department shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with grant funds and federally-owned equipment. If the Department fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(iii) When the Department exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 145.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 145.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Department reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(3) The requirements set forth in paragraph (d)(1) of this section do not apply to commercial organizations.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Department. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 145.34(g).

[59 FR 18731, Apr. 20, 1994, as amended at 65 FR 14407, 14409, Mar. 16, 2000]

§ 145.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 145.40 Purpose of procurement standards.

Sections 145.41 through 145.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds.

These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Department upon recipients, unless specifically required by Federal statute or executive order or approved by OMB. The standards in §§ 145.1 through 145.48 do not apply to small awards, except where imposed by Federal statute or Executive Order.

§ 145.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Department, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 145.42 Code of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 145.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 145.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain

features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procurement instruments used (e.g., fixed price contracts, cost reimbursement contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be awarded only to responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by implementation of E.O.s 12549 and 12689, ''Debarment and Suspension,'' implemented at 2 CFR 601.

(e) Recipients shall, on request, make available for the Department, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in the Department's implementation of this regulation.

(2) The procurement is expected to exceed the small purchase limitation and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase limitation, specifies a ''brand name'' product.

(4) The proposed award over the small purchase limitation is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase limitation.

[59 FR 18731, Apr. 20, 1994, as amended at 72 FR 10035, Mar. 7, 2007]

§ 145.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 145.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase limitation shall include the following at a minimum:

(a) basis for contractor selection,

(b) justification for lack of competition when competitive bids or offers are not obtained, and

(c) basis for award cost or price.

§ 145.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 145.48 Contract clauses.

The recipient shall include, in addition to clauses to define a sound and complete agreement, the following clauses in all contracts. The following clauses shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase limitation shall contain contract clauses that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase limitation shall contain suitable clauses for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. The clauses shall describe conditions under which the contract may be terminated by the recipient for default of the contractor as well as conditions where the contract may be terminated for convenience because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the Department may accept the bonding policy and requirements of the recipient, provided the Department has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price or other amount approved by the Grants Officer. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and

material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the small purchase limitation) awarded by recipients shall include a provision to the effect that the recipient, the Department, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the contract clauses in appendix A to this regulation, as applicable.

REPORTS AND RECORDS

§ 145.50 Purpose of reports and records.

Sections 145.51 through 145.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 145.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 145.26.

(b) The Department shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in § 145.51(f), performance reports shall not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semi-annual reports shall be due 30 days after the reporting period. The Department may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following.

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Department of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) The Department may make site visits, as needed.

(h) The Department shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 145.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF–269 or SF–269A, Financial Status Report

(i) The Department shall require recipients to use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs, unless an equivalent form has been prescribed by the Grants Officer and approved by the OMB and the Office of the Procurement Executive (A/OPE), e.g., Form JF–61 for the Office of Overseas Schools (A/OPR/OS). The Department may also have the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The Grants Officer shall prescribe whether the report shall be on a cash or accrual basis. If the Department requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Department shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Department shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Department upon request of the recipient.

(2) SF–272, Report of Federal Cash Transactions

(i) When funds are advanced to recipients the Department shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a. The Department shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) The Department may require forecasts of Federal cash requirements in the ''Remarks'' section of the report.

(iii) When practical and deemed necessary, the Department may require recipients to report in the ''Remarks'' section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. The Department may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) The Grants Officer may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the Grants Officer's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Department needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, the Department shall issue instructions to require recipients to submit such information under the ''Remarks'' section of the reports.

(2) When the Department determines that a recipient's accounting system does not meet the standards in §145.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is

brought up to standard. The Department, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) The Grants Officer may ''shade out'' any line item on any report if not necessary.

(4) The Department may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) The Department may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§ 145.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. The Department shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Department. The only exceptions are the following.

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Department, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in § 145.53(g).

(c) Copies of original records may be substituted for the original records if authorized by the Department.

(d) The Department shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, the Department may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Department, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no Department shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Department can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Department.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) apply to the following types of documents, and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Department or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting

records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Department or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

TERMINATION AND ENFORCEMENT

§ 145.60 Purpose of termination and enforcement.

Sections 145.61 and 145.62 set forth uniform suspension, termination and enforcement procedures.

§ 145.61 Termination.

(a) Awards may be terminated in whole or in part only if paragraphs (a)(1), (2) or (3) of this section apply.

(1) By the Department, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Department, with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient, upon sending to the Department written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Department determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraphs (a) (1) or (2).

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 145.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 145.62 Enforcement.

(a) *Remedies for noncompliance*. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Department may, in addition to imposing any of the special conditions outlined in § 145.14, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Department.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals*. In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination*. Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraphs (c) (1) and (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under Executive Orders 12549 and 12689 and the implementing regulations at 2 CFR 601.

[59 FR 18731, Apr. 20, 1994, as amended at 72 FR 10035, Mar. 7, 2007]

Subpart D—After-the-Award Requirements

§ 145.70 Purpose.

Sections 145.71 through 145.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 145.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Grants Officer may approve extensions when requested by the recipient.

(b) Unless the Grants Officer authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award.

(c) The Department shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Department has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Department shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 145.31 through 145.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Department shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 145.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 145.26.

(4) Property management requirements in §§ 145.31 through 145.37.

(5) Records retention as required in § 145.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Department and the recipient, provided the responsibilities of the recipient referred to in § 145.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 145.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Department may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Department shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, Federal Claims Collection Standards.

APPENDIX A TO PART 145—CLAUSES FOR CONTRACTS AND SMALL PURCHASES AWARDED BY RECIPIENT

All contracts and small purchases, awarded by a recipient who is subject to this regulation, shall contain the following clauses, as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a clause requiring compliance with Executive Order 11246, ''Equal Employment Opportunity,'' as amended by Executive Order 11375, ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR part 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a clause for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Department.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2000 shall include a clause for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Department.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*— Where applicable, all contracts awarded by recipients in excess of $2000 for construction contracts and in excess of $2500 for other contracts that involve the employment of mechanics or laborers shall include a clause for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*— Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,'' and any implementing regulations issued by the Department.

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the *Federal Water Pollution Control Act* (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subgrants of amounts in excess of $100,000 shall contain a clause that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Department and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any

person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (Executive Orders 12549 and 12689)*— No contract shall be made to parties listed on the General Services Administration's Excluded Parties List System (*http://www.epls.gov*) from Federal Procurement or Nonprocurement Programs in accordance with Executive Orders 12549 and 12689, 'Debarment and Suspension.' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than Executive Order 12549. Contractors with awards that exceed the small purchase limitation shall provide the required certification regarding its exclusion status and that of its principal employees.

[59 FR 18731, Apr. 20, 1994, as amended at 72 FR 10035, Mar. 7, 2007]

PART 146—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.
146.100 Purpose and effective date.
146.105 Definitions.
146.110 Remedial and affirmative action and self-evaluation.
146.115 Assurance required.
146.120 Transfers of property.
146.125 Effect of other requirements.
146.130 Effect of employment opportunities.
146.135 Designation of responsible employee and adoption of grievance procedures.
146.140 Dissemination of policy.

Subpart B—Coverage

146.200 Application
146.205 Educational institutions and other entities controlled by religious organizations.
146.210 Military and merchant marine educational institutions.
146.215 Membership practices of certain organizations.
146.220 Admissions.
146.225 Educational institutions eligible to submit transition plans.
146.230 Transition plans.
146.235 Statutory amendments.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

146.300 Admission.
146.305 Preference in admission.
146.310 Recruitment.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

146.400 Education programs or activities.
146.405 Housing.
146.410 Comparable facilities.
146.415 Access to course offerings.
146.420 Access to schools operated by LEAs.
146.425 Counseling and use of appraisal and counseling materials.
146.430 Financial assistance.
146.435 Employment assistance to students.
146.440 Health and insurance benefits and services.
146.445 Marital or parental status.
146.450 Athletics.
146.455 Textbooks and curricular material.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

146.500 Employment.
146.505 Employment criteria.
146.510 Recruitment.
146.515 Compensation.
146.520 Job classification and structure.
146.525 Fringe benefits.
146.530 Marital or parental status.
146.535 Effect of state or local law or other requirements.
146.540 Advertising.
146.545 Pre-employment inquiries.
146.550 Sex as a bona fide occupational qualification.

Subpart F—Procedures

146.600 Notice of covered programs.
146.605 Enforcement procedures.

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52878, unless otherwise noted.

Subpart A—Introduction

§ 146.100 Purpose and effective date.

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 September 29, 2000.

§ 146.105 Definitions.

As used in these Title IX regulations, the term:

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.

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.

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.

Designated agency official means Deputy Assistant Secretary for the Office of Equal Employment Opportunity and Civil Rights'.

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.

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.

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.

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.

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; or

(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.

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 semiskilled 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.

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.

Student means a person who has gained admission.

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).

Title IX regulations means the provisions set forth at §§146.100 through 146.605.

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.

[65 FR 52865, 52878, Aug. 30, 2000]

§ 146.110 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 September 29, 2000:

(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 non-

academic 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.

§ 146.115 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 § 146.110(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.

§ 146.120 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 §§ 146.205 through 146.235(a).

§ 146.125 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.

§ 146.130 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.

§ 146.135 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.

§ 146.140 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 §§ 146.300 through 146.310 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 § 146.135, 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 September 29, 2000 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

§ 146.200 Application.

Except as provided in §§ 146.205 through 146.235(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.

§ 146.205 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.

§ 146.210 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.

§ 146.215 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 1954, 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.

§ 146.220 Admissions.

(a) 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, §§ 146.225 and 146.230, and §§ 146.300 through 146.310, each administratively

separate unit shall be deemed to be an educational institution.

(c) *Application of §§146.300 through .310.* Except as provided in paragraphs (d) and (e) of this section, §§146.300 through 146.310 apply to each recipient. A recipient to which §§146.300 through 146.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§146.300 through 146.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§146.300 through 146.310 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.* §§146.300 through 146.310 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.

§ 146.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§146.300 through 146.310 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 §§146.300 through 146.310.

§ 146.230 Transition plans.

(a) *Submission of plans.* An institution to which §146.225 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 §146.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§146.300 through 146.310 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 §146.225 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.

§ 146.235 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) *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 section 8801 of title 20), 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

§ 146.300 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 §§ 146.300 through §§ 146.310 apply, except as provided in §§ 146.225 and §§ 146.230.

(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 §§ 146.300 through 146.310 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 §§ 146.300 through 146.310 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 § 146.235(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.

§ 146.305 Preference in admission.

A recipient to which §§ 146.300 through 146.310 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 §§ 146.300 through 146.310.

§ 146.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 146.300 through 146.310 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 § 146.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 146.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 146.300 through 146.310 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 §§ 146.300 through 146.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 146.400 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 146.400 through 146.455 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 §§ 146.300 through 146.310 do not apply, or an entity, not a recipient, to which §§ 146.300 through 146.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 146.400 through 146.455, 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 instate 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;

(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.

§ 146.405 Housing.

(a) *Generally*. 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.

§ 146.410 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.

§ 146.415 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 classes and activities in physical education 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 September 29, 2000. 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 September 29, 2000.

(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.

§ 146.420 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.

§ 146.425 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.

§ 146.430 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 § 146.450.

§ 146.435 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 §§ 146.500 through 146.550.

§ 146.440 Health and insurance benefits and services.

Subject to § 146.235(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 §§ 146.500 through 146.550 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.

§ 146.445 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 § 146.235(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.

§ 146.450 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;

(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 September 29, 2000. 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 September 29, 2000.

§ 146.455 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

§ 146.500 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 therefor, 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 §§ 146.500 through 146.550, 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*. The provisions of §§ 146.500 through 146.550 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.

§ 146.505 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.

§ 146.510 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 §§146.500 through 146.550.

§ 146.515 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.

§ 146.520 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 §146.550.

§ 146.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *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 provision of §146.515.

(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.

§ 146.530 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 §146235(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.

§ 146.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§ 146.500 through 146.550 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.

§ 146.540 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.

§ 146.545 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.

§ 146.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 146.500 through 146.550 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

§ 146.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency 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 Federal agency's office that enforces Title IX.

§ 146.605 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 22 CFR part 141.

[65 FR 52879, Aug. 30, 2000]

SUBCHAPTER P—DIPLOMATIC PRIVILEGES AND IMMUNITIES

PART 151—COMPULSORY LIABILITY INSURANCE FOR DIPLOMATIC MISSIONS AND PERSONNEL

Sec.
151.1 Purpose.
151.2 Definitions.
151.3 Types of insurance coverage required.
151.4 Minimum limits for motor vehicle insurance.
151.6 Authorized insurer.
151.7 Policy terms consistent with the Act.
151.8 Evidence of insurance for motor vehicles.
151.9 Evidence of insurance required for diplomatic license plates and waiver of fees.
151.10 Minimum limits of insurance for aircraft and/or vessels.
151.11 Notification of ownership, maintenance, or use of vessel and/or aircraft; evidence of insurance.

AUTHORITY: Sec. 6, Diplomatic Relations Act (Pub. L. 95–393; 22 U.S.C. 254e) as amended (Pub. L. 98–164, sec. 602; 22 U.S.C. 254e).

SOURCE: 44 FR 29451, May 21, 1979, unless otherwise noted.

§ 151.1 Purpose.

This part establishes regulations required under section 6 of the Diplomatic Relations Act (Pub. L. 95–393; 22 U.S.C. 254e). These regulations require all missions, members of missions and their families, and those officials of the United Nations who are entitled to diplomatic immunity to have and maintain liability insurance against the risks of bodily injury, including death, and property damage, including loss of use, arising from the ownership, maintenance, or use in the United States of any motor vehicle, vessel, or aircraft.

§ 151.2 Definitions.

(a) *Act* means the Diplomatic Relations Act, Pub. L. 95–393 (22 U.S.C. 254a *et seq.*, 28 U.S.C. 1364).

(b) *Persons subject to the Act,* as defined in section 2 of the Act, means: (1) The head of a mission and members of the diplomatic staff, administrative and technical staff, and service staff of a mission, as such terms are defined in Article 1 of the Vienna Convention on Diplomatic Relations of April 18, 1961 (TIAS 7502, 23 U.S.T. 3227); (2) members of the family of a member of the diplomatic staff of a mission who form part of his or her household if they are not nationals of the United States, and members of the family of a member of the administrative and technical staff of a mission who form part of his or her household if they are not nationals or permanent residents of the United States; and (3) senior officials of the United Nations as defined in paragraph (d) of this section.

(c) *Missions,* as defined in section 2 of the Act, means missions within the meaning of the Vienna Convention on Diplomatic Relations and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention.

(d) *Senior United Nations official* means a United Nations official entitled to diplomatic immunity as provided in section 19 of the Convention on Privileges and Immunities of the United Nations of February 13, 1946 (21 UST 1418; 1 UNTS 16).

(e) *Insurance* means insurance as required by the Act and these regulations.

§ 151.3 Types of insurance coverage required.

(a) Every person subject to the Act and every mission shall have and maintain with respect to any motor vehicle, vessel or aircraft owned by, leased to, or furnished for the regular use of every such person or mission liability insurance in accordance with the form, terms, and conditions provided for in these regulations.

(b) The insurance shall provide coverage against the following risks to third parties arising from the ownership, maintenance, or use in the United States of any motor vehicle, vessel, or aircraft:

(1) Bodily injury, including death;

(2) Property damage, including loss of use; and

(3) Any additional coverage required to be included in liability insurance policies by the jurisdiction where the motor vehicle, vessel or aircraft is

principally garaged, berthed, or kept, such as uninsured motorist coverage or first party no-fault coverage.

§ 151.4 Minimum limits for motor vehicle insurance.

The insurance shall provide not less than $100,000 per person and $300,000 per incident for bodily injury liability and $100,000 per incident for property damage or $300,000 combined single limit for all bodily injury liability and property damage liability arising from a single incident, except where the Director of the Office of Foreign Missions grants a special exception.

[54 FR 24555, June 8, 1989]

§ 151.6 Authorized insurer.

The insurance must be issued by an insurer licensed or otherwise authorized by applicable law to do business in the jurisdiction where the motor vehicle, vessel or aircraft is principally garaged, berthed or kept.

§ 151.7 Policy terms consistent with the Act.

(a) The insurance shall be construed in conformity with the Act. In particular, no effect shall be given to any policy terms which are inconsistent or in conflict with those provisions of the Act stating that any suit against the insurer under the policy shall not be subject to any of the following defenses:

(1) That the insured is immune from suit;

(2) That the insured is an indispensable party; or

(3) In the absence of fraud or collusion, that the insured has violated a term of the contract, unless the contract was canceled before the claim arose.

(b) Notwithstanding the provisions of paragraph (a) of this section, the insured is expected to respond to reasonable requests from the insurer for cooperation.

§ 151.8 Evidence of insurance for motor vehicles.

(a) Every mission must periodically, and otherwise upon official request, furnish evidence satisfactory to the Department of State that the required insurance is in effect for the mission, its members and their families. Every senior United Nations official must also periodically furnish evidence satisfactory to the Department of State that the required insurance is in effect.

(b) The Department of State will accept as satisfactory evidence that the required insurance is in effect:

(1) A written statement of self-certification signed by the Chief of Mission, indicating that the mission, its members and their families have and will maintain insurance throughout the period of registration of all vehicles owned or leased or otherwise regularly used, and showing the name of the insurance company or companies and identifying each policy by number and name of insured; and

(2) A written statement of self-certification signed by each senior United Nations official, indicating that he or she has and will maintain insurance throughout the period of registration on all motor vehicles owned or leased or otherwise regularly used, and showing the name of the insurance company or companies and identifying each by number and name of insured.

(c) A certification under paragraph (b) of this section by a Chief of a Mission to the United Nations or by a senior United Nations official shall be delivered to the Counselor for host country affairs of the United States Mission to the United Nations. All other certifications shall be delivered to the Chief of Protocol, Department of State.

§ 151.9 Evidence of insurance required for diplomatic license plates and waiver of fees.

The Department of State will not endorse on behalf of any person subject to the Act or any mission any application for diplomatic motor vehicle license plates or any application for waiver of motor vehicle registration fees without prior receipt of satisfactory evidence from the Chief of Mission or other duly authorized official that the required insurance is in effect.

§ 151.10 Minimum limits of insurance for aircraft and/or vessels.

Insurance in respect of vessels and/or aircraft shall provide limits of liability

adequate in light of reasonably foreseeable risks from the ownership, maintenance, or other regular use of vessels and/or aircraft.

§ 151.11 Notification of ownership, maintenance or use of vessel and/or aircraft; evidence of insurance.

(a) Each person subject to the Act and each mission must notify the Department of State in writing of the ownership, maintenance or other regular use of a vessel or aircraft in the United States by such mission or person.

(b) Notices under paragraph (a) of this section shall identify the vessel and/or aircraft with specificity, including model and manufacturer's name, and serial and registration numbers. Each notification shall be accompanied by a copy of the insurance policy or policies issued in respect of the vessel and/or aircraft. Such policy or policies need not be issued by the insurer providing liability insurance for motor vehicles.

(c) With regard to senior United Nations officials, missions to the United Nations and members of such missions as have diplomatic status and their families, notices and evidence of insurance under this section shall be delivered to the counselor for Host Country Affairs of the United States Mission to the United Nations. All other notices under this section shall be delivered to the Chief of Protocol, Department of State.

SUBCHAPTER Q—ENVIRONMENTAL PROTECTION

PART 161—REGULATIONS FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Subpart A—General

Sec.
161.1 Purpose and scope.
161.2 Policy.
161.3 Applicability.
161.4 Definitions.

Subpart B—NEPA and Departmental Decisionmaking

161.5 Major decision points and timing.
161.6 Responsibilities of departmental officials.
161.7 Categories of actions.

Subpart C—Environmental Review Procedures

161.8 General description of the Department's NEPA process.
161.9 Specific steps in the Department's NEPA process.

Subpart D—Coordination of Other Requirements of NEPA

161.10 Non-Federal applicants for permits.
161.11 Environmental review and consultation requirements.
161.12 Environmental effects abroad of major departmental actions.

AUTHORITY: National Environmental Policy Act (NEPA), as amended, 42 U.S.C. 4321 *et seq.;* E.O. 11514, 34 FR 4247, as amended by E.O. 11991, 42 FR 26927; 22 U.S.C. 2658, as amended.

SOURCE: 45 FR 59554, Sept. 10, 1980, unless otherwise noted.

Subpart A—General

§ 161.1 Purpose and scope.

These Departmental regulations are designed to supplement the CEQ Regulations and provide for the implementation of those provisions identified in § 1507.3(b) of the CEQ Regulations. The CEQ Regulations are incorporated herein by reference. The Department's regulations seek to assure that environmental considerations and values are incorporated into the Department's decisionmaking process and assign responsibility within the Department for assessing the significant environmental effects in the United States of the Department's actions.

§ 161.2 Policy.

It is the policy of the Department of State to use all practicable means, consistent with the Department's statutory authority, available resources and national policy, to:

(a) Protect and enhance the quality of the environment;

(b) Ensure that environmental amenities and values are appropriately considered in Departmental actions;

(c) Integrate planning and environmental review procedures with the Department's decisionmaking process;

(d) Invite and facilitate, when appropriate, Federal, State and local governmental authorities and public involvement in decisions which affect the quality of the environment; and

(e) Recognize the worldwide and long-range character of environmental concerns and, when consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment.

§ 161.3 Applicability.

The provisions of these regulations apply to decisions on all Departmental actions which may affect the quality of the environment within the United States. The Department is establishing separate environmental review procedures under Executive Order 12114 (January 4, 1979) for actions having potential effects on the environment of global commons or areas outside the jurisdiction of any nation, or on the environment of foreign nations.

§ 161.4 Definitions.

Definitions for many terms used in these regulations may be found in section 1508 of the CEQ Regulations. In addition, for the purpose of these regulations, the term:

(a) *Responsible action officer* means the Department officer principally responsible for the preparation of action memoranda and other documents relating to a given Departmental action to which by these regulations apply. Ordinarily, the responsible action officer will be the country or office director whose office has action responsibility for a given action.

(b) *CEQ Regulations* means the regulations implementing the procedural provisions of the National Environmental Policy Act, issued by the Council on Environmental Quality on November 29, 1978 (43 FR 55978–56007), and codified at 40 CFR parts 1500–1508.

(c) *United States* means the States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, the Trust Territory of the Pacific Islands, American Samoa, the U.S. Virgin Islands, Guam and the other territories and possessions of the United States, including the territorial seas thereof. For the purpose of these regulations, actions having significant environmental effects on the resources of the U.S. continental shelf or resources of the U.S. Fishery Conservation Zone subject to the jurisdiction of the United States shall be considered to be actions having significant environmental effects in the United States.

(d) *Environmental document* means an environmental assessment, an environmental impact statement, a Finding of No Significant Impact or a Notice of Intent prepared under these regulations.

Subpart B—NEPA and Departmental Decisionmaking

§ 161.5 Major decision points and timing.

(a) The responsible action officer shall ensure compliance with these regulations at the earliest practicable stage of Departmental study, consideration or planning of a proposed major Federal action which could significantly affect the quality of the human environment. To accomplish this the responsible action officer must ensure that data developed during the review process is collected, analyzed and made available for consideration early in planning and decisionmaking when it will be most valuable in formulating, reviewing and deciding upon proposals for Departmental action.

(b) Environmental analysis and review of a proposed Departmental action shall be conducted as early as practicable so as to be timely, yet late enough to be relevant to the decisionmaking.

(c) Environmental documents should, whenever possible, accompany the principal action memorandum relating to a proposed action. An environmental document required in conjunction with conclusion of an international agreement shall, where possible, be prepared and circulated for review and comment before final negotiations begin. The completed environmental document should thus ordinarily accompany the principal action memorandum or request for authority to negotiate an agreement under the Department's Circular 175 regulation (11 FAM 720).

(d) To the maximum extent possible an environmental document should be prepared before the establishment of a final United States position on a proposal. In such cases the document should indicate the alternatives under consideration without specifying a Departmental preference. If the content and dimensions of a proposed action will not be clear until after the conclusion of an international negotiation or if a decision to proceed on an action involving another nation or international organization is required on short notice and before the environmental document can be prepared, the environmental document should be prepared as soon as possible after the conclusion of an agreed text of a treaty or agreement on the proposed action. If the Senate's advice and consent to a treaty with potential significant environmental effects in the United States will be sought, the final environmental impact statement should accompany other decision documentation for ratification. Legislative environmental impact statements on proposed treaties or legislation shall conform to the requirements of § 1506.8 of the CEQ Regulations and must be prepared in time for Congressional hearings and deliberations.

(e) Because actions having effects on the United States may to varying degrees be initiated, influenced and conducted by other countries, it is recognized that the preparation of environmental documents for such actions must be adjusted to meet a variety of circumstances. Bearing in mind the degree to which other countries possess information on and the ability to affect the decision under consideration, responsible action officers shall seek at all times to prepare environmental analysis documents as early as feasible in the decisionmaking process.

§ 161.6 Responsibilities of departmental officials.

(a) *General.* As a general rule, responsibility for preparing environmental analysis documents will follow the Department's standard organizational practices; in this way environmental considerations and awareness of environmental responsibilities will be integrated most readily and effectively into the usual decisionmaking processes.

(1) *Departmental bureaus.* Each bureau within the Department shall be responsible for:

(i) Implementing these regulations and incorporating them into its normal decisionmaking processes;

(ii) Identifying actions it intends to initiate which may affect significantly the environment of the United States and employing the environmental evaluation procedures outlined in these regulations to ensure that necessary actions are taken to meet the requirements of applicable laws and regulations;

(iii) Coordinating environmental assessment-related activities for which it is responsible with the Office of Environment and Health in the Bureau of Oceans and International Environmental and Scientific Affairs and supporting and assisting the Office of Environment and Health in implementing these regulations as required; and

(iv) Providing the personnel required to implement these regulations, informing the Office of Environment and Health and the Office of the Legal Adviser whenever it is anticipated that environmental documents will be prepared under these regulations, and consulting the Office of Environment and Health and the Office of the Legal Adviser as necessary for guidance and assistance in the preparation of such documents.

(2) *Bureau of Oceans and International Environmental and Scientific Affairs.* Through its Office of Environment and Health the Bureau shall have the primary responsibility for ensuring the Department's compliance with environmental policies, regulations and procedures. It shall provide policy and professional direction and guidance within the Department for implementing these regulations. It shall also assist other bureaus in obtaining appropriate scientific advice and budgetary resources to implement the regulations. The Office of Environment and Health will act as the focal point for implementation, working closely with the Departmental bureaus and the Office of the Legal Adviser. The Bureau and other involved bureaus will work closely with the Assistant Secretary for Congressional Relations in the preparation of environmental documents relating to legislation. In carrying out its responsibilities the Bureau shall:

(i) Coordinate the formulation, development and revision of Departmental policies and positions on matters pertaining to environmental evaluation and review;

(ii) Develop and ensure the implementation of Departmentwide standards, procedures and working relationships for environmental review and compliance with applicable environmental laws and regulations;

(iii) Develop, as an integral part of the Department's basic decision processes, procedures to ensure that environmental factors are properly considered in all relevant proposals and decisions;

(iv) Monitor these processes to ensure that Departmental procedures are achieving their purposes;

(v) Advise, assist and inform Departmental bureaus of the technical and management aspects of environmental analysis, and of the relevant expertise available in and outside the Department;

(vi) Establish and maintain working relationships with the Council on Environmental Quality, Environmental Protection Agency, and other federal, State and local governmental agencies concerned with environmental matters;

(vii) Represent the Department in working with other government agencies and organizations to formulate, revise and achieve uniform understanding and application of government-wide policies relating to the environment;

(viii) Consolidate and transmit to the appropriate parties Departmental comments on environmental impact statements and other environmental reports prepared by other agencies; and

(ix) Acquire information for and prepare other Departmental reports on environmental assessment matters.

(3) *Office of the Legal Adviser*. The Office of the Legal Adviser is the principal Departmental authority on the legal aspects of environmental matters and the implementation of these regulations and shall advise and assist Departmental Bureaus in these matters.

(4) *Bureau Environmental Coordinators*. Each Departmental bureau and major office shall designate an officer to act as coordinator, adviser and principal point of contact for environmental matters within the bureau. The bureau coordinator will advise and assist the bureau in implementing these regulations and serve as a member of the Departmental Committee of Environmental Coordinators.

(5) *Departmental Committee of Environmental Coordinators*. A Departmental Committee of Environmental Coordinators shall be established to assist in coordinating Departmental implementation of these regulations; in providing advice on major issues, policies and procedures relating to the Department's implementation of environmental analysis requirements; and in ensuring general conformity of Departmental implementation practices. The Committee's responsibility will be to exchange information on the implementation of these regulations, assist bureaus in early identification of Departmental actions which should be analyzed for environmental effects and help to coordinate and provide the appropriate analysis. The Committee will be chaired by the Office of Environment and Health and will be comprised of bureau and office coordinators designated by the respective bureaus and offices.

(6) *Outside contractors*. Qualified outside contractors may be employed to assist Departmental officers in preparing environmental documents as required under these regulations.

§ 161.7 Categories of actions.

Departmental officers shall review each major Departmental action having a potentially significant effect on the quality of the environment in the United States. The need to prepare formal environmental documents will depend on the scope of the action and the context and intensity of any environmental effects expected if the action is implemented. Departmental actions can generally be grouped into three categories, as follows:

(a) *Actions normally requiring environmental impact statements*. Any Departmental action deemed to have a ''significant effect upon the quality of the human environment'' of the United States requires the preparation of an environmental impact statement. The criteria to be used in determining significance are set forth in § 1508.27 of the CEQ Regulations. The Department has reviewed representative actions and has found no common pattern which would enable it to specify actions normally requiring environmental impact statements. If developments later enable such designations to be made the Department will publish a description of proposed actions for such designation in the FEDERAL REGISTER.

(b) *Actions categorically excluded from the requirement to prepare environmental impact statements*. Categorical exclusion, as defined in § 1508.4 of the CEQ Regulations, provides for exclusion from environmental review of specified actions which have as a class been found to have no significant impact on the quality of the human environment. Neither an environmental assessment nor an environmental impact statement is ordinarily required for such actions. Departmental actions categorically excluded from the requirements of these regulations include the following:

(1) Routine conduct of Departmental and overseas political and economic functions, including reporting on political and economic developments, trends and activities, communicating to host governments United States Government views, maintaining contact with foreign officials and individuals, and facilitating trade opportunities abroad and U.S. business expansion in foreign markets;

(2) Provision of consular services—visas, passports and citizenship, and special consular services, such as issuing or reviewing passports and visas, taking legal depositions, notarizing absentee ballots and other documents and delivering retirement checks, social security payments and veterans benefits;

(3) Conduct of routine administrative functions, such as budget and finance, personnel and general services. This includes routine administrative procurements (e.g., general supplies, negotiating leases for office space or staff housing, ordering supplies and arranging for customs clearances); financial transactions, including salaries, expenses and grants; routine management, formulation and allocation of the Department's budget at all levels (this does not exempt the preparation of environmental documents for proposals included in the Department's budget when required); and personnel actions (e.g., promotions, hirings, and counseling American and host country employees who work for the Department of State);

(4) Preparing for and participating in conferences, workshops or meetings for information exchange, data collection or research or study activities; and

(5) Document and information exchanges.

Even though an action may be categorically excluded from the need for an environmental impact statement, if information developed during the planning for the actions indicates the possibility that the particular action in question may nonetheless cause significant environmental effects, an environmental assessment shall be prepared to evaluate those effects. Based upon the assessment, a determination will be made whether to prepare an environmental impact statement. The Department may designate additional actions for categorical exclusion by publishing a listing of actions proposed for such designation in the FEDERAL REGISTER.

(c) *Actions normally requiring environmental assessments.* An environmental assessment shall provide the basis of the determination whether an environmental impact statement is required. A Departmental action shall require the preparation of an environmental assessment if the action is not one known normally to require an environmental impact statement and is not categorically excluded. Departmental actions normally included in this category are actions for which the Department has lead-agency responsibility and which may significantly affect the human environment of the United States, such as those actions involving:

(1) Issuance of permits for construction of international bridges and pipeline (see Executive Order 11423 and the International Bridge Act of 1972 (Pub. L. 92–434, 86 Stat. 23));

(2) Wetlands, floodplains, endangered species and national historical, archeological and recreational sites (see also specific requirements for environmental review and consultation in § 161.11 of these regulations); and

(3) Ocean dumping, control of toxic substances, disposal and storage of wastes and radioactive substances.

(d) *Emergencies and other exceptional circumstances.* Not every Departmental activity will be considered a major Federal action for the purposes of these regulations. Several limited classes of action which might ordinarily be subject to these regulations will not be considered major Federal actions requiring the preparation of an environmental impact statement. Among them are the following:

(1) Actions taken in emergency circumstances and disaster and emergency relief activities as defined in § 1506.11 of the CEQ Regulations (in such circumstances the responsible action officer should consult with the Office of Environment and Health which shall consult with the Council on Environmental Quality about appropriate alternative arrangements);

(2) Mandatory actions required under any treaty or international agreement

to which the United States Government is a party, or required by the decisions of international organizations or authorities in which the United States is a member or participant except when the United States has substantial discretion over implementation of such requirements;

(3) Payment of contributions, either assessed or voluntary, to any international organization of which the United States is a member pursuant to the obligation of a treaty or other international agreement or which is not for the purpose of carrying out a specifically identifiable action which would affect the environment; and

(4) Support for or acquiescence in (by affirmative vote or agreement to consensus) an activity or expenditure of funds by an international organization where the United States has no unilateral right to control such expenditures.

Subpart C—Environmental Review Procedures

§ 161.8 General description of the Department's NEPA process.

In reviewing proposed actions for potential environmental effects in the United States responsible action officers will follow the procedural steps set forth below. These steps are developed in conjunction with the procedural steps required by the CEQ Regulations which are referenced in the following sections.

(a) *Preliminary environmental evaluations.* Early in the process of considering any possible action the responsible action officer shall review the action to determine if it may cause potential significant environmental effects on the environment of the United States. A proposed action shall be reviewed initially to determine into which of the following three basic categories of action it falls:

(1) Actions normally requiring environmental impact statements;

(2) Actions categorically excluded from environmental impact statements; or

(3) Actions normally requiring environmental assessments. If the responsible action officer concludes that the proposed action is a major action potentially having significant effects in the United States he should, in cooperation with other appropriate Departmental officials, carry out the steps described in these regulations. If during his review of the location of potential environmental effects or following preparation of an environmental assessment it is determined that the action could affect the environment of the global commons or a foreign nation the officer is responsible for ensuring compliance with the Department's procedures for implementing Executive Order No. 12114 on Environmental Effects Abroad of Major Federal Actions (Foreign Affairs Manual, Volume 2).

(b) *Environmental Assessment.* An environmental assessment is a concise document which analyzes potential environmental effects to determine if an environmental impact statement is required (CEQ Regulations §§1501.3 and 1508.9). If the action does not fall into either the category of those actions normally requiring an environmental impact statement or that of actions categorically excluded from the requirement to prepare an environmental impact statement, then the responsible action officer, in cooperation with other Departmental officials, shall prepare an environmental assessment to determine whether it is necessary to prepare an environmental impact statement or a ''Finding of no significant impact''. If the action normally requires an environmental impact statement, there is ordinarily no need for the preparation of an environmental assessment and the environmental impact statement process should be initiated without preparing such an assessment. If the action is categorically excluded, no further environmental review is needed. If an environmental assessment is prepared it may also be used to evaluate whether the proposed action may have effects outside the United States.

(c) *Finding of no significant impact.* If the environmental assessment indicates that the environmental effects of the action in the United States are not significant, then the responsible action officer shall make a ''Finding of no significant impact'', thereby concluding the NEPA review process (CEQ Regulations §§1501.4 and 1508.13).

(d) *Environmental impact statement.* If the environmental assessment demonstrates that the environmental effects of the action with the United States may be ''significant'' (see § 1508.27 of the CEQ Regulations) the Department is required to prepare an environmental impact statement (EIS) in accordance with these regulations (see also CEQ Regulations § 1501.8, part 1502 and §§ 1506.2 through 1506.7). In preparing the environmental impact statement the following steps will be carried out:

(1) *Notice of intent to prepare an EIS.* If an impact statement is required, the Department will publish in the FEDERAL REGISTER a ''Notice of intent'' to prepare such a statement (CEQ Regulations §§ 1501.7 and 1508.22).

(2) *Scoping procedures.* The Department will then hold a scoping meeting with interested agencies and individuals to determine the proper content (''scope'') of the statement (CEQ Regulations §§ 1501.7 and 1508.25).

(3) *Draft environmental impact statement (DEIS).* The Department will then prepare a draft EIS (DEIS) which will be filed with the Environmental Protection Agency and circulated to agencies and the public for comment for at least 45 days, except where the CEQ Regulations and these regulations permit the time period to be shortened (CEQ Regulations § 1501.8, part 1502, §§ 1506.2 through 1506.7, 1506.10(d) and 1506.11; 161.7(d), 161.9(n)(2)).

(4) *Final environmental impact statement (FEIS).* In light of the comments and following any revision in the draft EIS, the Department will file with the Environmental Protection Agency and circulate to agencies and the public a final EIS at least 30 days before making a final decision on the action, except where the CEQ Regulations and these regulations permit the time period to be shortened (CEQ Regulations §§ 1506.9, 1506.10(d), 1506.11; 161.7(d), 161.9(n)(2)).

(5) *Record of decision.* After making a decision on the action, the Department will make available a formal ''Record of decision'' (CEQ Regulations § 1505.2).

§ 161.9 Specific steps in the Department's NEPA process.

(a) *Decision whether to prepare an EIS.* In deciding whether to prepare an environmental impact statement, the responsible action officer shall make an initial review in the early planning stages of a proposed action to identify and evaluate potential environmental effects of the actions and all reasonable measures which may be taken to mitigate adverse impacts. This review must be conducted in conjunction with all requests under the Department's Circular 175 procedure (11 FAM 720), with all actions involving the obligation of funds within the Department's annual or supplemental budget submissions to the Office of Management and Budget, and with other actions when a potentially significant environmental impact may result. The responsible action officer shall ensure that the principal action memoranda prepared for such actions properly reflect the environmental review in all cases. No written statement is required in the case of actions which do not raise the question of environmental impacts. The environmental evaluation document prepared shall be considered along with political, economic and other decision-making factors relating to the proposed action.

(1) *Review of the categories of actions.* During the initial environmental review of the proposed action, the responsible action officer should classify the proposed Departmental action as one either normally requiring an environmental impact statement, normally not requiring such a statement, or normally requiring an environmental assessment. (See § 1504.1 of the CEQ Regulations and § 161.7 of these regulations.)

(i) *Actions normally requiring environmental statements.* Environmental assessments are not required for actions which it is already known will require the preparation of environmental impact statements. For each major Departmental action which, in the view of the responsible action officer meets the criteria of this section, he shall, in cooperation with the Office of Environment and Health, initiate steps to prepare an environmental impact statement. This will be accomplished by

preparing a ''Notice of intent'' to prepare an EIS (see § 1508.22 of the CEQ Regulations). The Office of Environment and Health shall arrange for publication of the notice in the FEDERAL REGISTER (see § 1507.3(e) of the CEQ Regulations). The responsible action officer shall then apply the procedures set forth in § 161.8 of these regulations to determine the scope of the proposed EIS, and proceed to prepare and release the environmental impact statement in accordance with CEQ and Departmental regulations. If, however, the responsible action officer believes that the proposed action, though included within or closely similar to one which normally requires the preparation of an EIS, will itself have no significant impact, he should conduct an environmental assessment in accordance with the CEQ Regulations (§ 1508.9). If the assessment demonstrates that there will be no significant impact, he should prepare a ''Finding of no significant impact'' and provide for public review a notice of this finding in accordance with §§ 1501.4(e) and 1506.6 of the CEQ Regulations.

(ii) *Actions categorically excluded.* Separate detailed documentation is not normally required for actions which are categorically excluded and which are therefore exempt from the requirement of preparations of an environmental assessment or environmental impact statement. However, the responsible action officer shall note in the action memorandum concerning the action that the proposed action has been reviewed under the Department's environmental procedures and determined to be categorically excluded. The Office of Environment and Health shall periodically review actions in the classes categorically excluded under these regulations to determine if the original decision to categorically exclude the class remains valid. If such a review determines that a proposed action may have a significant impact on the human environment the necessary revision in the categorical exclusion shall be made and an environmental assessment shall be prepared to determine the need for the preparation of an environmental impact statement.

(iii) *Actions normally requiring environmental assessments.* For each action meeting the criteria of this section the responsible action officer shall prepare an environmental assessment (see §§ 1501.3 and 1508.9 of the CEQ Regulations) and, on the basis of that assessment, determine if an EIS is required. If the determination is that no environmental impact statement is required, the responsible action officer shall, in coordination with the Office of Environment and Health, prepare a ''Finding of no significant impact'' (see §§ 1501.4 and 1508.13 of the CEQ Regulations). The ''Finding of no significant impact'' shall be made available to the public through direct distribution and publication in the FEDERAL REGISTER. If the determination is that an environmental impact statement is required, the official shall proceed with the ''Notice of intent'' to prepare an EIS and the subsequent steps in the preparation and release of an EIS in accordance with the CEQ Regulations (§§ 1501.7, 1507.3 and 1508.22) and these regulations.

(2) *Preparation of environmental assessments.* Environmental assessments, as defined in the CEQ Regulations (§ 1508.9), should be prepared as directed in § 1501.3 of the CEQ Regulations. The environmental assessment shall be used to determine whether to prepare an environmental impact statement or a ''Finding of no significant impact''. The assessment shall include a brief discussion of the need for the proposed action, of alternatives and of environmental impacts and a listing of agencies and persons consulted in preparing the assessment.

(3) *Notice of intent to prepare an EIS.* As soon as practicable after deciding to prepare an environmental impact statement and before initiating the scoping process (see § 161.9(b) of these regulations) the Department or another lead agency, if one is designated in accordance with § 1501.5 of the CEQ Regulations, shall publish in the FEDERAL REGISTER a ''Notice of intent'' to prepare an EIS in accordance with §§ 1501.7 and 1508.22 of the CEQ Regulations. The Office of Environment and Health shall arrange for publishing the notice.

(b) *Scoping.* The Department shall conduct an early and open meeting with interested agencies and the public

for determining the scope of issues to be addressed in a given environmental impact statement and for identifying the significant issues related to a proposed action. The elements of the scoping process are defined in § 1501.7 of the CEQ Regulations and must include consideration of the range of actions, alternatives, and impacts discussed in § 1508.25 of the CEQ Regulations.

(c) *Cooperation with other agencies.* Departmental officials are encouraged to cooperate with other agencies and the public throughout the conduct of the Department's NEPA process. The Office of Environment and Health shall ensure also that the Department reviews the draft and final impact statements submitted for review by other agencies (§ 1502.19 of the CEQ Regulations). Where appropriate and to eliminate duplication it shall arrange to prepare environmental assessments and impact statements jointly with other Federal or State agencies. Where possible it will arrange for the department to ''adopt'' statements prepared by other agencies (§ 1506.3 of the CEQ Regulations). It shall arrange lead and cooperating agency responsibilities for preparing environmental documents (see §§ 1501.5 and 1501.6 of CEQ Regulations).

(d) *Preparation of draft environmental impact statement.* The responsible action officer shall be responsible for the preparation of the draft environmental impact statement in the manner described in § 1501.8, part 1502, and §§ 1506.2 through 1506.7 of the CEQ Regulations. Preliminary copies of the draft environmental impact statement and attachments shall be submitted to the Office of Environment and Health before any formal review is conducted outside the Department. This submission shall be accompanied by a list of Federal, State, and local officials (Part 1503 of the CEQ Regulations) and a list of other interested parties (§ 1506.6 of the CEQ Regulations) whose comments shall be sought. The Office of Environment and Health shall review the draft and obtain additional comments from other appropriate Departmental bureaus and offices.

(e) *Review of and comment on draft EIS.* For external review, the Office of Environment and Health shall transmit five copies of the revised draft statement to the Environmental Protection Agency (EPA) Office of Federal Activities. EPA will publish a notice of the statement's availability the following week in the FEDERAL REGISTER. Upon transmission of the draft statement to EPA, the Office of Environment and Health shall also seek the views of appropriate agencies and individuals in accordance with Part 1503 and §§ 1506.6 and 1506.9 of the CEQ Regulations. It shall specify that replies are required at a stated date not earlier than 45 days from the date of NEPA publication of the draft statement availability. Any views submitted during the comment period shall be provided to the responsible action officer in the Department for consideration in preparing the final statement. To the fullest extent possible, requirements for review and consultation with other agencies on environmental matters established by statutes other than NEPA, such as the review and consultation requirements of the Endangered Species Act of 1973, as amended, should be met before or through this review process (see § 161.11 of these regulations). In addition, the draft EIS shall list all environmentally-related federal permits, licenses or other approvals required to implement the proposal as specified in § 1502.25(b) of the CEQ Regulations.

(f) *Public involvement.* (1) Departmental officials will make diligent efforts to involve the public in implementing these regulations as provided in §§ 1501.4(e), 1503.1(a)(e) and 1506.6 of the CEQ Regulations.

(2) Interested persons can obtain information on the Department's environmental impact statements and other aspects of the Department's NEPA process by contacting the Director, Office of Environment and Health, Room 7820, Department of State, Washington, DC 20520 (tel. 202/632–9266). Information pertaining to the NEPA process may be sent to the above address. FEDERAL REGISTER notices concerning the Department's environmental documents shall specify where such information relevant to the documents in question may be obtained.

(3) The responsible action officer shall identify those persons, community organizations, environmental interest groups, international organizations or other bodies which may have an interest in or be affected by the proposed Departmental action and who should therefore be involved in the NEPA process. With the assistance of the Office of Environment and Health, the responsible action shall transmit a list of such persons, groups and organizations to the Office of Environment and Health at the same time he submits:

(i) A recommendation regarding a ''Finding of no significant impact'';

(ii) A ''Notice of intent to prepare an EIS'';

(iii) A recommendation on possible public hearings (see §1506.6(c) of CEQ Regulations);

(iv) A draft EIS, or

(v) A final EIS.

(4) The responsible action officer shall consult with the Office of Environment and Health and make recommendations regarding the need for public hearings. The Office of Environment and Health shall, as necessary, review such recommendations with the Office of the Legal Adviser.

(g) *Preparation of final environmental impact statement.* (1) After conclusion of the review process with other Federal, State and local agencies and the public, the responsible action officer shall consider suggestions received and revise the draft environmental impact statement as appropriate in accordance with part 1502 and §1501.8 and §§1506.2 through 1506.7 of the CEQ Regulations.

(2) Five copies of the preliminary final environmental impact statement, with attached copies of the comments received and suggested responses, shall be provided to the Office of Environment and Health. The Office of Environment and Health will, as appropriate, obtain additional comments from any other appropriate Departmental bureau or offices and notify the responsible action officer of any further changes required and the number of final statements to be transmitted. The Office of Environment and Health shall submit five copies of the final statement to the Environmental Protection Agency's Office of Environmental Review. Copies shall also be sent to all parties who commented and to other interested parties in accordance with §1506.9 of the CEQ Regulations.

(3) Each draft and final statement, the supporting documentation, and the ''Record of decision'' (see §161.9(h) of these regulations) shall be available for public review and copying at the Office of Environment and Health (OES/ENH), Room 7820, Department of State, Washington, DC 20520 (tel. 202/632–9267).

(h) *Record of the decision.* At the time of the decision on the proposed action, the responsible Departmental official shall consult with the Office of Environment and Health and prepare a concise ''Record of decision'' (see §1505.2 of the CEQ Regulations).

(i) *Timing of EIS preparation and action decision.* Preparation of an environmental impact statement shall be initiated as soon as the responsible action officer, in consultation with the Office of Environment and Health and the Office of the Legal Adviser, has determined that the statement shall be prepared. Except where permitted by the CEQ Regulations (§§1506.10(d), 1506.11) and these regulations (§§161.7(d), 161.9(n)(2)), no decision on the proposed action shall be made by the Department until the later of the following dates:

(1) Ninety (90) days after publication by EPA of a notice of availability of a Departmental draft EIS.

(2) Thirty (30) days after publication by EPA of a notice of availability of a departmental final EIS.

(j) *Implementing and monitoring the decision.* Section 1505.3 of the CEQ Regulations establishes the procedures to be followed by the Department in monitoring to assure that any mitigation measures or other commitments associated with the decision and its implementation are carried out. The Office of Environment and Health will maintain general oversight and cooperate with bureau officers in such monitoring.

(k) *Supplemental environmental impact statements.* Departmental officials shall supplement a draft EIS whenever an alternative which is substantially different from those discussed in the draft is under consideration or when the

draft is otherwise out of date. A final EIS shall be supplemented when a substantial change is made in the proposed action or when significant new information on the environmental impacts comes to light. A supplemental EIS should be prepared, circulated and approved in accordance with the provisions of § 1502.9 of the CEQ Regulations. No supplemental EIS need be prepared when the final decision on the action in question has already been made. If there are reasons not to prepare a supplemental EIS when one ordinarily would be called for, the responsible action officer should consult with the Office of Environment and Health, which shall consult with the Council on Environmental Quality on the matter.

(l) *Programmatic and generic environmental impact statements.* (1) Before preparing an environmental document under these regulations the responsible action officer should determine if there exists a generic or programmatic environmental document analyzing actions, effects or issues similar to those involved in the proposed action. A generic environmental document reviews the environmental effects that are generic or common to a class of Departmental actions which may not be specific to any single country or area. Where such a document is prepared it could be applied to a number of similar specific country applications. If a generic document exists and if it deals with relevant similarities in the action, such as common timing, environmental impacts, alternatives, methods of implementation or subject matter it will not be necessary to prepare further environmental documentation.

(2) A programmatic environmental document shall focus its analysis on the environmental aspects of an entire program rather than on the specific elements of the program. If a programmatic environmental document has already been prepared the responsible action officer should determine whether it adequately deals with the environmental effects of the particular action under review. If the programmatic document adequately reviews the environmental impacts of the action under consideration, then additional environmental documentation is not required under these regulations. In preparing environmental documents on specific actions, Departmental officers shall consider the advisability of modifying or expanding the documents so they may serve as generic or programmatic documents for a broader range of actions.

(m) *Amendments.* Amendments to these regulations may be made by the Assistant Secretary for Oceans and International Environmental and Scientific Affairs in consultation with other Departmental bureaus and the Office of the Legal Adviser. Such amendments will be published in the FEDERAL REGISTER after consultation with the Council on Environmental Quality, in accordance with § 1507.3 of the CEQ Regulations, and public review and comment.

(n) *Modifications.* The Department's procedures for preparing environmental documents may be modified to accommodate the following circumstances:

(1) *Classified material.* Most Departmental environmental documents will not normally contain classified or administratively controlled material (see § 1507.3(c) of the CEQ Regulations); in some cases, however, an environmental document must include such material to evaluate adequately environmental effects. In such cases Departmental environmental documents, or portions thereof, may be classified. Such material should, if possible, be confined to a classified annex of the environmental document. Approval for classification must be granted with the concurrence of the Assistant Secretary for Oceans and International Environmental and Scientific Affairs and the Office of the Legal Adviser, and the assistant secretary of the bureau with the action responsibility for the proposed action. In these cases, Departmental environmental documents or portions thereof may be classified in accordance with the criteria set forth in Executive Order 12065, dated December 1, 1978. Handling and disclosure of classified or administratively controlled material shall be governed by 22 CFR part 9. The portions of an environmental document which are not classified or administratively controlled will be made available to persons outside the Department, as provided in 22 CFR part 9.

Classification does not preclude the obligation to ensure that environmental documents are reviewed by competent scientific and technical experts. Appropriate arrangements will be made through the Office of Environment and Health for Federal agency review of classified or administratively controlled environmental documents.

(2) *Time periods for environmental review*. When necessary to comply with other specific statutory requirements or for compelling reasons of national policy the Department may, by agreement with the Environmental Protection Agency, modify time periods specified by the CEQ Regulations for preparing environmental documents in accordance with §1506.10 of the CEQ Regulations. See also provisions for emergency circumstances contained in §1506.11 of the CEQ Regulations and §161.7(d) of these regulations.

Subpart D—Coordination of Other Requirements of NEPA

§161.10 Non-Federal applicants for permits.

The Department is responsible for issuing international permits for the construction of bridges and oil pipelines that cross the international boundaries with Canada and Mexico. The Office of Environment and Health will assist in preparation of the required environmental analysis documentation for such permits. Applicants for international permits may obtain information on the type of environmental information needed and the extent of the applicant's participation in the necessary environmental studies and their documentation from the Office of the Legal Adviser, Department of State, Washington, DC 20520 (tel. 202/632–0349). Applicants are encouraged to consult early with the Department on the necessary environmental and other requirements in order to expedite the NEPA process.

§161.11 Environmental review and consultation requirements.

In addition to the environmental review requirements of NEPA the Department has other statutory environmental review and consultation requirements. Departmental officials, in cooperation with the Office of Environment and Health and the Office of the Legal Adviser shall, to the maximum extent possible, conduct environmental review and consultation for these additional requirements concurrently with and integrated with preparation of assessments, and environmental impact statements. The principal additional requirements affecting the Department of State's actions are outlined below.

(a) Section 7 of the Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*, requires identification of and consultation on aspects of any Departmental action that may have effects in the United States on listed species or their habitat. As appropriate, written request for consultation, along with the draft environmental document, shall be conveyed by the Office of Environment and Health to the Regional Director of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, for the Region in the United States where the action will be carried out.

(b) Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f), requires identification of National Register properties, eligible properties, or properties in the United States which may be eligible for the National Register within the area of the potential impact of a proposed Departmental action. Evaluation of the impact of the action on such properties shall be discussed in draft environmental impact statements and transmitted to the Advisory Council on Historic Preservation for comments.

(c) Executive Order 11988 (Floodplains Management) and Executive Order 11990 (Wetlands), requires identification of actions which will occur in or affect a floodplain or wetland (e.g., in areas along the boundary with Canada or Mexico). A comparative evaluation of such actions shall be discussed in draft environmental impact statements and transmitted to the U.S. Water Resources Council for comments.

(d) Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq*.

(e) Section 309 of the Clean Air Act of 1955, as amended, 42 U.S.C. 7609.

(f) Clean Water Act of 1977, 33 U.S.C. 1251 *et seq*.

(g) Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq*.

(h) Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1401 *et seq*.

(i) Deepwater Port Act of 1974, as amended, 33 U.S.C. 1501 *et seq*.

(j) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq*.

§ 161.12 Environmental effects abroad of major departmental actions.

Departmental officials shall analyze actions under their cognizance with due regard for the environmental effects in the global commons and areas outside the jurisdiction of any nation and in foreign jurisdictions. Such analysis shall be prepared in accordance with separate Departmental procedures (Foreign Affairs Manual, Volume 2), dated September 4, 1979 for implementing Executive Order 12114, ''Environmental Effects Abroad of Major Federal Actions'' (44 FR 1957), dated January 4, 1979.

SUBCHAPTER R—ACCESS TO INFORMATION

PART 171—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

Subpart A—General Policy and Procedures

Sec.
171.1 Availability of information.
171.2 Types of records maintained.
171.3 Public reading room.
171.4 Electronic reading room.
171.5 Requests for information—types and how made.
171.6 Archival records.

Subpart B—Freedom of Information Act Provisions

171.10 Purpose and scope.
171.11 Definitions.
171.12 Processing requests.
171.13 Business information.
171.14 Fees to be charged—general.
171.15 Fees to be charged—categories of requesters.
171.16 Miscellaneous fee provisions.
171.17 Waiver or reduction of fees.

Subpart C—Executive Order 12958 Provisions

171.20 Definitions.
171.21 Declassification review.
171.22 Appeals.
171.23 Declassification in the public interest.
171.24 Access by historical researchers and certain former government personnel.
171.25 Applicability of other laws.

Subpart D—Privacy Act Provisions

171.30 Purpose and scope.
171.31 Definitions.
171.32 Request for access to records.
171.33 Request to amend or correct records.
171.34 Request for an accounting of record disclosures.
171.35 Denials of requests; appeals.
171.36 Exemptions.

Subpart E—Ethics in Government Provisions

171.40 Purpose and scope.
171.41 Covered employees.
171.42 Requests and identifying information.
171.43 Time limits and fees.
171.44 Improper use of reports.

Subpart F—Appeals Procedures

171.50 Appeals of denials of expedited processing.
171.51 Appeals of denials of fee waivers or reductions.
171.52 Appeal of denial of access to, declassification of, amendment of, accounting of disclosures of, or challenge to classification of records.

AUTHORITY: 22 U.S.C. 552, 552a; Ethics in Government Act of 1978, Pub. L. 95–521, 92 Stat. 1824, as amended; E.O. 12958, as amended, 60 FR 19825, 3 CFR, 1995 Comp., p. 333; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

SOURCE: 69 FR 63935, Nov. 3, 2004, unless otherwise noted.

Subpart A—General Policy and Procedures

§ 171.1 Availability of information.

Records of the Department of State shall be made available to the public upon request made in compliance with the access procedures established in this part, except for any records exempt by law from disclosure. Any request for records must describe the information sought in such a way (*see* § 171.5(c)) that an employee of the Department of State who is familiar with the subject area of the request can locate the records with a reasonable amount of effort. The sections that follow govern the response of the Department to requests for information under the Freedom of Information Act, the Privacy Act, Executive Order 12958, and the Ethics in Government Act. Regulations at 22 CFR 172.1–9 govern the response of the Department to subpoenas, court orders, and certain other requests for testimony of Department officials or disclosure of Department records in litigation to which the Department is not a party.

§ 171.2 Types of records maintained.

Most of the records maintained by the Department pertain to the formulation and execution of U.S. foreign policy. Certain records that pertain to individuals are also maintained such as applications for U.S. passports, applications for visas to enter the U.S.,

records on consular assistance given abroad by U.S. Foreign Service posts to U.S citizens, and records on Department employees. Further information on the types of records maintained by the Department may be obtained by reviewing the records disposition schedules which are available through the Department's Web site: *http://www.state.gov* or directly at the FOIA home page: *http://foia.state.gov*.

§ 171.3 Public reading room.

A reading room providing public access to certain Department of State material is located in the Department of State, SA–2, 515 22nd Street, NW., Washington, DC. The reading room contains material pertaining to access to information under the Freedom of Information Act, Privacy Act, E.O. 12958 and includes those statutes, regulations, guidelines, and other items required to be made available to the public under 5 U.S.C. 552(a)(2). Also available in the reading room are microfiches of records released by the Department pursuant to requests under the Freedom of Information Act and compilations of documents reviewed and released in certain special projects. The reading room is open during normal Department weekday working hours, 8:15 a.m. to 5 p.m. There are no fees for access by the public to this room or the material contained therein, but fees shall be assessed for the duplication of materials maintained in the reading room at the rate of 15 cents per page and $2.00 per microfiche card. Fees for copies made by other methods of reproduction or duplication, such as tapes, printouts, or CD-ROM, shall be the actual cost of producing the copies, including operator time. Persons wishing to use their own copying equipment must request approval in advance from the Department's Information and Privacy Coordinator, U.S. Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–6001. The use of such equipment must be consistent with security regulations of the Department and is subject to the availability of personnel to monitor such copying.

§ 171.4 Electronic reading room.

The Department has established a site on the Internet with most of the same records and reference materials that are available in the public reading room. This site also contains information on accessing records under the FOIA and the Privacy Act. The site is a valuable source that is easily accessed by the public by clicking on ''FOIA'' at the Department's Web site at *http://www.state.gov* or directly at the FOIA home page at *http://foia.state.gov*. Included on the FOIA home page are links to other sites where Department information may be available. The Department's Privacy Act systems of records and the various records disposition schedules may be found on the Department's FOIA home page under ''Reference Materials.''

§ 171.5 Requests for information—types and how made.

(a) Requests for records in accordance with this chapter may be made by mail addressed to the Information and Privacy Coordinator, U.S. Department of State, SA–2, 515 22nd Street, NW., Washington, DC 20522–6001. Facsimile requests under the FOIA only may be sent to: (202) 261–8579. E-mail requests cannot be accepted at this time. Requesters are urged to indicate clearly on their requests the provision of law under which they are requesting information. This will facilitate the processing of the request by the Department. In any case, the Department will process the request under the provision of law that provides the greatest access to the requested records.

(b) Requests may also be made by the public in person from 8:15 a.m. to 5 p.m. at the Department of State, SA–2, 515 22nd Street, NW., Washington, DC.

(c) Although no particular request format is required, it is essential that a request reasonably describe the Department records that are sought. The burden of adequately identifying the record requested lies with the requester. Requests should be specific and include all pertinent details about the request. For FOIA requests, the request should include the subject, timeframe, any individuals involved, and reasons why the Department is believed to have records on the subject of

the request. For Privacy Act requests, the request should state the type of records sought, the complete name and date and place of birth of the subject of the request, and the timeframe for the records. An original signature is required. *See* § 171.12(b) for guidance regarding third party requests. Individuals may seek assistance regarding any aspect of their requests from the Chief, Requester Liaison Division, (202) 261–8484.

(d) While every effort is made to guarantee the greatest possible access to all requesters regardless of the specific statute under which the information is requested, the following guidance is provided for individuals in requesting records:

(1) *Freedom of Information Act*. Requests for documents concerning the general activities of government and of the Department of State in particular (*see* subpart B of this part).

(2) *E.O. 12958*. Requests for mandatory review and declassification of specific Department records and requests for access to such records by historical researchers and certain former government officials (*see* subpart C of this part).

(3) *Privacy Act*. Requests from U.S. citizens or legal permanent resident aliens for records that pertain to them and that are maintained by the Department under the individual's name or personal identifier (*see* subpart D of this part).

(4) *Ethics in Government Act*. Requests for the financial Disclosure Statements of Department Employees covered by this Act (*see* subpart E of this part).

(e) *First-in/first-out processing*. As a general matter, information access requests are processed in the order in which they are received. However, if the request is specific and the search can be narrowed, it may be processed more quickly.

(f) *Cut-off date*. In determining which records are responsive to a request, the Department ordinarily will include only records in its possession as of the date the search for responsive documents is initiated, unless the requester has specified an earlier time frame.

(g) *Records previously withheld or in litigation*. Requests shall not be processed for records that have been reviewed and withheld within the past two years or whose withholding is the subject of litigation.

§ 171.6 Archival records.

The Department ordinarily transfers records to the National Archives when they are 25 years old. Accordingly, requests for records 25 years old or older should be addressed to: Archives II, 8601 Adelphi Road, National Archives at College Park, MD 20470–6001.

Subpart B—Freedom of Information Act Provisions

§ 171.10 Purpose and scope.

This subpart contains the rules that the Department follows under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The rules should be read together with the FOIA which provides additional information about access to records and contains the specific exemptions that are applicable to withholding information. Privacy Act records determined to be exempt from disclosure under the Privacy Act are processed as well under the FOIA and are subject to this subpart.

§ 171.11 Definitions.

As used in this subpart, the following definitions shall apply:

(a) *Freedom of Information Act* or *FOIA* means the statute codified at 5 U.S.C. 552, as amended.

(b) *Department* means the United States Department of State, including its field offices and Foreign Service posts abroad;

(c) *Agency* means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency;

(d) *Information and Privacy Coordinator* means the Director of the Department's Office of Information Programs and Services (IPS) who is responsible for processing requests for access to information under the FOIA, the Privacy Act, E.O. 12958, and the Ethics in Government Act;

(e) *Record* means all information under the control of the Department,

including information created, stored, and retrievable by electronic means, regardless of physical form or characteristics, made in or received by the Department and preserved as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of the data contained therein. It includes records of other Government agencies that have been expressly placed under the control of the Department upon termination of those agencies. It does not include personal records created primarily for the personal convenience of an individual and not used to conduct Department business and not integrated into the Department's record keeping system or files. It does not include records that are not already in existence and that would have to be created specifically to meet a request. However, information available in electronic form shall be searched and compiled in response to a request unless such search and compilation would significantly interfere with the operation of the Department's automated information systems.

(f) *Control* means the Department's legal authority over a record, taking into account the ability of the Department to use and dispose of the record as it sees fit, to legally determine the disposition of a record, the intent of the record's creator to retain or relinquish control over the record, the extent to which Department personnel have read or relied upon the record, and the degree to which the record has been integrated into the Department's record keeping system or files.

(g) *Direct costs* means those costs the Department incurs in searching for, duplicating, and, in the case of commercial requests, reviewing documents in response to a FOIA request. The term does not include overhead expenses.

(h) *Search costs* means those costs the Department incurs in looking for, identifying, and retrieving material, in paper or electronic form, that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Department shall attempt to ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the Department and the requester.

(i) *Duplication costs* means those costs the Department incurs in copying a requested record in a form appropriate for release in response to a FOIA request. Such copies may take the form of paper copy, microfiche, audio-visual materials, or machine-readable electronic documentation (e.g., disk or CD-ROM), among others.

(j) *Review costs* means costs the Department incurs in examining a record to determine whether and to what extent the record is responsive to the FOIA request and the extent to which it may be disclosed to the requester. It does not include costs of resolving general legal or policy issues that may be raised by a request.

(k) *Unusual circumstances*. As used herein, but only to the extent reasonably necessary to the proper processing of the particular request, the term ''unusual circumstances'' means:

(1) The need to search for and collect the requested records from Foreign Service posts or other separate and distinct Department offices;

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

(3) The need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the Department that have a substantial subject matter interest therein. Such consultation shall be conducted with all practicable speed.

(l) *Commercial use request* means a request from or on behalf of one who requests information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester belongs within this category, the Department will look at the use to which the requester will put the information requested.

(m) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution

of vocational education, that operates a program or programs of scholarly research.

(n) *Non-commercial scientific institution* means an institution that is not operated on a ''commercial'' basis, as that term is used in paragraph (l) 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.

(o) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. News media include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase by the general public. Freelance journalists may be regarded as working for a news organization if they can demonstrate, such as by past publication, a likelihood of publication through a representative of the news media, even though not actually employed by it.

(p) *All other* means an individual or organization not covered by a definition in paragraphs (l), (m), (n), or (o) of this section.

§ 171.12 Processing requests.

The Information and Privacy Coordinator is responsible for acting on all initial requests except for requests for records coming under the jurisdiction of the Bureau of Consular Affairs, the Bureau of Diplomatic Security, the Bureau of Human Resources, the Office of Medical Services, and the Office of the Inspector General.

(a) *Third party requests*. Except for requests under the Privacy Act by a parent of a minor or by a legal guardian (§ 171.32(c)), requests for records pertaining to another individual shall be processed under the FOIA and must be accompanied by a written authorization for access by the individual, notarized or made under penalty of perjury, or by proof that the individual is deceased (e.g., death certificate or obituary).

(b) *Expedited processing*. Requests and appeals shall be taken out of order and given expedited treatment whenever a requester has demonstrated that a ''compelling need'' for the information exists. A request for expedited processing may be made at the time of the initial request for records or at any later time. The request for expedited processing shall set forth with specificity the facts on which the request is based. A notice of the determination whether to grant expedited processing shall be provided to the requester within 10 days of the date of the receipt of the request. A ''compelling need'' is deemed to exist where the requester can demonstrate one of the following:

(1) Failure to obtain requested information on an expedited basis could reasonably be expected to: Pose an imminent threat to the life or physical safety of an individual; impair substantial due process rights; or harm substantial humanitarian interests.

(2) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. News media requesters would normally qualify; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just a particular segment or group.

(i) *Urgently needed*. The information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. Information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the breaking nature of the story.

(ii) *Actual or alleged Federal Government activity*. The information concerns some actions taken, contemplated, or alleged by or about the government of the United States, or one of its components or agencies, including the Congress.

(c) *Appeal of denial of expedited processing*. Any denial of a request for expedited processing may be appealed in accordance with the appeal procedure set forth in § 171.50.

(d) *Time limits*. The statutory time limit for responding to a FOIA request or to an appeal from a denial of a FOIA request is 20 days. In unusual circumstances, as defined in § 171.11(k), the time limits may be extended by the Information and Privacy Coordinator for not more than 10 days, excepting Saturdays, Sundays, or legal public holidays.

(e) *Multitrack processing*. The Department 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. The Department may provide requesters in a slower track an opportunity to limit the scope of their request in order to qualify for faster processing.

(f) *Form or format of response*. The Department shall provide requested records in any form or format sought by the requester if the record is readily reproducible in that form or format through reasonable efforts.

§ 171.13 Business information.

(a) Business information obtained by the Department from a submitter will be disclosed under the FOIA only in compliance with this section.

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

(1) *Business information* means information obtained by the Department from a submitter that arguably may be exempt from disclosure as privileged or confidential under Exemption 4 of the FOIA.

(2) *Submitter* means any person or entity from which the Department obtains business information. The term includes corporations, partnerships, sole proprietorships; State, local, and tribal governments; and foreign governments.

(c) *Designation of business information*. A submitter of 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 exempt 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*. The Department shall provide a submitter with prompt written notice of a FOIA request or administrative appeal of a denial of such a request that seeks its information whenever required under paragraph (e) of this section, except as provided in paragraph (f) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the information requested or include copies of the requested records or record portions containing the information.

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

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

(2) The Department has reason to believe that the information may not be protected from disclosure under Exemption 4.

(f) *When notice is not required*. The notice requirements of paragraphs (d) and (e) of this section shall not apply if:

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

(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; or

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

(g) *Opportunity to object to disclosure*. The Department 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 in the notice. If a submitter has any objection to disclosure, a detailed written statement in support of the objection must be submitted. 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 a submitter under this paragraph may itself be subject to disclosure under the FOIA.

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

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

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

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

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

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

§ 171.14 Fees to be charged—general.

The Department shall seek to charge fees that recoup the full allowable direct costs it incurs in processing a FOIA request. It shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Department will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. With the exception of requesters seeking documents for a commercial use, the Department will provide the first two hours of search time and the first 100 pages of duplication without charge. By making a FOIA request, the requester shall be considered to have agreed to pay all applicable fees up to $25.00 unless a fee waiver has been granted.

(a) *Searches for responsive records*. If the Department estimates that the search costs will exceed $25.00, the requester shall be so notified. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request to meet the requester's needs at a lower cost. The request shall not be processed further unless the requester agrees to pay the estimated fees. For both manual and computer searches, the Department shall charge the estimated direct cost of each search based on the average current salary rates of the categories of personnel doing the searches. Further information on search fees is available by clicking on ''FOIA'' at the Department's Web site at *http://www.state.gov* or directly at the FOIA home page at *http://foia.state.gov*.

(1) *Manual searches*. The Department will charge at the salary rate (*i.e.*, basic pay plus 16 percent of basic pay) of the employee making the search.

(2) *Computer searches*. The Department will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary attributable to the search.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are releasable. Charges may be assessed for the initial review only; *i.e.*, the review undertaken the first time the Department analyzes the applicability of a specific exemption to a particular record or portion of a record.

(c) *Duplication of records.* Records shall be duplicated at a rate of $.15 per page. For copies prepared by computer, such as tapes or printouts, the Department shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Department shall charge the actual direct costs of producing the document. If the Department estimates that the duplication costs will exceed $25.00, the requester shall be so informed. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(d) *Other charges.* The Department shall recover the full costs of providing services such as those enumerated below:

(1) Certifying that records are true copies (*see* part 22 of this chapter);

(2) Sending records by special methods such as express mail, overnight courier, etc.

(f) Payment shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Information and Privacy Coordinator.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

[69 FR 63935, Nov. 3, 2004, as amended at 72 FR 57858, Oct. 11, 2007]

§ 171.15 Fees to be charged—categories of requesters.

Under the FOIA, there are four categories of requesters: Commercial use requesters, educational and non-commercial scientific institutions, representatives of the news media, and all other requesters. The fees for each of these categories are:

(a) *Commercial use requesters.* When the Department receives a request for documents for commercial use as defined in § 171.11(l), it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The Department may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (*see* § 171.16(b)).

(b) *Educational and non-commercial scientific institution requesters.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution, as defined in § 171.11(m) and (n), and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(c) *Representatives of the news media.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 171.11(o), and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a commercial use request.

(d) *All other requesters.* The Department shall charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

§ 171.16 Miscellaneous fee provisions.

(a) *Charging interest.* The Department shall begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. The fact that the fee has been received by the Department within the thirty-day grace period, even if not processed, shall stay the accrual of interest. Interest will be at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of the billing.

(b) *Charges for unsuccessful search or if records are withheld.* The Department may assess charges for time spent searching, even if it fails to locate the records or if the records located are determined to be exempt from disclosure.

(c) *Advance payment.* The Department may not require a requester to make an advance payment, *i.e.*, payment before work is commenced or continued on a request, unless:

(1) It estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250. In such a case, the Department shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or shall require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay within 30 days of the date of the billing a fee charged. In such a case, the Department shall require the requester to pay the full amount previously owed plus any applicable interest and to make an advance payment of the full amount of the estimated fee before the Department begins to process a new or pending request from that requester. If a requester has failed to pay a fee charged by another U.S. Government agency in an information access case, the Department may require proof that such fee has been paid before processing a new or pending request from that requester.

(3) When the Department acts under paragraph (c)(1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (*i.e.*, 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits), will begin only after the Department has received fee payments described in paragraphs (c)(1) and (2) of this section.

(d) *Aggregating requests.* When the Department reasonably believes that a requester, or a group of requesters acting in concert, has submitted multiple requests involving related matters solely to avoid payment of fees, the Department may aggregate those requests for purposes of assessing processing fees.

(e) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365).* The Department shall comply with provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to effect repayment.

§ 171.17 Waiver or reduction of fees.

(a) Fees otherwise chargeable in connection with a request for disclosure of a record shall be waived or reduced where it is determined that disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(1) In order to determine whether disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, the Department will consider the following four factors:

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

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

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure, *i.e.*, whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject

area as well as the intention and ability to disseminate the information to the public; and

(iv) The significance of the contribution to public understanding, *i.e.*, whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, the Department will consider the following two factors:

(i) The existence and magnitude of a commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

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

(b) The Department may refuse to consider waiver or reduction of fees for requesters (persons or organizations) from whom unpaid fees remain owed to the Department for another information access request.

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

(d) The Department's decision to refuse to waive or reduce fees may be appealed in accordance with § 171.51.

Subpart C—Executive Order 12958 Provisions

§ 171.20 Definitions.

As used in this subpart, the following definitions shall apply:

(a) *Agency* means any executive branch agency, as defined in 5 U.S.C. 105, any military department, as defined by 5 U.S.C. 102, and any other entity within the executive branch that comes into possession of classified information.

(b) *Classified information* means information that has been determined pursuant to E.O. 12958 or any predecessor order on national security information to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(c) *Declassification* means the authorized change in the status of information from classified information to unclassified information.

(d) *Department* means the U.S. Department of State, including its field offices and Foreign Service posts abroad.

(e) *FOIA* means the Freedom of Information Act, 5 U.S.C. 552.

(f) *Foreign government information* means:

(1) Information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

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

(3) Information received and treated as foreign government information under the terms of a predecessor executive order.

(g) *Information* means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics that is owned by, produced by or for, or is under the control of the United States Government.

(h) *Mandatory declassification review* means the process by which specific classified information is reviewed for declassification pursuant to a request under § 171.21.

(i) *National Security* means the national defense or foreign relations of the United States.

(j) *Certain former government personnel* includes former officials of the Department of State or other U.S. Government agencies who previously have occupied policy-making positions to which they were appointed by the President under 3 U.S.C. 105(a)(2)(A) or

by the Vice President under 3 U.S.C. 106(a)(1)(A). It does not include former Foreign Service Officers as a class or persons who merely received assignment commissions as Foreign Service Officers, Foreign Service Reserve Officers, Foreign Service Staff Officers and employees.

(k) *Senior Agency Official* means the Under Secretary of State for Management.

§ 171.21 Declassification review.

(a) *Scope*. All information classified under E.O. 12958 or predecessor orders shall be subject to declassification review upon request by a member of the public or a U.S. government employee or agency with the following exceptions:

(1) Information originated by the incumbent President or, in the performance of executive duties, the incumbent Vice President; the incumbent President's White House staff or, in the performance of executive duties, the incumbent Vice President's staff; committees, commissions, or boards appointed by the incumbent President; other entities within the Executive Office of the President that solely advise and assist the incumbent President;

(2) Information that is the subject of litigation;

(3) Information that has been reviewed for declassification within the past two years; and

(4) Information exempted from search and review under the Central Intelligence Agency Information Act.

(b) *Requests*. Requests for mandatory declassification review should be addressed to the Information and Privacy Coordinator at the address given in Sec. 171.5. E-mail requests are not accepted at this time.

(c) *Mandatory declassification review and the FOIA*. A mandatory declassification review request is separate and distinct from a request for records under the FOIA. When a requester submits a request under both mandatory declassification review and the FOIA, the Department shall require the requester to elect review under one process or the other. If the requester fails to make such election, the request will be under the process that would result in the greatest disclosure unless the information requested is subject to only mandatory declassification review.

(d) *Description of information sought*. In order to be processed, a request for declassification review must describe the document or the material containing the information sought with sufficient specificity to enable the Department to locate the document or material with a reasonable amount of effort. Whenever a request does not sufficiently describe the material, the Department shall notify the requester that no further action will be taken unless additional description of the information sought is provided.

(e) *Refusal to confirm or deny existence of information*. The Department may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of existence or nonexistence is itself classified.

(f) *Processing*. In responding to mandatory declassification review requests, the Department shall make a review determination as promptly as possible and notify the requester accordingly. When the requested information cannot be declassified in its entirety, the Department shall release all meaningful portions that can be declassified and that are not exempt from disclosure on other grounds (see § 171.25).

(g) *Other agency information*. When the Department receives a request for information in its possession that was originally classified by another agency, it shall refer the request and the pertinent information to the other agency for processing unless that agency has agreed that the Department may review such information for declassification on behalf of that agency. The Department may, after consultation with the other agency, inform the requester of the referral unless association of the other agency with the information is itself classified.

(h) *Foreign government information*. In the case of a request for material containing foreign government information, the Department, if it is also the agency that initially received the foreign government information, shall determine whether the information may be declassified and may, if appropriate,

consult with the relevant foreign government on that issue. If the Department is not the agency that initially received the foreign government information, it shall refer the request to the original receiving agency for direct response to the requester.

(i) *Cryptologic and intelligence information*. Mandatory declassification review requests for cryptologic information shall be processed in accordance with special procedures established by the Secretary of Defense, and such requests for information concerning intelligence activities or intelligence sources and methods shall be processed in accordance with special procedures established by the Director of Central Intelligence.

§ 171.22 Appeals.

Any denial of a mandatory declassification review request may be appealed to the Department's Appeals Review Panel in accordance with § 171.52. A denial by the Appeals Review Panel of a mandatory declassification review appeal may be further appealed to the Interagency Security Classification Appeals Panel.

§ 171.23 Declassification in the public interest.

It is presumed that information that continues to meet classification requirements requires continued protection. In exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the senior Department official with Top Secret authority having primary jurisdiction over the information in question. That official, after consultation with the Assistant Secretary for Public Affairs, will determine whether the public interest in disclosure outweighs the damage to national security that reasonably could be expected from disclosure. If the determination is made that the information should be declassified and disclosed, that official will make such a recommendation to the Secretary or the senior agency official who shall make the decision on declassification and disclosure. This provision does not amplify or modify the substantive criteria or procedures for classification or create any substantive or procedural right subject to judicial review.

§ 171.24 Access by historical researchers and certain former government personnel.

(a) The restriction in E.O. 12958 and predecessor orders on limiting access to classified information to individuals who have a need-to-know the information may be waived, under the conditions set forth below, for persons who:

(1) Are engaged in historical research projects;

(2) Have served as Presidential or Vice Presidential appointees as defined in § 171.20(j), or

(3) Served as President or Vice President.

(b) Requests by such persons must be submitted in writing to the Information and Privacy Coordinator at the address set forth in § 171.5 and must include a general description of the records sought, the time period covered by the request, and an explanation why access is sought. Requests for access by such requesters may be granted if:

(1) The Secretary or the Senior Agency Official determines in writing that access is consistent with the interests of national security;

(2) The requester agrees in writing to safeguard the information from unauthorized disclosure or compromise;

(3) The requester submits a statement in writing authorizing the Department to review any notes and manuscripts created as a result of access;

(4) The requester submits a statement in writing that any information obtained from review of the records will not be disseminated without the express written permission of the Department;

(c) If a requester uses a research assistant, the requester and the research assistant must both submit a statement in writing acknowledging that the same access conditions set forth in paragraph (b)(4) of this section apply to the research assistant. Such a research assistant must be working for the applicant and not gathering information for publication on his or her own behalf.

(d) Access granted under this section shall be limited to items the appointee originated, reviewed, signed, or received while serving as a Presidential or Vice Presidential appointee or as President or Vice President.

(e) Such requesters may seek declassification and release of material to which they have been granted access under this section through either the FOIA or the mandatory declassification review provisions of E.O. 12958. Such requests shall be processed in the order received, along with other FOIA and mandatory declassification review requests, and shall be subject to the fees applicable to FOIA requests.

§ 171.25 Applicability of other laws.

Exemptions from disclosure set forth in the Freedom of Information Act, the Privacy Act, and other statutes or privileges protecting information from disclosure recognized in discovery or other such litigation-related procedures may be applied to withhold information declassified under the provisions of this subpart.

Subpart D—Privacy Act Provisions

§ 171.30 Purpose and scope.

This subpart contains the rules that the 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 records by the Department. If any records retrieved pursuant to an access request under the Privacy Act are found to be exempt from disclosure under that Act, they will be processed for possible disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552. No fees shall be charged for access to or amendment of Privacy Act records.

§ 171.31 Definitions.

As used in this subpart, the following definitions shall apply:

(a) *Department* means the United States Department of State, including its field offices and Foreign Service posts abroad.

(b) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) *Maintain* includes maintain, collect, use, or disseminate.

(d) *Record* means any item, collection, or grouping of information about an individual that is maintained by the Department, including, but not limited to education, financial transactions, medical history, and criminal or employment history, that contains the individual's name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph.

(e) *System of Records* means a group of any records under the control of the Department from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to an individual.

(f) *Control* has the meaning set forth in § 171.11(f)

(g) *Information and Privacy Coordinator* has the meaning set forth in § 171.11(d).

(h) *DS* is the abbreviation for the Bureau of Diplomatic Security of the U.S. Department of State.

(i) *OIG* is the abbreviation for the Office of the Inspector General of the U.S. Department of State.

§ 171.32 Request for access to records.

(a) *Description of records sought.* All requests for access to a record must reasonably describe the System of Records and the individual's record within the system in sufficient detail to permit identification of the requested record. At a minimum, requests should include the individual's full name (including maiden name, if appropriate) and any other names used, present mailing address and ZIP Code, date and place of birth, and any other information that might help in identifying the record. Helpful data includes the approximate time period of the

record and the circumstances that give the individual reason to believe that the Department of State maintains a record under the individual's name or personal identifier. In certain instances, it may be necessary for the Department to request additional information from the requester, either to ensure a full search, or to ensure that a record retrieved does in fact pertain to the individual.

(b) *Verification of personal identity.* The Department will require reasonable identification of individuals requesting records under the Privacy Act to ensure that records are disclosed only to the proper persons. Requesters must state their full name, current address, date and place of birth, and, at the requester's option, social security number. The request must be signed, and the requester's signature must be either notarized or submitted under penalty of perjury (28 U.S.C. 1746) as a substitute for notarization. If the requester seeks records under another name the requester has used, a statement, under penalty of perjury, that the requester has also used the other name must be included.

(c) *Third party access.* The Department shall allow third party access to records under certain conditions:

(1) *Parents.* Upon presentation of documentation of the parental relationship, a parent of a minor (an unmarried person under the age of 18) may, on behalf of the minor, request records pertaining to the minor and the Department may, in its discretion, disclose such records to the parent to the extent determined by the Department to be appropriate in the circumstances of the case. In any case, minors may request such records on their own behalf.

(2) *Guardians.* A guardian of a minor or of an individual who has been declared by a court to be incompetent may act for and on behalf of the minor or the incompetent individual upon presentation of appropriate documentation of the guardian relationship.

(3) *Authorized representatives or designees.* When an individual wishes to authorize another person or persons access to his or her records, the individual shall submit, in addition to the identifying information described in paragraph (b) of this section, a signed statement, either notarized or made under penalty of perjury, authorizing and consenting to access by a designated person or persons. Such requests shall be processed under the FOIA (*see* § 171.12).

(d) *Records relating to civil actions.* Nothing in this subpart entitles an individual to access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) *Time limits.* The Department will acknowledge the request promptly and furnish the requested information as soon as possible thereafter.

(f) *Information on amending records.* At the time the Department grants access to a record, it will also furnish guidelines for requesting amendment of a record. These guidelines may also be obtained by writing to the Information and Privacy Coordinator at the address given in § 171.5. The guidelines are also available in the reading room described in § 171.3 and in the electronic reading room described in § 171.4.

§ 171.33 Request to amend or correct records.

(a) An individual has the right to request that the Department amend a record pertaining to the individual that the individual believes is not accurate, relevant, timely, or complete.

(b) Requests to amend records must be in writing and mailed or delivered to the Information and Privacy Coordinator, at the address given in § 171.5, who will coordinate the review of the request with the appropriate offices of the Department. The Department will require verification of personal identity as provided in § 171.32(b) before it will initiate action to amend a record. Amendment requests should contain, as a minimum, identifying information needed to locate the record in question, a description of the specific correction requested, and an explanation of why the existing record is not accurate, relevant, timely, or complete. The requester should submit as much pertinent documentation, other information, and explanation as possible to support the request for amendment.

(c) All requests for amendments to records will be acknowledged within 10

days (excluding Saturdays, Sundays, and legal public holidays).

(d) In reviewing a record in response to a request to amend, the Department shall review the record to determine if it is accurate, relevant, timely, and complete.

(e) If the Department agrees with an individual's request to amend a record, it shall:

(1) Advise the individual in writing of its decision;

(2) Amend the record accordingly; and

(3) If an accounting of disclosure has been made, advise all previous recipients of the record of the amendment and its substance.

(f) If the Department denies, in whole or in part, the individual's amendment request, it shall advise the individual in writing of its decision, of the reason therefore, and of the individual's right to appeal the denial in accordance with § 171.52.

§ 171.34 Request for an accounting of record disclosures.

(a) *How made.* Except where accountings of disclosures are not required to be kept, as set forth in paragraph (b) of this section, an individual has a right to request an accounting of any disclosure that the Department has made to another person, organization, or agency of any record about an individual. This accounting shall contain the date, nature, and purpose of each disclosure as well as the name and address of the recipient of the disclosure. Any request for accounting should identify each particular record in question and may be made by writing directly to the Information and Privacy Coordinator at the address given in § 171.5.

(b) *Where accountings not required.* The Department is not required to keep an accounting of disclosures in the case of:

(1) Disclosures made to employees within the Department who have a need for the record in the performance of their duties;

(2) Disclosures required under the FOIA;

(3) Disclosures made to another agency or to an instrumentality of any governmental jurisdiction under the control of or within the United States for authorized civil or criminal law enforcement activities pursuant to a written request from such agency or instrumentality specifying the activities for which the disclosures are sought and the portions of the records sought.

§ 171.35 Denials of requests; appeals.

If the Department denies a request for access to Privacy Act records, for amendment of such records, or for an accounting of disclosure of such records, the requester shall be informed of the reason for the denial and of the right to appeal the denial to the Appeals Review Panel in accordance with § 171.52.

§ 171.36 Exemptions.

Systems of records maintained by the Department are authorized to be exempted from certain provisions of the Privacy Act under both general and specific exemptions set forth in the Act. In utilizing these exemptions, the Department is exempting only those portions of systems that are necessary for the proper functioning of the Department and that are consistent with the Privacy Act. Where compliance would not appear to interfere with or adversely affect the law enforcement process, and/or where it may be appropriate to permit individuals to contest the accuracy of the information collected, e.g., public source materials, the applicable exemption may be waived, either partially or totally, by the Department or the OIG, in the sole discretion of the Department or the OIG, as appropriate.

(a) *General exemptions.* (1) Individuals may not have access to records maintained by the Department that were provided by another agency that has determined by regulation that such information is subject to general exemption under 5 U.S.C. 552a(j)(1). If such exempt records are the subject of an access request, the Department will advise the requester of their existence and of the name and address of the source agency, unless that information is itself exempt from disclosure.

(2) The systems of records maintained by the Bureau of Diplomatic Security (STATE–36), the Office of the Inspector General (STATE–53), and the

Information Access Program Records system (STATE–35) are subject to general exemption under 5 U.S.C. 552a(j)(2). All records contained in record system STATE–36, Security Records, are exempt from all provisions of the Privacy Act except sections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent to which they meet the criteria of section (j)(2). These exemptions are necessary to ensure the effectiveness of the investigative, judicial, and protective processes. All records contained in STATE–53, records of the Inspector General and Automated Individual Cross-Reference System, are exempt from all of the provisions of the Privacy Act except sections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent to which they meet the criteria of section (j)(2). These exemptions are necessary to ensure the proper functions of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to prevent interference with the enforcement of criminal laws, to avoid the disclosure of investigative techniques, to avoid the endangering of the life and safety of any individual, to avoid premature disclosure of the knowledge of potential criminal activity and the evidentiary bases of possible enforcement actions, and to maintain the integrity of the law enforcement process. All records contained in the Information Access Program Records system (STATE–35) are exempt from all of the provisions of the Privacy Act except sections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent to which they meet the criteria of section (j)(2). These exemptions are necessary to ensure the protection of law enforcement information retrieved from various sources in response to information access requests.

(b) *Specific exemptions*. Portions of the following systems of records are exempted from 5 U.S.C. 552a (c)(3), (d), (e)(1), and (4), (G), (H), and (I), and (f). The names of the systems correspond to those published in the FEDERAL REGISTER by the Department.

(1) *Exempt under 5 U.S.C. 552a(k)(1)*. The reason for invoking this exemption is to protect material required to be kept secret in the interest of national defense and foreign policy.

Board of Appellate Review Records. STATE–02.

Congressional Correspondence. STATE–43.

Congressional Travel Records. STATE–44.

Coordinator for the Combating of Terrorism Records. STATE–06.

External Research Records. STATE–10.

Extradition Records. STATE–11.

Foreign Assistance Inspection Records. STATE–48.

Human Resources Records. STATE–31.

Information Access Programs Records. STATE–35.

Intelligence and Research Records. STATE–15.

International Organizations Records. STATE–17.

Law of the Sea Records. STATE–19.

Legal Case Management Records. STATE–21.

Munitions Control Records. STATE–42.

Overseas Citizens Services Records. STATE–05.

Overseas Records. STATE–25.

Passport Records. STATE–26.

Personality Cross-Reference Index to the Secretariat Automated Data Index Records. STATE–28.

Personality Index to the Central Foreign Policy Records. STATE–29.

Personnel Payroll Records. STATE–30.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE–53.

Records of the Office of the Assistant Legal Adviser for International Claims and Investment Disputes. STATE–54.

Rover Records. STATE–41.

Records of Domestic Accounts Receivable. STATE–23.

Records of the Office of White House Liaison. STATE–34.

Board of Appellate Review Records. STATE–02.

Refugee Records. STATE–59.

Refugee Data Center Processing Records. STATE–60.

Security Records. STATE–36.

Visa Records. STATE–39.

(2) *Exempt under 5 U.S.C. 552(a)(k)(2).* The reasons for invoking this exemption are to prevent individuals that are the subject of investigation from frustrating the investigatory process, to ensure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the confidence of foreign governments in the integrity of the procedures under which privileged or confidential information may be provided, and to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel.

Board of Appellate Review Records. STATE–02.

Coordinator for the Combating of Terrorism Records. STATE–06.

Extradition Records. STATE–11.

Foreign Assistance Inspection Records. STATE–48.

Garnishment of Wages Records. STATE–61.

Information Access Program Records. STATE–35.

Intelligence and Research Records. STATE–15.

Munitions Control Records. STATE–42.

Overseas Citizens Services Records. STATE–05.

Overseas Records. STATE–25.

Passport Records. STATE–26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE–28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE–53.

Security Records. STATE–36.

Visa Records. STATE–39.

(3) *Exempt under 5 U.S.C. 552(a)(k)(3).* The reason for invoking this exemption is to preclude impairment of the Department's effective performance in carrying out its lawful protective responsibilities under 18 U.S.C. 3056 and 22 U.S.C. 4802.

Extradition Records. STATE–11.

Information Access Programs Records. STATE–35.

Intelligence and Research Records. STATE–15.

Overseas Citizens Services Records. STATE–05.

Overseas Records. STATE–25.

Passport Records. STATE–26.

Personality Cross-Reference Index to the Secretariat Automated Data Index. STATE–28.

Personality Index to the Central Foreign Policy Records. STATE–29.

Security Records. STATE–36.

Visa Records. STATE–39.

(4) *Exempt under 5 U.S.C. 552a(k)(4).* The reason for invoking this exemption is to avoid needless review of records that are used solely for statistical purposes and from which no individual determinations are made.

Foreign Service Institute Records. STATE–14.

Human Resources Records. STATE–31.

Information Access Programs Records. STATE–35.

Personnel Payroll Records. STATE–30.

Security Records. STATE–36.

(5) *Exempt under 5 U.S.C. 552a(k)(5).* The reasons for invoking this exemption are to ensure the proper functioning of the investigatory process, to ensure effective determination of suitability, eligibility, and qualification for employment and to protect the confidentiality of sources of information.

Equal Employment Opportunity Records. STATE–09.

Foreign Assistance Inspection Records. STATE–48.

Foreign Service Grievance Board Records. STATE–13.

Human Resources Records. STATE–31.

Information Access Programs Records. STATE–35.

Legal Adviser Attorney Employment Application Records. STATE–20.

Overseas Records. STATE–25.

Personality Cross-Reference Index to the Secretariat Automated Data Index Records. STATE–28.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE–53.

Records of the Office of White House Liaison. STATE–34.

Rover Records. STATE–41.

Security Records. STATE–36.

Senior Personnel Appointments Records. STATE–47.

(6) *Exempt under 5 U.S.C. 552(k)(6).* The reasons for invoking this exemption are to prevent the compromise of testing or evaluation material used solely to determine individual qualifications for employment or promotion and to avoid giving unfair advantage to individuals by virtue of their having access to such material.

Foreign Service Institute Records. STATE–14.

Human Resources Records. STATE–31.

Information Access Programs Records. STATE–35.

Security Records. STATE–36.

(7) *Exempt under 5 U.S.C. 552a(k)(7).* The reason for invoking this exemption is to prevent access to material maintained from time to time by the Department in connection with various military personnel exchange programs.

Overseas Records. STATE–25.

Human Resources Records. STATE–31.

Information Access Programs Records. STATE–35.

Personality Cross-Reference Index to the Secretariat Automated Data Index Records. STATE–28.

Personality Index to the Central Foreign Policy Records. STATE–29.

Subpart E—Ethics in Government Act Provisions

§ 171.40 Purpose and scope.

This subpart sets forth the regulations under which persons may request access to the public financial disclosure reports of employees of the Department as well as limits to such requests and use of such information. The Ethics in Government Act 1978, as amended, and the Office of Government Ethics implementing regulations, 5 CFR part 2634, require that high-level Federal officials disclose publicly their personal financial interests.

§ 171.41 Covered employees.

(a) Officers and employees (including special Government employees as defined in 18 U.S.C. 202) whose positions are classified at grades GS–16 and above of the General Schedule, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than the 120% of the minimum rate of basic pay for GS–15 of the General Schedule;

(b) Officers or employees in any other positions determined by the Director of the Office of Government Ethics to be of equal classification to GS–16;

(c) Employees in the excepted service in positions that are of a confidential or policy-making character, unless by regulation their positions have been excluded by the Director of the Office of Government Ethics;

(d) The designated agency official who acts as the Department's Ethics Officer;

(e) Incumbent officials holding positions referred to above if they have served 61 days or more in the position during the preceding calendar year.

(f) Officials who have terminated employment from a position referred to above and who have not accepted another such position within 30 days of such termination.

§ 171.42 Requests and identifying information.

Requests for access to public financial disclosure reports of covered employees should be made in writing to the Information and Privacy Coordinator at the address given in § 171.5 setting forth:

(a) The name and/or position title of the Department of State official who is the subject of the request,

(b) The time period covered by the report requested,

(c) A completed Office of Government Ethics request form, OGE Form 201, October, 1999. This form may be obtained by writing to the Information and Privacy Coordinator or by visiting the Public Reading Room described in § 171.3 or *http://www.usoge.gov*.

§ 171.43 Time limits and fees.

(a) Reports shall be made available within thirty (30) days from receipt of a request by the Department. The Department does not charge a fee for a single copy of a public financial report. However, the Department will charge for additional copies of a report at a rate of 15 cents per page plus the actual direct cost of mailing the reports. However, the Department will not charge for individual requests if the total charge would be $10.00 or less.

(b) A report shall be retained by the Department and made available to the public for a period of six (6) years after receipt of such report. After such a six year period, the report shall be destroyed, unless needed in an ongoing investigation, except that those reports filed by individuals who are nominated for office by the President to a position that requires the advice and consent of the Senate, and who subsequently are not confirmed by the Senate, will be retained and made available for a one-year period, and then destroyed, unless needed in an ongoing investigation.

§ 171.44 Improper use of reports.

(a) The Attorney General may bring a civil action against any person who obtains or uses a financial disclosure report:

(1) For any unlawful purpose;

(2) For any commercial purpose, other than for news or community dissemination to the general public;

(3) For determining or establishing the credit rating of any individual;

(4) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(b) The court in which such action is brought may assess a civil penalty not to exceed $10,000 against any person who obtains or uses the reports for these prohibited purposes. Such remedy shall be in addition to any other remedy available under statutory or common law.

Subpart F—Appeal Procedures

§ 171.50 Appeal of denials of expedited processing.

(a) A denial of a request for expedited processing may be appealed to the Chief of the Requester Liaison Division of the office of the Information and Privacy Coordinator at the address given in § 171.5 within 30 days of receipt of the denial. Appeals should contain as much information and documentation as possible to support the request for expedited processing in accordance with the criteria set forth in § 171.12(b)

(b) The Requester Liaison Division Chief will issue a final decision in writing within ten (10) days from the date on which the office of the Information and Privacy Coordinator receives the appeal.

§ 171.51 Appeals of denials of fee waivers or reductions.

(a) A denial of a request for a waiver or reductions of fees may be appealed to the Chief of the Requester of Liaison Division of the Office of the Information and Privacy Coordinator at the address given in § 171.5 within 30 days of receipt of the denial. Appeals should contain as much information and documentation as possible to support the request for fee waiver or reduction in accordance with the criteria set forth in § 171.17.

(b) The Requester Liaison Division Chief will issue a final decision in writing within 30 days from the date on which the office of the Information and Privacy Coordinator receives the appeal.

§ 171.52 Appeal of denial of access to, declassification of, amendment of, accounting of disclosures of, or challenge to classification of records.

(a) *Right of administrative appeal.* Except for records that have been reviewed and withheld within the past two years or are the subject of litigation, any requester whose request for access to records, declassification of records, amendment of records, accounting of disclosures of records, or any authorized holder of classified information whose classification challenge has been denied, has a right to appeal the denial to the Department's Appeals Review Panel. This appeal right includes the right to appeal the determination by the Department that no records responsive to an access request exist in Department files. Privacy Act appeals may be made only by the individual to whom the records pertain.

(b) *Form of appeal.* There is no required form for an appeal. However, it is essential that the appeal contain a clear statement of the decision or determination by the Department being appealed. When possible, the appeal should include argumentation and documentation to support the appeal and to contest the bases for denial cited by the Department. The appeal should be sent to: Chairman, Appeals Review

Panel, c/o Information and Privacy Coordinator/Appeals Officer, at the address given in §171.5.

(c) *Time limits.* The appeal should be received within 60 days of the date of receipt by the requester of the Department's denial. The time limit for response to an appeal begins to run on the day that the appeal is received. The time limit (excluding Saturdays, Sundays, and legal public holidays) for agency decision on an administrative appeal is 20 days under the FOIA (which may be extended for up to an additional 10 days in unusual circumstances) and 30 days under the Privacy Act (which the Panel may extend an additional 30 days for good cause shown). The Panel shall decide mandatory declassification review appeals as promptly as possible.

(d) *Notification to appellant.* The Chairman of the Appeals Review Panel shall notify the appellant in writing of the Panel's decision on the appeal. When the decision is to uphold the denial, the Chairman shall include in his notification the reasons therefore. The appellant shall be advised that the decision of the Panel represents the final decision of the Department and of the right to seek judicial review of the Panel's decision, when applicable. In mandatory declassification review appeals, the Panel shall advise the requester of the right to appeal the decision to the Interagency Security Classification Appeals Panel under §3.5(d) of E.O. 12958.

(e) *Procedures in Privacy Act amendment cases.* (1) If the Panel's decision is that a record shall be amended in accordance with the appellant's request, the Chairman shall direct the office responsible for the record to amend the record, advise all previous recipients of the record of the amendment and its substance if an accounting of disclosure has been made, and so advise the individual in writing.

(2) If the Panel's decision is that the request of the appellant to amend the record is denied, in addition to the notification required by paragraph (d) of this section, the Chairman shall advise the appellant:

(i) Of the right to file a concise statement of the reasons for disagreeing with the decision of the Department;

(ii) Of the procedures for filing the statement of disagreement;

(iii) That any statement of disagreement that is filed will be made available to anyone to whom the record is subsequently disclosed, together with, at the discretion of the Department, a brief statement by the Department summarizing its reasons for refusing to amend the record;

(iv) That prior recipients of the disputed record will be provided a copy of any statement of disagreement, to the extent that an accounting of disclosures was maintained.

(3) If the appellant files a statement under paragraph (e)(2) of this section, the Department will clearly annotate the record so that the fact that the record is disputed is apparent to anyone who may subsequently have access to the record. When information that is the subject of a statement of dispute filed by an individual is subsequently disclosed, the Department will note that the information is disputed and provide a copy of the individual's statement. The Department may also include a brief summary of reasons for not amending the record when disclosing disputed information. Copies of the Department's statement shall be treated as part of the individual's record for granting access; however, it will not be subject to amendment by an individual under these regulations.

PART 172—SERVICE OF PROCESS; PRODUCTION OR DISCLOSURE OF OFFICIAL INFORMATION IN RESPONSE TO COURT ORDERS, SUBPOENAS, NOTICES OF DEPOSITIONS, REQUESTS FOR ADMISSIONS, INTERROGATORIES, OR SIMILAR REQUESTS OR DEMANDS IN CONNECTION WITH FEDERAL OR STATE LITIGATION; EXPERT TESTIMONY

Sec.

172.1 Purpose and scope; definitions.
172.2 Service of summonses and complaints.
172.3 Service of subpoenas, court orders, and other demands or requests for official information or action.
172.4 Testimony and production of documents prohibited unless approved by appropriate Department officials.

172.5 Procedure when testimony or production of documents is sought; general.
172.6 Procedure when response to demand is required prior to receiving instructions.
172.7 Procedure in the event of an adverse ruling.
172.8 Considerations in determining whether the Department will comply with a demand or request.
172.9 Prohibition on providing expert or opinion testimony.

AUTHORITY: 5 U.S.C. 301; 8 U.S.C. 1202(f); 22 U.S.C. 2658, 2664, 3926.

SOURCE: 57 FR 32896, July 24, 1992, unless otherwise noted.

§ 172.1 Purpose and scope; definitions.

(a) This part 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 State (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 authority (collectively, ''demands''), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, or other litigation-related matters, 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 an employee of the Department as part of the performance of that person's duties or by virtue of that person's official status.

(b) For purposes of this part, and except as the Department may otherwise determine in a particular case, the term *employee* includes the Secretary and former Secretaries of State, and all employees and former employees of the Department of State or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of State or his Chiefs of Mission, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors.

(c) For purposes of this part, 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), or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature. This part 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 part shall not apply to any claims by Department of State 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.

(d) For purposes of this part, *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 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.

(e) Nothing in this part 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 12356 on national security information (3 CFR, 1982 Comp., p. 166), the Government in the Sunshine Act, 5

U.S.C. 552b, the Department's implementing regulations in 22 CFR part 171 or pursuant to congressional subpoena. Nothing in this part otherwise permits disclosure of information by the Department or its employees except as provided by statute or other applicable law.

(f) This part 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.

(g) Nothing in this part affects:

(1) The disclosure of information during the course of legal proceedings in non-United States courts, commissions, boards, or other judicial or quasi-judicial bodies or tribunals; or

(2) The rules and procedures, under applicable U.S. law and international conventions, governing diplomatic and consular immunity.

(h) Nothing in this part 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 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.

§ 172.2 Service of summonses and complaints.

(a) Only the Executive Office of the Office of the Legal Adviser (L/EX) is authorized to receive and accept summonses or complaints sought to be served upon the Department or Department employees. All such documents should be delivered or addressed to The Executive Office, Office of the Legal Adviser, room 5519, United States Department of State, 2201 C Street, NW., Washington, DC 20520–6310.

(b) In the event any summons or complaint described in § 172.1(a) is delivered to an employee of the Department other than in the manner specified in this part, such attempted service shall be ineffective, and the recipient thereof shall either decline to accept the proffered service or return such document under cover of a written communication which directs the person attempting to make service to the procedures set forth herein.

(c) Except as otherwise provided §§ 172.2(d) and 173.3(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 L/EX.

(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 stationed overseas 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, and will waive applicable diplomatic or consular privileges and immunities when the Department determines that it is in the interest of the United States to do so.

(e) Documents for which L/EX 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 the laws of rules applicable for the service of process.

§ 172.3 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 L/EX is authorized to receive and accept subpoenas, or other demands or requests directed to the

Department, or any component thereof, or its employees, or former employees, whether civil or criminal 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 (including former employees) other than in the manner prescribed in paragraph (a) of this section, such attempted service shall be ineffective. Such employee shall, after consultation with the Office of the Legal Adviser, decline to accept the subpoena, demand or request or shall return them to the server under cover of a written communication referring to the procedures prescribed in this part.

(c) Except as otherwise provided in this part, 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 L/EX 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.

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

(a) No employee of the Department shall, in response to a demand or request in connection with any litigation, whether criminal or civil, 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 persons's official status, unless authorized to do so by the Director General of the Foreign Service and Director of Personnel (M/DGP) or the Legal Adviser (L), or delegates of either, following consultation between the two bureaus, or as authorized in § 172.4(b).

(b) With respect to the official functions of the Passport Office, the Visa Office, and the Office of Citizens Services, the Assistant Secretary of State for Consular Affairs or delegate thereof may, subject to concurrence by the Office of the Legal Adviser, authorize employees to provide oral or written testimony.

(c) No employee shall, in response to a demand or request in connection with any litigation, produce for use at such proceedings 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 Director General of the Foreign Service and Director of Personnel, the Legal Adviser, or the Assistant Secretary of State for Consular Affairs, or the delegates thereof, as appropriate, following consultations between the concerned bureaus.

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

(a) If official Department 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 Legal Adviser) 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 22 CFR 171.10(a) and 171.31. Subject to § 172.7, 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 § 172.4. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). The Office of the Legal Adviser may waive this requirement 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 § 172.2 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 Legal Adviser will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

§ 172.6 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 § 172.4 renders a decision, the Department will request that either a Department of Justice attorney or a Department attorney designated for the purpose:

(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 part;

(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) Respectively 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 Department attorney on the employee's behalf, the employee shall respectfully request the demanding court or authority for a reasonable stay of proceedings for the purpose of obtaining instructions from the Department.

§ 172.7 Procedure in the event of an adverse ruling.

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 § 172.6, 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 part and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

§ 172.8 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 others:

(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, *inter alia*, any of the following factors 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.

§ 172.9 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) 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 § 172.4 may, consistent with 5 CFR 2635.805, in their discretion and with the concurrence of the Office of the Legal Adviser, grant special, written authorization for Department employees to appear and testify as expert witnesses at no expense to the United States.

(c) If, despite the final determination of the appropriate Department official designated in § 172.4, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a Department employee, such employee shall immediately inform the Office of the Legal Adviser of such order. If the Office of the Legal Adviser determines that no further legal review of or challenge to the court's order will be made, the Department employee shall comply with the order. If so directed by the Office of the Legal Adviser, however, the employee shall respectfully decline to testify. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

SUBCHAPTER S—INTERNATIONAL AGREEMENTS

PART 181—COORDINATION, REPORTING AND PUBLICATION OF INTERNATIONAL AGREEMENTS

Sec.
181.1 Purpose and application.
181.2 Criteria.
181.3 Determinations.
181.4 Consultations with the Secretary of State.
181.5 Twenty-day rule for concluded agreements.
181.6 Documentation and certification.
181.7 Transmittal to the Congress.
181.8 Publication.
181.9 Internet Web site publication.

AUTHORITY: 1 U.S.C. 112a, 112b; and 22 U.S.C. 2651a.

SOURCE: 46 FR 35918, July 13, 1981, unless otherwise noted.

§ 181.1 Purpose and application.

(a) The purpose of this part is to implement the provisions of 1 U.S.C. 112a and 112b, popularly known as the Case-Zablocki Act (hereinafter ''the Act''), on the reporting to Congress, coordination with the Secretary of State and publication of international agreements. This part applies to all agencies of the U.S. Government whose responsibilities include the negotiation and conclusion of international agreements. This part does not, however, constitute a delegation by the Secretary of State of the authority to engage in such activites. Further, it does not affect any additional requirements of law governing the relationship between particular agencies and the Secretary of State in connection with international negotiations and agreements, or any other requirements of law concerning the relationship between particular agencies and the Congress. The term *agency* as used in this part means each authority of the United States Government, whether or not it is within or subject to review by another agency.

(b) Pursuant to the key legal requirements of the Act—full and timely disclosure to the Congress of all concluded agreements and consultation by agencies with the Secretary of State with respect to proposed agreements—every agency of the Government is required to comply with each of the provisions set out in this part in implementation of the Act. Nevertheless, this part is intended as a framework of measures and procedures which, it is recognized, cannot anticipate all circumstances or situations that may arise. Deviation or derogation from the provisions of this part will not affect the legal validity, under United States law or under international law, of agreements concluded, will not give rise to a cause of action, and will not affect any public or private rights established by such agreements.

[46 FR 35918, July 13, 1981, as amended at 61 FR 7071, Feb. 26, 1996]

§ 181.2 Criteria.

(a) *General.* The following criteria are to be applied in deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement within the meaning of the Act, as well as within the meaning of 1 U.S.C. 112a, requiring the publication of international agreements. Each of the criteria except those in paragraph (a)(5) of this section must be met in order for any given undertaking of the United States to constitute an international agreement.

(1) *Identity and intention of the parties.* A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example of the latter is the Final Act of the Helsinki Conference on Cooperation and Security in Europe. In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law. In the absence of any provision in

the arrangement with respect to governing law, it will be presumed to be governed by international law. This presumption may be overcome by clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system. Arrangements governed solely by the law of the United States, or one of the states or jurisdictions thereof, or by the law of any foreign state, are not international agreements for these purposes. For example, a foreign military sales loan agreement governed in its entirety by U.S. law is not an international agreement.

(2) *Significance of the arrangement.* Minor or trivial undertakings, even if couched in legal language and form, are not considered international agreements within the meaning of the Act or of 1 U.S.C. 112a. In deciding what level of significance must be reached before a particular arrangement becomes an international agreement, the entire context of the transaction and the expectations and intent of the parties must be taken into account. The duration of the activities pursuant to the undertaking or the duration of the undertaking itself shall not be a factor in determining whether it constitutes an international agreement. It remains a matter of judgment based on all of the circumstances of the transaction. Determinations are made pursuant to § 181.3. Examples of arrangements that may constitute international agreements are agreements that: (i) Are of political significance; (ii) involve substantial grants of funds or loans by the United States or credits payable to the United States; (iii) constitute a substantial commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations; (iv) involve continuing and/or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment, or the pooling of data. However, individual research grants and contracts do not ordinarily constitute international agreements.

(3) *Specificity, including objective criteria for determining enforceability.* International agreements require precision and specificity in the language setting forth the undertakings of the parties. Undertakings couched in vague or very general terms containing no objective criteria for determining enforceability or performance are not normally international agreements. Most frequently such terms reflect an intent not to be bound. For example, a promise to ''help develop a more viable world economic system'' lacks the specificity essential to constitute a legally binding international agreement. However, the intent of the parties is the key factor. Undertakings as general as those of, for example, Articles 55 and 56 of the United Nations Charter have been held to create internationally binding obligations intended as such by the parties.

(4) *Necessity for two or more parties.* While unilateral commitments on occasion may be legally binding, they do not constitute international agreements. For example, a statement by the President promising to send money to Country Y to assist earthquake victims would not be an international agreement. It might be an important undertaking, but not all undertakings in international relations are in the form of international agreements. Care should be taken to examine whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings. Moreover, ''consideration,'' as that term is used in domestic contract law, is not required for international agreements.

(5) *Form.* Form as such is not normally an important factor, but it does deserve consideration. Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, or entry into force dates, may or may not be international agreements. Failure to use the customary form may constitute evidence of a lack of intent to be legally bound by the arrangement. If, however, the general content and context reveal an intention to enter into a legally binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. Moreover, the title of the agreement

will not be determinative. Decisions will be made on the basis of the substance of the arrangement, rather than on its denomination as an international agreement, a memorandum of understanding, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide-memoire, agreed minute, or any other name.

(b) *Agency-level agreements.* Agency-level agreements are international agreements within the meaning of the Act and of 1 U.S.C. 112a if they satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government, does not mean that the agreement is not an international agreement. Determinations are made on the basis of the substance of the agency-level agreement in question.

(c) *Implementing agreements.* An implementing agreement, if it satisfies the criteria discussed in paragraph (a) of this section, may be an international agreement, depending upon how precisely it is anticipated and identified in the underlying agreement it is designed to implement. If the terms of the implementing agreement are closely anticipated and identified in the underlying agreement, only the underlying agreement is considered and international agreement. For example, the underlying agreement might call for the sale by the United States of 1000 tractors, and a subsequent implementing agreement might require a first installment on this obligation by the sale of 100 tractors of the brand X variety. In that case, the implementing agreement is sufficiently identified in the underlying agreement, and would not itself be considered an international agreement within the meaning of the Act or of 1 U.S.C. 112a. Project annexes and other documents which provide technical content for an umbrella agreement are not normally treated as international agreements. However, if the underlying agreement is general in nature, and the implementing agreement meets the specified criteria of paragraph (a) of this section, the implementing agreement might well be an international agreement. For example, if the underlying agreement calls for the conclusion of ''agreements for agricultural assistance,'' but without further specificity, then a particular agricultural assistance agreement subsequently concluded in ''implementation'' of that obligation, provided it meets the criteria discussed in paragraph (a) of this section, would constitute an international agreement independent of the underlying agreement.

(d) *Extensions and modifications of agreements.* If an undertaking constitutes an international agreement within the meaning of the Act and of 1 U.S.C. 112a, then a subsequent extension or modification of such an agreement would itself constitute an international agreement within the meaning of the Act and of 1 U.S.C. 112a.

(e) *Oral agreements.* Any oral arrangement that meets the criteria discussed in paragraphs (a)(1)–(4) of this section is an international agreement and, pursuant to section (a) of the Act, must be reduced to writing by the agency that concluded the oral arrangement. In such written form, the arrangement is subject to all the requirements of the Act and of this part. Whenever a question arises whether an oral arrangement constitutes an international agreement, the arrangement shall be reduced to writing and the decision made in accordance with § 181.3.

(f) Notwithstanding the other provisions of this section, arrangements that constitute international agreements within the meaning of this section include

(1) Bilateral or multilateral counterterrorism agreements and

(2) Bilateral agreements with a country that is subject to a determination under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)).

[46 FR 35918, July 13, 1981, as amended at 71 FR 53008, Sept. 8, 2006]

§ 181.3 Determinations.

(a) Whether any undertaking, document, or set of documents constitutes

or would constitute an international agreement within the meaning of the Act or of 1 U.S.C. 112a shall be determined by the Legal Adviser of the Department of State, a Deputy Legal Adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate.

(b) Agencies whose responsibilities include the negotiation and conclusion of international agreements are responsible for transmitting to the Assistant Legal Adviser for Treaty Affairs, for decision pursuant to paragraph (a) of this section, the texts of any document or set of documents that might constitute an international agreement. The transmittal shall be made prior to or simultaneously with the request for consultations with the Secretary of State required by subsection (c) of the Act and § 181.4 of this part.

(c) Agencies whose responsibilities include the negotiation and conclusion of large numbers of agency-level and implementing arrangements at overseas posts, only a small number of which might constitute international agreements within the meaning of the Act and of 1 U.S.C. 112a, are required to transmit prior to their entry into force only the texts of the more important of such arrangements for decision pursuant to paragraph (a) of this section. The texts of all arrangements that might constitute international agreements shall, however, be transmitted to the Office of the Assistant Legal Adviser for Treaty Affairs as soon as possible, and in no event to arrive at that office later than 20 days after their signing, for decision pursuant to paragraph (a) of this section.

(d) Agencies to which paragraphs (b) and (c) of this section apply shall consult periodically with the Assistant Legal Adviser for Treaty Affairs in order to determine which categories of arrangements for which they are responsible are likely to be international agreements within the meaning of the Act and of 1 U.S.C. 112a.

§ 181.4 Consultations with the Secretary of State.

(a) The Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with United States foreign policy objectives. Except as provided in § 181.3(c) of this part, no agency of the U.S. Government may conclude an international agreement, whether entered into in the name of the U.S. Government or in the name of the agency, without prior consultation with the Secretary of State or his designee.

(b) The Secretary of State (or his designee) gives his approval for any proposed agreement negotiated pursuant to his authorization, and his opinion on any proposed agreement negotiated by an agency which has separate authority to negotiate such agreement. The approval or opinion of the Secretary of State or his designee with respect to any proposed international agreement will be given pursuant to Department of State procedures set out in Volume 11, *Foreign Affairs Manual*, Chapter 700 (Circular 175 procedure). Officers of the Department of State shall be responsible for the preparation of all documents required by the Circular 175 procedure.

(c) Pursuant to the Circular 175 procedure, the approval of, or an opinion on a proposed international agreement to be concluded in the name of the U.S. Government will be given either by the Secretary of State or his designee. The approval of, or opinion on a proposed international agreement to be concluded in the name of a particular agency of the U.S. Government will be given by the interested assistant secretary or secretaries of State, or their designees, unless such official(s) judge that consultation with the Secretary, Deputy Secretary, or an Under Secretary is necessary. The approval of, or opinion on a proposed international agreement will normally be given within 20 days of receipt of the request for consultation and of the information as required by § 181.4(d)–(g).

(d) Any agency wishing to conclude an international agreement shall transmit to the interested bureau or office in the Department of State, or to

the Office of the Legal Adviser, for consultation pursuant to this section, a draft text or summary of the proposed agreement, a precise citation of the Constitutional, statutory, or treaty authority for such agreement, and other background information as requested by the Department of State. The transmittal of the draft text or summary and citation of legal authority shall be made before negotiations are undertaken, or if that is not feasible, as early as possible in the negotiating process. In any event such transmittals must be made no later than 50 days prior to the anticipated date for concluding the proposed agreement. If unusual circumstances prevent this 50-day requirement from being met, the concerned agency shall use its best efforts to effect such transmittal as early as possible prior to the anticipated date for concluding the proposed agreement.

(e)(1) If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds.

(2) If a proposed agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a significant regulatory action (as defined in section 3 of Executive Order 12866), the agency proposing the arrangement shall state what arrangements have been planned or carried out concerning timely consultation with the Office of Management and Budget (OMB) for such commitment. The Department of State should receive confirmation that OMB has been consulted in a timely manner concerning the proposed commitment.

(f) Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated; that is, where a number of agreements are to be negotiated according to a more or less standard formula, such as, for example, Pub. L. 480 Agricultural Commodities Agreements. Any agency wishing to conclude a particular agreement within a specific class of agreements about which consultations have previously been held pursuant to this section shall transmit a draft text of the proposed agreement to the Office of the Legal Adviser as early as possible but in no event later than 20 days prior to the anticipated date for concluding the agreement.

(g) The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or his designee) has been consulted in his capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements. Designees of the Secretary of State serving on any such interagency committee or council are to provide as soon as possible to the interested offices or bureaus of the Department of State and to the Office of the Legal Adviser copies of draft texts or summaries of such proposed agreements and other background information as requested.

(h) Before an agreement containing a foreign language text may be signed or otherwise concluded, a signed memorandum must be obtained from a responsible language officer of the Department of State or of the U.S. Government agency concerned certifying that the foreign language text and the English language test are in conformity with each other and that both texts have the same meaning in all substantive respects. The signed memorandum is to be made available to the Department of State upon request.

[46 FR 35918, July 13, 1981, as amended at 71 FR 53008, Sept. 8, 2006]

§ 181.5 Twenty-day rule for concluded agreements.

(a) Any agency, including the Department of State, that concludes an international agreement within the meaning of the Act and of 1 U.S.C. 112a, whether entered into in the name of the U.S. Government or in the name of the agency, must transmit the text of the concluded agreement to the Office of the Assistant Legal Adviser for Treaty Affairs as soon as possible and in no event to arrive at that office later than 20 days after the agreement has been signed. The 20-day limit, which is required by the Act, is essential for purposes of permitting the Department of State to meet its obligation under the Act to transmit concluded agreements to the Congress no later than 60 days after their entry into force.

(b) In any case of transmittal after the 20-day limit, the agency or Department of State office concerned may be asked to provide to the Assistant Legal Adviser for Treaty Affairs a statement describing the reasons for the late transmittal. Any such statements will be used, as necessary, in the preparation of the annual report on late transmittals, to be signed by the President and transmitted to the Congress, as required by subsection (b) of the Act.

§ 181.6 Documentation and certification.

(a) Transmittals of concluded agreements to the Assistant Legal Adviser for Treaty Affairs pursuant to § 181.5 must include the signed or initialed original texts, together with all accompanying papers, such as agreed minutes, exchanges of notes, or side letters. The texts transmitted must be accurate, legible, and complete, and must include the texts of all languages in which the agreement was signed or initiated. Names and identities of the individuals signing or initialing the agreements, for the foreign government as well as for the United States, must, unless clearly evident in the texts transmitted, be separately provided.

(b) Agreements from overseas posts should be transmitted to the Department of State by priority airgram, marked for the attention of the Assistant Legal Adviser for Treaty Affairs, with the following notation below the enclosure line: FAIM: Please send attached original agreement to L/T on arrival.

(c) Where the original texts of concluded agreements are not available, certified copies must be transmitted in the same manner as original texts. A certified copy must be an exact copy of the signed original.

(d) When an exchange of diplomatic notes between the United States and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the United States to the foreign government, and the signed original of the note from the foreign government, must be transmitted. If, in conjunction with the agreement signed, other notes related thereto are exchanged (either at the same time, beforehand, or subsequently), properly certified copies of the notes from the United States to the foreign government must be transmitted with the signed originals of the notes from the foreign government.

(e) Copies may be certified either by a certification on the document itself, or by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or stamped, that the document is a true copy of the original signed or initialed by (insert full name of signing officer), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed by (full name) and it is signed by the certifying officer.

§ 181.7 Transmittal to the Congress.

(a) International agreements other than treaties shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the President of the Senate and the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter.

(b) Classified agreements shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the Senate Committee on Foreign Relations and to the House Committee on International Relations.

(c) The Assistant Legal Adviser for Treaty Affairs shall also transmit to the President of the Senate and to the Speaker of the House of Representatives background information to accompany each agreement reported under the Act. Background statements, while not expressly required by the act, have been requested by the Congress and have become an integral part of the reporting requirement. Each background statement shall include information explaining the agreement and a precise citation of legal authority. At the request of the Assistant Legal Adviser for Treaty Affairs, each background statement is to be prepared in time for transmittal with the agreement it accompanies by the office most closely concerned with the agreement. Background statements for classified agreements are to be transmitted by the Assistant Legal Adviser for Treaty Affairs to the Senate Committee on Foreign Relations and to the House Committee on International Relations.

(d) Pursuant to section 12 of the Taiwan Relations Act (22 U.S.C. 3311), any agreement entered into between the American Institute in Taiwan and the governing authorities on Taiwan, or any agreement entered into between the Institute and an agency of the United States Government, shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the President of the Senate and to the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter. Classified agreements entered into by the Institute shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the Senate Committee on Foreign Affairs.

[46 FR 35918, July 13, 1981, as amended at 71 FR 53009, Sept. 8, 2006]

§ 181.8 Publication.

(a) The following categories of international agreements will not be published in United States Treaties and Other International Agreements:

(1) Bilateral agreements for the rescheduling of intergovernmental debt payments;

(2) Bilateral textile agreements concerning the importation of products containing specified textile fibers done under the Agricultural Act of 1956, as amended;

(3) Bilateral agreements between postal administrations governing technical arrangements;

(4) Bilateral agreements that apply to specified military exercises;

(5) Bilateral military personnel exchange agreements;

(6) Bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions;

(7) Bilateral mapping agreements;

(8) Tariff and other schedules under the General Agreement on Tariffs and Trade and under the Agreement of the World Trade Organization;

(9) Agreements that have been given a national security classification pursuant to Executive Order No. 12958 or its successors; and

(10) Bilateral agreements with other governments that apply to specific activities and programs financed with foreign assistance funds administered by the United States Agency for International Development pursuant to the Foreign Assistance Act, as amended, and the Agricultural Trade Development and Assistance Act of 1954, as amended;

(11) Letters of agreements and memoranda of understanding with other governments that apply to bilateral assistance for counter-narcotics and other anti-crime purposes furnished pursuant to the Foreign Assistance Act, as amended;

(12) Bilateral agreements that apply to specified education and leadership development programs designed to acquaint U.S. and foreign armed forces, law enforcement, homeland security, or related personnel with limited, specialized aspects of each other's practices or operations; and

(13) Bilateral agreements between aviation agencies governing specified aviation technical assistance projects

for the provision of managerial, operational, and technical assistance in developing and modernizing the civil aviation infrastructure; and

(b) Agreements on the subjects listed in paragraphs (a) (1) through (9) of this section that had not been published as of February 26, 1996. Agreements on the subjects listed in paragraphs (a)(10) through (13) of this section that had not been published as of September 8, 2006.

(c) Any international agreements in the possession of the Department of State, other than those in paragraph (a)(9) of this section, but not published will be made available upon request by the Department of State.

(d) The Assistant Legal Adviser for Treaty Affairs shall annually submit to Congress a report that contains an index of all international agreements, listed by country, date, title, and summary of each such agreement (including a description of the duration of activities under the agreement and the agreement itself), that the United States:

(1) Has signed, proclaimed, or with reference to which any other final formality has been executed, or that has been extended or otherwise modified, during the preceding calendar year; and

(2) Has not been published, or is not proposed to be published, in the compilation entitled ''United States Treaties and Other International Agreements.''

[61 FR 7071, Feb. 26, 1996, as amended at 71 FR 53009, Sept. 8, 2006]

§ 181.9 Internet Web site publication.

The Office of the Assistant Legal Adviser for Treaty Affairs, with the cooperation of other bureaus in the Department, shall be responsible for making publicly available on the Internet Web site of the Department of State each treaty or international agreement proposed to be published in the compilation entitled ''United States Treaties and Other International Agreements'' not later than 180 days after the date on which the treaty or agreement enters into force.

[71 FR 53009, Sept. 8, 2006]

SUBCHAPTER T—HOSTAGE RELIEF

PART 191—HOSTAGE RELIEF ASSISTANCE

Subpart A—General

Sec.
191.1 Declaration of hostile action.
191.2 Application for determination of eligibility.
191.3 Definitions.
191.4 Notification of eligible persons.
191.5 Relationships among agencies.
191.6 Effective date.

Subpart B—Application of Soldiers' and Sailors' Civil Relief Act

191.10 Eligibility for benefits.
191.11 Applicable benefits.
191.12 Description of benefits.
191.13 Administration of benefits.

Subpart C—Medical Benefits

191.20 Eligibility for benefits.
191.21 Applicable benefits.
191.22 Administration of benefits.
191.23 Disputes.

Subpart D—Educational Benefits

191.30 Eligibility for benefits.
191.31 Applicable family benefits.
191.32 Applicable benefits for hostages.
191.33 Administration of benefits.
191.34 Maximum limitation on benefits.

AUTHORITY: Hostage Relief Act of 1980 (Pub. L. 96–449 and sec. 4 of Act of 1949 (22 U.S.C. 2658)).

SOURCE: 46 FR 17543, Mar. 19, 1981, unless otherwise noted.

Subpart A—General

§ 191.1 Declaration of hostile action.

(a) The Secretary of State from time to time shall declare when and where individuals in the civil or uniformed services of the United States, or a citizen or resident alien of the United States rendering personal services to the United States abroad similar to the service of a civil officer or employee of the United States, have been placed in captive status because of hostile action abroad directed against the United States and occurring or continuing between November 4, 1979, and such date as may be declared by the President under section 101(2)(A) of the Hostage Relief Act of 1980 (Pub. L. 96–449, hereafter ''the Act'') or January 1, 1983, whichever is later. Each such declaration shall be published in the FEDERAL REGISTER.

(b) The Secretary of State upon his or her own initiative, or upon application under § 191.2 shall determine which individuals in captive status as so declared shall be considered hostages eligible for benefits under the Act. The Secretary shall also determine who is eligible under the Act for benefits as a member of a family or household of a hostage. The determination of the Secretary shall be final, but any interested person may request reconsideration on the basis of information not considered at the time of original determination. The criteria for determination are set forth in sections 101 and 205 of the Act, and in these regulations.

§ 191.2 Application for determination of eligibility.

(a) Any person who believes that they or other persons known to them are either hostages as defined in the Act, or members of the family or household of hostages as defined in § 191.3(a)(1), or a child eligible for benefits under subpart D, may apply for benefits under this subchapter for themselves, or on behalf of others entitled thereto.

(b) The application shall be in writing, should contain all identifying and other pertinent data available to the person applying about the person or persons claimed to be eligible, and should be addressed to the Assistant Secretary of State for Administration, Department of State, Washington, DC 20520. Applications may be filed at any time after publication of a declaration under § 191.1(a) in the FEDERAL REGISTER, and during the period of its validity, or within 60 days after release from captivity. Later filing may be considered when in the opinion of the Secretary of State there is good cause for the late filing.

§ 191.3 Definitions.

When used in this subchapter, unless otherwise specified, the terms—

(a) *Family member* means (1) a spouse, (2) an unmarried dependent child including a step-child or adopted child, (3) a person designated in official records or determined by the agency head or designee thereof to be a dependent, or (4) other persons such as parents, parents-in-law, persons who stand in the place of a spouse or parents, or other members of a household when fully justified by the circumstances of the hostage situation, as determined by the Secretary of State.

(b) *Agency head* means the head of an agency as defined in the Act (or successor agency) employing an individual determined to be an American hostage. The Secretary of State is the agency head with respect to any hostage not employed by an agency.

(c) *Principal* means the hostage whose captivity forms the basis for benefits under this subchapter for a family member.

§ 191.4 Notification of eligible persons.

The Assistant Secretary of State for Administration shall be responsible for notifying each individual determined to be eligible for benefits under the Act or, if that person is not available, a representative or Family Member of the hostage.

§ 191.5 Relationships among agencies.

(a) The Assistant Secretary of State for Administration shall promptly inform the head of any agency whenever an employee (including a member of the Armed Forces) in that agency, or Family Member of such employee, is determined to be eligible for benefits under this subchapter.

(b) In accordance with inter-agency agreements between the Department of State and relevant agencies—

(1) The Veterans Administration will periodically bill the Department of State for expenses it pays for each eligible person under subpart D of this subchapter plus the administrative costs of carrying out its responsibilities under this part.

(2) The Department of State will, on a periodic basis, determine the cost for services and benefits it provides to all eligible persons under this subchapter and bill each agency for the costs attributable to Principals (and Family Members) in or acting on behalf of the agency plus a proportionate share of related administrative expenses.

§ 191.6 Effective date.

This regulation is effective as of November 4, 1979. Reimbursement may be made for expenses approved under this subchapter for services rendered on or after such date.

Subpart B—Application of Soldiers' and Sailors' Civil Relief Act

§ 191.10 Eligibility for benefits.

A person designated as a hostage under subpart A of this subchapter, other than a member of the Armed Forces covered by the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, shall be eligible for benefits under this part.

§ 191.11 Applicable benefits.

(a) Eligible persons are entitled to the benefits provided by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501, *et seq.*), including the benefits provided by section 701 (50 U.S.C. App. 591) notwithstanding paragraph (c) thereof, but excluding the benefits provided by sections 104, 105, 106, 400 through 408, 501 through 512, and 514 (50 U.S.C. App. 514, 515, 516, 540 through 548, 561 through 572, and 574).

(b) In applying such Act for purposes of this section—

(1) The term ''person in the military service'' is deemed to include any such American hostage;

(2) The term ''period of military service'' is deemed to include the period during which such American hostage is in a captive status;

(3) References therein to the Secretary of the Army, the Secretary of the Navy, the Adjutant General of the Army, the Chief of Naval Personnel, and the Commandant, United States Marine Corps, or other officials of government are deemed to be references to the Secretary of State; and

(4) The term ''dependents'' shall, to the extent permissible by law, be construed to include ''Family Members'' as defined in section 101 of the Hostage Relief Act.

§ 191.12 Description of benefits.

The following material is included to assist persons affected, by providing a brief description of some of the provisions of the Civil Relief Act. Note that not all of the sections applicable to hostages have been included here. References to sections herein are references to the Civil Relief Act of 1940, as amended, followed by references in parentheses to the same section in the United States Code.

(a) *Guarantors, endorsers.* Section 103 (50 U.S.C. App. 513) provides that whenever a hostage is granted relief from the enforcement of an obligation, a court, in its discretion, may grant the same relief to guarantors and endorsers of the obligation. Amendments extend relief to accommodation makers and others primarily or secondarily liable on an obligation, and to sureties on a criminal bail bond. They provide, on certain conditions, that the benefits of the section with reference to persons primarily or secondarily liable on an obligation may be waived in writing.

(b) *Written agreements.* Section 107 (50 U.S.C. App. 517) provides that nothing contained in the Act shall prevent hostages from making certain arrangements with respect to their contracts and obligations, but requires that such arrangements be in writing.

(c) *Protection in court.* Section 200 (50 U.S.C. App. 520) provides that if a hostage is made defendant in a court action and is unable to appear in court, the court shall appoint an attorney to represent the hostage and protect the hostage's interests. Further, if a judgment is rendered against the hostage, an opportunity to reopen the case and present a defense, if meritorious, may be permitted within 90 days after release.

(d) *Court postponement.* Section 201 (50 U.S.C. App. 521) authorizes a court to postpone any court proceedings if a hostage is a party thereto and is unable to participate by reason of being a captive.

(e) *Relief against penalties.* Section 202 (50 U.S.C. App. 522) provides for relief against fines or penalties when a court proceeding involving a hostage is postponed, or when the fine or penalties are incurred for failure to perform any obligation. In the latter case, relief depends upon whether the hostage's ability to pay or perform is materially affected by being held captive.

(f) *Postponement of action.* Section 203 (50 U.S.C. App. 523) authorizes a court to postpone or vacate the execution of any judgment, attachment or garnishment.

(g) *Period of postponement.* Section 204 (50 U.S.C. App. 524) authorizes a court to postpone proceedings for the period of captivity, and for 3 months thereafter, or any part thereof.

(h) *Extended time limits.* Section 205 (50 U.S.C. App. 525) excludes the period of captivity from computing time under existing or future statutes of limitation. Amendments extend relief to include actions before administrative agencies, and provide that the period of captivity shall not be included in the period for redemption of real property sold to enforce any obligation, tax, or assessment. Section 207 excludes application of section 205 to any period of limitation prescribed by or under the internal revenue laws of the United States.

(i) *Interest rates.* Section 206 (50 U.S.C. App. 526) provides that interest on the obligations of hostages shall not exceed a specified per centum per annum, unless the court determines that ability to pay greater interest is not affected by being held captive.

(j) *Misuse of benefits.* Section 600 (50 U.S.C. App. 580) provides against transfers made with intent to delay the just enforcement of a civil right by taking advantage of the Act.

(k) *Further relief.* Section 700 (50 U.S.C. App. 590) provides that a person, during a period of captivity or 6 months thereafter, may apply to a court for relief with respect to obligations incurred prior to captivity, or any tax or assessment whether falling due prior to or during the period of captivity. The court may, on certain conditions, stay the enforcement of such obligations.

(l) *Stay of eviction.* Section 300 (50 U.S.C. App. 530) provides that a hostage's dependents shall not be evicted from their dwelling if the rental is $150 or less per month, except upon leave of a court. If it is proved that inability to pay rent is a result of being in captivity, the court is authorized to stay eviction proceedings for not longer than 3 months. An amendment extends relief to owners of the premises with respect to payments on mortgage and taxes.

(m) *Contract and mortgage obligations.* As provided by sections 301 and 302 of the Act (50 U.S.C. App. 531 and 532), as amended, contracts for the purchase of real and personal property, which originated prior to the period of captivity, may not be rescinded, terminated, or foreclosed, or the property repossessed, except as provided in section 107 (50 U.S.C. App. 517), unless by an order of a court. The mentioned sections give the court wide discretionary powers to make such disposition of the particular case as may be equitable in order to conserve the interests of both the hostage and the creditor. The cited sections further provide that the court may stay the proceedings for the period of captivity and 3 months thereafter, if in its opinion the ability of the hostage to perform the obligation is materially affected by reason of captivity. Section 303 (50 U.S.C. App. 533) provides that the court may appoint appraisers and, based upon their report, order such sum as may be just, if any, paid to hostages or their dependents, as a condition to foreclosing a mortgage, resuming possession of property, and rescinding or terminating a contract.

(n) *Termination of a lease.* Section 304 (50 U.S.C. App. 534) provides, in general, that a lease covering premises occupied for dwelling, business, or agricultural purpose, executed by persons who subsequently become hostages, may be terminated by a notice in writing given to the lessor, subject to such action as may be taken by a court on application of the lessor. Termination of a lease providing for monthly payment of rent shall not be effective until 30 days after the first date on which the next rental payment is due, and, in the case of other leases, on the last day of the month following the month when the notice is served.

(o) *Assignment of life insurance policy.* Section 305 (50 U.S.C. App. 535) provides that the assignee of a life insurance policy assigned as security, other than the insurer in connection with a policy loan, except upon certain conditions, shall not exercise any right with respect to the assignment during the period of captivity of the insured and one year thereafter, unless upon order of a court.

(p) *Storage lien.* Section 305 (50 U.S.C. App. 535) provides that a lien for storage of personal property may not be foreclosed except upon court order. The court may stay proceedings or make other just disposition.

(q) *Extension of benefits to dependents.* Section 306 (50 U.S.C. App. 536) extends the benefits to section 300 through 305 to dependents of a hostage.

(r) *Real and personal property taxes.* Section 500 (50 U.S.C. App. 560) forbids sale of property, except upon court leave, to enforce collection of taxes or assessments (other than taxes on income) on personal property or real property owned and occupied by the hostage or dependents thereof at the commencement of captivity and still occupied by the hostage's dependents or employees. The court may stay proceedings for a period not more than 6 months after termination of captivity. When by law such property may be sold to enforce collection, the hostage will have the right to redeem it within 6 months after termination of captivity. Unpaid taxes or assessments bear interest at 6 percent.

(s) *Income taxes.* Section 513 provides for deferment of payment of income taxes. However, section 204 of the Hostage Relief Act of 1980 provides for deferment and certain other relief, and should be referred to in order to determine statutory tax benefits in addition to those in section 513 of the Civil Relief Act.

(t) *Certification of hostage.* Section 601 provides that a certificate signed by the agency head shall be prima facie evidence that the person named has been a hostage during the period specified in the certification.

(u) *Interlocutory orders.* Section 602 (50 U.S.C. App. 582) provides that a court

may revoke an interlocutory order it has issued pursuant to any provision of the Soldiers' and Sailors' Civil Relief Act of 1940.

(v) *Power of attorney*. Section 701 (50 U.S.C. App. 591) provides that certain powers of attorney executed by a hostage which expire by their terms after the person was captured shall be automatically extended for the period of captivity. Exceptions are made with respect to powers of attorney which by their terms clearly indicate they are to expire on the date specified irrespective of hostage status. (Section 701 applies to American hostages notwithstanding paragraph (c) thereof which states that it applies only to powers of attorney issued during the ''Vietnam era''.)

§ 191.13 Administration of benefits.

(a) The Assistant Secretary of State for Administration will issue certifications or other documents when required for purposes of the Civil Relief Act.

(b) The Assistant Secretary of State shall whenever possible promptly inform the chief legal officer of each State in which hostages maintain residence of all persons determined to be hostages eligible for assistance under this subpart.

Subpart C—Medical Benefits

§ 191.20 Eligibility for benefits.

A person designated as a hostage or Family Member of a hostage under subpart A of this subchapter shall be eligible for benefits under this subpart.

§ 191.21 Applicable benefits.

A person eligible for benefits under this part shall be eligible for authorized medical and health care at U.S. Government expense, and for payment of other authorized expenses related to such care or for obtaining such care for any illness or injury which is determined by the Secretary of State to be caused or materially aggravated by the hostage situation, to the extent that such care may not—

(a) Be provided or paid for under any other Government health or medical program, including, but not limited to, the programs administered by the Secretary of Defense, the Secretary of Labor and the Administrator of Veterans Affairs; or

(b) Be entitled to reimbursement by any private or Government health insurance or comparable plan.

§ 191.22 Administration of benefits.

(a) An eligible person, who desires medical or health care under this subpart or any person acting on behalf thereof, shall submit an application to the Office of Medical Services, Department of State, Washington, DC 20520 (hereafter referred to as the ''Office''). The applicant shall supply all relevant information, including insurance information, requested by the Director of the Office. An eligible person may also submit claims to the Office for payment for emergency care when there is not time to obtain prior authorization as prescribed by this paragraph, and for payment for care received prior to or ongoing on the effective date of these regulations.

(b) The Office shall evaluate all requests for care and claims for reimbursement and determine, on behalf of the Secretary of State, whether the care in question is authorized under § 191.21 of this subpart. The Office will authorize care, or payment for care when it determines the criteria of such section are met. Authorization shall include a determination as to the necessity and reasonableness of medical or health care.

(c) The Office will refer applicants eligible for benefits under other Government health programs to the Government agency administering those programs. Any portion of authorized care not provided or paid for under another Government program will be reimbursed under this subpart.

(d) Eligible persons may obtain authorized care from any licensed facility or health care provider of their choice approved by the Office. To the extent possible, the Office will attempt to arrange for authorized care to be provided in a Government facility at no cost to the patient.

(e) Authorized care provided by a private facility or health care provider will be paid or reimbursed under this subpart to the extent that the Office determines that costs do not exceed

reasonable and customary charges for similar care in the locality.

(f) All bills for authorized medical or health care covered by insurance shall be submitted to the patient's insurance carrier for payment prior to submission to the Office for payment of the balance authorized by this part. The Office will request the health care providers to bill the insurance carrier and the Department of State for authorized care, rather than the patient.

(g) Eligible persons will be reimbursed by the Office for authorized travel to obtain an evaluation of their claim under paragraph (b) of this section and for other authorized travel to obtain medical or health care authorized by this subpart.

§ 191.23 Disputes.

Any dispute between the Office and eligible persons concerning (a) whether medical or health care is required in a given case, (b) whether required care is incident to the hostage taking, or (c) whether the cost for any authorized care is reasonable and customary, shall be referred to the Medical Director, Department of State and the Foreign Service for a determination. If the person bringing the claim is not satisfied with the decision of the Medical Director, the dispute shall be referred to a medical board composed of three physicians, one appointed by the Medical Director, one by the eligible person and the third by the first two members. A majority decision by the board shall be binding on all parties.

Subpart D—Educational Benefits

§ 191.30 Eligibility for benefits.

(a) A spouse or unmarried dependent child aged 18 or above of a hostage as determined under subpart A of this subchapter shall be eligible for benefits under § 191.31 of this subpart. (Certain limitations apply, however, to persons eligible for direct assistance through other programs of the Veterans Administration under chapter 35 of title 38, United States Code).

(b) A Principal (see definition in § 191.3) designated as a hostage under Subpart A of this subchapter, who intends to change jobs or careers because of the hostage experience and who desires additional training for this purpose, shall be eligible for benefits under § 191.32 of this part unless such person is eligible for comparable benefits under title 38 of the United States Code as determined by the Administrator of the Veterans Administration.

§ 191.31 Applicable family benefits.

(a) An eligible spouse or child shall be paid (by advancement or reimbursement) for expenses incurred for subsistence, tuition, fees, supplies, books, and equipment, and other educational expenses, while attending an educational or training institution approved in accordance with procedures established by the Veterans Administration, which shall be comparable to procedures established pursuant to chapters 35 and 36 of title 38 U.S.C.

(b) Except as provide in paragraph (c) or (d) of this section), payments shall be available under this subsection for an eligible spouse or child for education or training which occurs—

(1) 90 days after the Principal is placed in a captive status, and

(i) Through the end of any semester or quarter which begins before the date on which the Principal ceases to be in a captive status, or

(ii) If the educational or training institution is not operated on a semester or quarter system, the earlier of the end of any course which began before such date or the end of the twelve-week period following that date.

(c) In special circumstances and within the limitation of § 191.34, the Secretary of State may, under the criteria and procedures set forth in § 191.33, approve payments for education or training under this subsection which occurs after the date determined under paragraph (b) of this section.

(d) In the event a Principal dies and the death is determined by the Secretary of State to be incident to that individual being a hostage, payments shall be available under this subsection for education or training of a spouse or child of the Principal which occurs after the date of death, up to the maximum that may be authorized under § 191.34.

§ 191.32 Applicable benefits for hostages.

(a) When authorized by the Secretary of State a Principal, following released from captivity, shall be paid (by advancement or reimbursement) for expenses incurred for subsistence, tuition, fees, supplies, books and equipment, and other educational expenses, while attending an educational or training institution approved in accordance with procedures established by the Veterans Administration comparable to procedures established pursuant to chapters 35 and 36 of title 38 U.S.C. Payments shall be available under this subsection for education or training which occurs on or before—

(1) The end of any semester or quarter (as appropriate) which begins before the date which is 10 years after the day on which the Principal ceases to be in a captive status, or

(2) If the educational or training institution is not operated on a semester or quarter system, the earlier of the end of any course which began before such date or the end of the twelve-week period following that date.

(b) A person eligible for benefits under this subsection shall not be required to separate from Government service in order to undertake the training or education, but while in Government service, may only receive such training or education during off-duty hours or during periods of approved leave.

§ 191.33 Administration of benefits.

(a) Any person desiring benefits under this part shall apply in writing to the Assistant Secretary of State for Administration, Department of State, Washington, DC 20520. The application shall specify the benefits desired and the basis of eligibility for those benefits. The Secretary of State shall make determinations of eligibility for benefits under this part, and shall forward approved applications to the Veterans Administration and advise the applicant of the name and address of the office in the Veterans Administration that will counsel the eligible persons on how to obtain the benefits that have been approved. Persons whose applications are disapproved shall be advised of the reasons for the disapproval.

(b) The Veterans Administration shall provide the same level and kind of assistance, including payments (by advancement or reimbursement) for authorized expenses up to the same maximum amounts, to spouses and children of hostages, and to Principals following their release from captivity as it does to eligible spouses and children of veterans and to eligible veterans, respectively, under chapters 35 and 36 of title 38, United States Code. The Veterans Administration shall, following consultation with the Secretary of State and under procedures it has established to administer section 1724 of title 38, United States Code, discontinue assistance for any individual whose conduct or progress is unsatisfactory under standards consistent with those established pursuant to such section 1724.

(c) An Advisory Board shall be established to advise on eligibility for benefits under paragraphs (c) and (d) of §§ 191.31 and 191.32. The Board shall be composed of the Assistant Secretary of State for Administration as Chairperson, the Director of the Office of Medical Services of the Department of State, the Executive Director of the regional bureau of the Department of State in whose region the relevant hostile action occurred, the Director of Personnel or other designee of the applicable employing agency, and a representative of the Veterans Administration designated by the Administrator.

(d) If an application is received from a spouse or child for extended training under § 191.31(c), the Secretary of Administration shall determine with the advice of the Advisory Board whether the Principal, following release from captivity, is incapacitated by the hostage experience to the extent that (1) he or she has not returned to full-time active duty and is unlikely to be able to resume the normal duties of his or her position or career, or (2) in the event of a separation from Government service, a comparable position or career, for at least six months from the date the Principal is released from captivity. If the Secretary makes such a determination, he or she may approve, within the limits of § 191.34, an application under § 191.31(c) for up to one year

of education or training. If the Principal remains incapacitated, the Secretary may approve additional training or education up to the maximum authorized under § 191.34.

§ 191.34 Maximum limitation on benefits.

(a) In no event may assistance be provided under this subpart for any individual for a period in excess of 45 months, or the equivalent thereof in part-time education or training.

(b) The eligibility of a spouse for benefits under paragraph (c) or (d) of § 191.31 shall expire on a date which is 10 years after the date of the release of the hostage, or the death of the hostage, respectively. The eligibility of a dependent child for benefits under such paragraphs (c) and (d) shall expire on the 26th birthday of such child or on such later date as determined by the Administrator of the Veterans Administration, as would be applicable if section 1712 of title 38, United States Code, were applicable.

PART 192—VICTIMS OF TERRORISM COMPENSATION

Subpart A—General

Sec.
192.1 Declarations of hostile action.
192.2 Application for determination of eligibility.
192.3 Definitions.
192.4 Notification of eligible persons.
192.5 Relationships among agencies.

Subpart B—Payment of Salary and Other Benefits for Captive Situations

192.10 Eligibility for benefits.
192.11 Applicable benefits.
192.12 Administration of benefits.

Subpart C—Application of Soldiers' and Sailors' Civil Relief Act to Captive Situations

192.20 Eligibility for benefits.
192.21 Applicable benefits.
192.22 Description of benefits.
192.23 Administration of benefits.

Subpart D—Medical Benefits for Captive Situations

192.30 Eligibility for benefits.
192.31 Applicable benefits.
192.32 Administration of benefits.
192.33 Dispute.

Subpart E—Educational Benefits for Captive Situations

192.40 Eligibility for benefits.
192.41 Applicable family benefits.
192.42 Applicable benefits for captives.
192.43 Administration of benefits.
192.44 Maximum limitation on benefits.

Subpart F—Compensation for Disability or Death

192.50 Eligibility for benefits.
192.51 Death benefit.
192.52 Disability benefits.

AUTHORITY: 5 U.S.C. 5569 and 5570 and E.O. 12598 (52 FR 23421).

SOURCE: 54 FR 12597, Mar. 28, 1989, unless otherwise noted.

Subpart A—General

§ 192.1 Declarations of hostile action.

(a)(1) The Secretary of State shall declare when and where individuals in the Civil Service of the United States, including members of the Foreign Service and foreign service nationals, or a citizen, national or resident alien of the United States rendering personal services to the United States similar to the service of an individual in the Civil Service, have been placed in captive status commencing on or after November 4, 1979, for purposes of § 192.11(b) or January 21, 1981, for all other purposes under this part, which arises because of hostile action abroad and is a result of the individual's relationship with the U.S. Government as provided in the Victims of Terrorism Compensation Act, codified in 5 U.S.C. 5569 and 5570 and Executive Order 12598.

(2) The Secretary of State, in consultation with the Secretary of Labor, shall also declare when and where individuals in the Civil Service of the United States including members of the Foreign Service and foreign service nationals, including individuals rendering personal services to the United States similar to the service of an individual in the Civil Service, and family members of these individuals are eligible to receive compensation for disability or death occurring after January 21, 1981. Such determination shall be based on the decision by the Secretary of State that the disability or death was caused by hostile action

abroad and was a result of the individual's relationship with the Government.

(3) Declarations of hostile action in domestic situations shall be made by the Secretary of State in consultation with the Attorney General of the United States and the head of the employing agency or agencies.

(b) The Secretary of State for actions abroad, or Agency Head for domestic actions, upon his or her own initiative, or upon application under § 192.2 shall determine which individuals in captive or missing status as so declared shall be considered captives eligible for benefits under the Act. The Secretary or Agency Head shall also determine who is eligible under the Act for benefits as a member of a family or household of a captive. The determination of the Secretary or Agency Head shall be final for purposes of determining captive status and cash payments, and not subject to judicial review, but any interested person may request reconsideration on the basis of information not considered at the time of original determination. The criteria for determination are set forth in sections 5569 and 5570 of title 5 of U.S.C., and in these regulations.

§ 192.2 Application for determination of eligibility.

(a) Any person who believes that that person or other persons known to that person are either captives as defined in 5 U.S.C. 5569(a)(1), individuals who have suffered disability or death caused by hostile action which was a result of the individual's relationship with the U.S. Government, members of the family or household of such individuals as defined in § 192.3(a)(1), or a child eligible for benefits under subchapter D, may apply for benefits under this subchapter for that person, or on behalf of others entitled thereto.

(b) The application in connection with hostile action abroad shall be in writing, shall contain all identifying and other pertinent data available to the person applying about the person or persons claimed to be eligible, and shall be addressed to the Director General of the Foreign Service, Department of State, Washington, DC 20520. Applications may be filed within 60 days after the latest of: a declaration under § 192.1(a), the hostile action, or release from captivity. Later filing may be considered when in the opinion of the Secretary of State there is good cause for the late filing. Applications in connection with hostile action in domestic situations shall conform to these same requirements and be filed with the Agency Head.

§ 192.3 Definitions.

When used in this subchapter, unless otherwise specified, the terms—

(a) *Secretary of State* includes any person to whom the Secretary of State has delegated the responsibilities of carrying out this subpart.

(b) *Family member* means a dependent of a captive and any individual other than a dependent who is a member of such person's family or household and shall include the following: (1) A spouse, (2) an unmarried dependent child including a step-child or adopted child under 21 years of age, (3) a person designated in official records or determined by the agency head or designee thereof to be dependent, and (4) other persons such as parents, non-dependent children, parents-in-law, persons who stand in the place of a spouse or parents, or other members of the family or household of a captive or employee, as determined by the Agency head concerned.

(c) *Agency head* means the head of an Executive Agency of the U.S. Federal Government employing an individual affected by hostile action as covered by these regulations. The Secretary of State is the agency head for actions abroad with respect to any such individual not employed by an agency.

(d) *Captive* means any individual in a captive status commencing while such individual is in the Civil Service or a citizen, national or resident alien of the United States rendering personal service to the United States similar to the service of an individual in the Civil Service (other than as a member of the uniformed services).

(e) *Captive status* means a missing status which, as determined under § 192.1, arises because of a hostile action and is a result of the individual's relationship with the Government.

(f) *Principal* means the person whose captivity, death or disability forms the basis for benefits for that individual or for a family member under this subchapter.

(g) *Individual rendering personal services to the United States similar to the* service of an individual in the Civil Service includes contract employees and other individuals fitting that description.

(h) *Pay and allowances* has the meaning set forth in 5 U.S.C. 5561(6):

(1) Basic pay;

(2) Special pay;

(3) Incentive pay;

(4) Basic allowances for quarters;

(5) Basic allowance for subsistence; and

(6) Station per diem allowances for not more than 90 days.

(i) *Child* means a dependent as defined in paragraph (b)(2) of this section.

§ 192.4 Notification of eligible persons.

The Director General of the Foreign Service for the Department of State, or other Agency Head in domestic situations, shall be responsible for notifying each individual determined to be eligible for benefits under the Act, or if that person is not available, a representative or family member of the eligible individual.

§ 192.5 Relationships among agencies.

(a) To assist in ensuring that eligible persons receive compensation, each Agency Head shall notify the Director General of the Foreign Service of the Department of State of any incident which he or she believes may be appropriately declared a hostile action under § 192.1.

(b) The Director General of the Foreign Service for the Department of State shall promptly inform the head of any agency whenever an employee of that agency, or Family Member of such employee, is determined to be eligible for benefits under this subchapter in connection with hostile action.

(c) In accordance with inter-agency agreements between the Department of State and relevant agencies—

(1) The Department of Veterans Affairs will periodically bill the Department of State for expenses it pays for each eligible person under subpart E of this subchapter plus the administrative costs of carrying out its responsibilities under this part.

(2) The Department of State will, on a periodic basis, determine the cost for services and benefits it provides to all eligible persons under this subchapter, and bill each agency for the medical service costs (in connection with hostile action abroad) and educational benefits attributable to Principals and Family Members, plus a proportionate share of related administrative expenses.

Subpart B—Payment of Salary and Other Benefits for Captive Situations

§ 192.10 Eligibility for benefits.

A person designated as a captive under subpart A of this subchapter shall be eligible for benefits under this subpart.

§ 192.11 Applicable benefits.

(a) Captives are entitled to receive or have credited to their account, for the period in captive status, the same pay and allowances to which they were entitled at the beginning of that period or to which they may have become entitled thereafter.

(b) A person designated as a captive (or a family member of a principal) under subpart A of this subchapter whose captivity commenced on or after November 4, 1979, is also entitled to receive a cash payment from the captive's employing agency, for each day held captive, in an amount equal to but not less than one-half of the amount of the world-wide average per diem rate established under 5 U.S.C. 5702.

§ 192.12 Administration of benefits.

(a) The amount deducted from the pay and allowances of captives must be recorded in the individual accounts of the agency concerned. A Treasury designated account, set up on the books of the agency concerned, may be utilized by the head of an agency to report the net amount of pay, allowances and interest credited to captives pursuant to 5 U.S.C. 5569(b). Interest payments under this section shall be paid out of

funds available for salaries and expenses of the agency. Interest shall be computed at a rate for any calendar quarter equal to the average rate paid on United States Treasury bills with 3-month maturities issued during the preceding calendar quarter, with quarterly compounding.

(b) Cash payments to captives for each day of captivity shall be made by the head of an agency before the end of the one-year period beginning on the date on which the captive status terminates. In the event the captive dies in captivity or prior to payment of these benefits, payment shall be made to the eligible survivors under §192.51(c) or the estate. A payment under this subchapter may be deferred or denied by the head of an agency pending determination of an offense committed by the captive under the provisions of 5 U.S.C. 8312.

Subpart C—Application of Soldiers' and Sailors' Civil Relief Act to Captive Situations

§192.20 Eligibility for benefits.

A person designated as a captive under subpart A of this subchapter, shall be eligible for benefits under this part.

§192.21 Applicable benefits.

(a) Eligible persons are entitled to the benefits provided by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501, *et seq.*), including the benefits provided by section 701 (50 U.S.C. App 591) notwithstanding paragraph (c) thereof, but excluding the benefits provided by sections 104, 105, 106, 400 through 408, 501 through 512, and 514 (50 U.S.C. App. 514, 515, 516, 540 through 548, 561 through 572, and 574).

(b) In applying such Act for purposes of this section—

(1) The term *person in the military service* is deemed to include any such captive;

(2) The term *period of military service* is deemed to include the period during which such captive is in a captive status;

(3) References therein to the Secretary of the Army, the Secretary of the Navy, the Adjutant General of the Army, the Chief of Naval Personnel, and the Commandant, United States Marine Corps, or other officials of government are deemed, in the case of any captive, to be references to the Secretary of State; and

(4) The term *dependents* shall, to the extent permissible by law, be construed to include ''Family Members'' as defined in §192.3 of these regulations.

§192.22 Description of benefits.

The following material is included to assist persons affected, by providing a brief description of some of the provisions of the Civil Relief Act. Note that not all of the sections applicable to captives have been included here. References to sections herein are references to the Civil Relief Act of 1940, as amended, followed by references in parentheses to the same section in the United States Code.

(a) *Guarantors, endorsers.* Section 103 (50 U.S.C. App 513) provides that whenever a captive is granted relief from the enforcement of an obligation, a court, in its discretion, may grant the same relief to guarantors and endorsers of the obligation. Amendments extend relief to accommodation makers and others primarily or secondarily liable on an obligation, and to sureties on a criminal bail bond. They provide, on certain conditions, that the benefits of the section with reference to persons primarily or secondarily liable on an obligation may be waived in writing.

(b) *Written agreements.* Section 107 (50 U.S.C. App. 517) provides that nothing contained in the Act shall prevent captives from making certain arrangements with respect to their contracts and obligations, but requires that such arrangements be in writing.

(c) *Protection in court.* Section 200 (50 U.S.C. App. 517) provides that if a captive is made a defendant in a court action and is unable to appear in court, the court shall appoint an attorney to represent the captive and protect the captive's interests. Further, if a judgment is rendered against the captive, an opportunity to reopen the case and present a defense, if meritorious, may be permitted within 90-days after release.

(d) *Court postponement.* Section 201 (50 U.S.C. App. 521) authorizes a court to postpone any court proceedings if a

captive is a party thereto and is unable to participate by reason of being a captive.

(e) *Relief against penalties.* Section 202 (50 U.S.C. App. 522) provides for relief against fines or penalties when a court proceeding involving a captive is postponed, or when the fine or penalties are incurred for failure to perform any obligation. In the latter case, relief depends upon whether the captive's ability to pay or perform is materially affected by being held captive.

(f) *Postponement of action.* Section 203 (50 U.S.C. App. 523) authorizes a court to postpone or vacate the execution of any judgment, attachment or garnishment.

(g) *Period of postponement.* Section 204 (50 U.S.C. App. 524) authorizes a court to postpone proceedings for the period of captivity and for 3 months thereafter, or any part thereof.

(h) *Extended time limits.* Section 205 (50 U.S.C. App. 525) excludes the period of captivity from computing time under existing or future statutes of limitation. Amendments extend relief to include actions before administrative agencies, and provide that the period of captivity shall not be included in the period for redemption of real property sold to enforce any obligation, tax, or assessment. Section 207 excludes application of section 205 to any period of limitation prescribed by or under the internal revenue laws of the United States.

(i) *Interest rates.* Section 206 (50 U.S.C. App. 526) provides that interest on the obligations of captives shall not exceed a specified per centum per annum, unless the court determines that ability to pay greater interest is not affected by being held captive.

(j) *Misuse of benefits.* Section 600 (50 U.S.C. App. 580) provides against transfers made with intent to delay the just enforcement of a civil right by taking advantage of the Act.

(k) *Further relief.* Section 700 (50 U.S.C. App. 590) provides that a person, during a period of captivity or 6 months thereafter, may apply to a court for relief with respect to obligations incurred prior to captivity, or any tax or assessment whether falling due prior to or during the period of captivity. The court may, on certain conditions, stay the enforcement of such obligations.

(l) *Stay of eviction.* Section 300 (50 U.S.C. App. 530) provides that a captive's dependents shall not be evicted from their dwelling if the rental is minimal, except upon leave of a court. If it is proved that inability to pay rent is a result of being in captivity, the court is authorized to stay eviction proceedings for not longer than 3 months. An amendment extends relief to owners of the premises with respect to payment on mortgage and taxes.

(m) *Contract and mortgage obligations.* As provided by sections 301 and 302 of the Act (50 U.S.C. App. 531 and 532), as amended, contracts for the purchase of real and personal property, which originated prior to the period of captivity, may not be rescinded, terminated, or foreclosed, or the property repossessed, except as provided in section 107 (50 U.S.C. App. 517), unless by an order of a court. The mentioned sections give the court wide discretionary powers to make such disposition of the particular case as may be equitable in order to conserve the interests of both the captive and the creditor. The cited sections further provide that the court may stay the proceedings for the period of captivity and 3 months thereafter, if in its opinion the ability of the captive to perform the obligation is materially affected by reason of captivity. Section 303 (50 U.S.C. App. 533) provides that the court may appoint appraisers and, based upon their report, order such sum as may be just, if any, paid to captives or their dependents, as a condition to foreclosing a mortgage, resuming possession of property, and rescinding or terminating a contract.

(n) *Termination of a lease.* Section 304 (50 U.S.C. App. 534) provides, in general, that a lease covering premises occupied for dwelling, business, or agricultural purpose, executed by persons who subsequently become captives, may be terminated by a notice in writing given to the lessor, subject to such action as may be taken by a court on application of the lessor. Termination of a lease providing for monthly payment of rent shall not be effective until 30 days after the first date on which the next rental payment is due, and, in

the case of other leases, on the last day of the month following the month when the notice is served.

(o) *Assignment of life insurance policy.* Section 305 (50 U.S.C. App. 535) provides that the assignee of a life insurance policy assigned as security, other that the insurer in connection with a policy loan, except upon certain conditions, shall not exercise any right with respect to the assignment during period of captivity of the insured and one year thereafter, unless upon order of a court.

(p) *Storage lien.* Section 305 (50 U.S.C. App. 535) provides that a lien for storage of personal property may not be foreclosed except upon court order. The court may stay proceedings or make other just disposition.

(q) *Extension of benefits to dependents.* Section 306 (50 U.S.C. App. 536) extends the benefits to section 300 through 305 to dependents of a captive.

(r) *Real and personal property taxes.* Section 500 (50 U.S.C. App. 560) forbids sale of property, except upon court leave, to enforce collection of taxes or assessments (other than taxes on income) on personal property or real property owned and occupied by the captive or dependents thereof at the commencement of captivity and still occupied by the captive's dependents or employees. The court may stay proceedings for a period not more than 6 months after termination of captivity. When by law such property may be sold to enforce collection, the captive will have the right to redeem it within 6 months after termination of captivity. Unpaid taxes or assessments bear interest at 6 percent.

(s) *Income taxes.* Section 513 provides for deferment of payment of income taxes.

(t) *Certification of captive.* Section 601 provides that a certificate signed by the agency head shall be prima facie evidence that the person named has been a captive during the period specified in the certification.

(u) *Interlocutory orders.* Section 602 (50 U.S.C. App. 582) provides that a court may revoke an interlocutory order it has issued pursuant to any provision of the Soldiers' and Sailors' Civil Relief Act of 1940.

(v) *Power of attorney.* Section 701 (50 U.S.C. App. 591) provides that certain powers of attorney executed by a captive which expire by their terms after the person was captured shall be automatically extended for the period of captivity. Exceptions are made with respect to powers of attorney which by their terms clearly indicate they are to expire on the date specified irrespective of captive status. (Section 701 applies to American captives notwithstanding paragraph (c) thereof which states that it applies only to powers of attorney issued during the ''Vietnam era'').

§ 192.23 Administration of benefits.

(a) The Director General of the Department of State or Agency Head will issue certifications or other documents when required for purposes of the Civil Relief Act.

(b) The Director General of the Department of State or Agency Head shall whenever possible promptly inform the chief legal officer of each U.S. State in which captives maintain residence of all persons determined to be captives eligible for assistance under this subpart.

Subpart D—Medical Benefits for Captive Situations

§ 192.30 Eligibility for benefits.

A person designated as a captive or family member of a captive under subpart A of this subchapter, shall be eligible for benefits under this subpart.

§ 192.31 Applicable benefits.

A person eligible for benefits under this part shall be eligible for authorized physical and mental health care at U.S. Government expense (through either or advancement or reimbursement), and for payment of other authorized expenses related to such care or for obtaining such care for any illness or injury, to the extent, as determined by the Secretary of State or Agency Head, that such care is incident to an individual being held captive and is not covered by—

(a) Any other Government health or medical program, including, but not limited to, the programs administered

by the Secretary of Defense, the Secretary of Labor and the Secretary of Veteran Affairs; or

(b) Reimbursement by any private or Government health insurance or comparable plan. In the case of coverage by a private or Government health insurance plan, that carrier will be designated as the primary carrier, and benefits under this subpart will serve only to supplement expenses not paid by the primary carrier.

§ 192.32 Administration of benefits.

(a)(1) A person eligible due to hostile action abroad, who desires medical or health care under this subpart or any person acting on behalf thereof, shall submit an application to the Office of Medical Services, Department of State, Washington, DC 20520 (hereafter referred to as the ''Office''). That office will handle and process medical applications and claims using the criteria in this subpart. Persons eligible in connection with domestic situations shall make application with the Agency Head, and the Agency Head shall apply the following procedures in a similar manner in administering medical benefits in domestic situations involving the respective agency.

(2) The applicant shall supply all relevant information, including insurance information, requested by the Director of the Office. An eligible person may also submit claims to the Office for payment for emergency care when there is not time to obtain prior authorization as prescribed by this paragraph.

(b) The Office shall evaluate all requests for care and claims for reimbursement and determine, on behalf of the Secretary of State, whether the care in question is authorized under § 192.31 of this subpart. The Office will authorize care or payment of care, when it determines the criteria of § 192.31 are met. Authorization shall include a determination as to the necessity and reasonableness of medical or health care.

(c) The Office will refer applicants eligible for benefits under other Government health programs to the Government agency administering those programs. Any portion of authorized care not provided or paid for under another Government program or private insurance will be reimbursed under this subpart, subject to a determination of the reasonableness of charges. Such determination shall be made by applying the fee schedule established by the Office of Workers' Compensation Programs (OWCP), Department of Labor, which is used in paying medical benefits for work-related injuries to employees who are fully covered by OWCP.

(d) Eligible persons may obtain authorized care from any licensed facility or health care provider of their choice approved by the Office. To the extent possible, the Office will attempt to arrange for authorized care to be provided in a Government facility at no cost to the patient.

(e) Authorized care provided by a private facility or health care provider will be paid or reimbursed under this subpart to the extent that the Office determines that costs do not exceed reasonable and customary charges for similar care in the locality.

(f) All bills for authorized medical or health care covered by insurance shall be submitted to the patient's insurance carrier for payment prior to submission to the Office for payment of the balance authorized by this part. The Office will request the health care providers to bill the insurance carrier and the Department of State for authorized care, rather than the patient.

(g) Eligible persons will be reimbursed by the Office for authorized travel to obtain an evaluation of their claim under paragraph (b) of this section and for other authorized travel to obtain medical or health care authorized by this subpart.

§ 192.33 Dispute.

Any dispute between the Office and eligible persons concerning whether medical or health care is required in a given case, whether required care is incident to the captivity, or whether the cost for any authorized care is reasonable and customary, shall be referred to the Medical Director, Department of State, for a determination. If the person bringing the claim is not satisfied with the decision of the Medical Director, the dispute shall be referred to a

medical board composed of three physicians, one appointed by the Medical Director, one by the eligible person and the third by the first two members. A majority decision by the board shall be binding on all parties.

Subpart E—Educational Benefits for Captive Situations

§ 192.40 Eligibility for benefits.

(a) A spouse or unmarried dependent child (including an unmarried dependent stepchild or adopted child) under 21 years of age of a captive as determined under subpart A of the subchapter shall be eligible for benefits under 192.41 of this subpart. (Certain limitations apply, however, to persons eligible for direct assistance through other programs of the Department of Veterans' Affairs under chapter 35 of title 38, United States Code).

(b) A Principal designated as a captive under subpart A of this subchapter, who intends to change jobs or careers because of the captive experience and who desires additional training for this purpose, shall be eligible for benefits under § 192.42 of this part, unless the Secretary of the Department of Veterans' Affairs determines that such person is eligible to receive educational assistance for the additional training under either chapters 30, 32, 34, or 35, title 38 U.S.C.

§ 192.41 Applicable family benefits.

(a) An eligible spouse or child shall be paid (by advancement or reimbursement) for expenses incurred for subsistence, tuition, fees, supplies, books and equipment, and other educational expenses while attending an educational or training institution approved in accordance with procedures established by the Department of Veterans' Affairs, which shall be comparable to procedures established pursuant to chapters 35 and 36 of title 38 U.S.C.

(b) Except as provided in paragraph (c) or (d) of this section, payments shall be available under this subsection for an eligible spouse or child for educational training which occurs—

(1) 90 days after the Principal is placed in a captive status, and

(i) Through the end of any semester or quarter which begins before the date on which the Principal ceases to be in a captive status, or

(ii) If the educational or training institution is not operated on a semester or quarter system, the earlier of the end of any course which began before such date or the end of the sixteen-week period following that date.

(c) In special circumstances and within the limitation of § 192.44, the Secretary of State, under the criteria and procedures set forth in § 192.43, may approve payments for education or training under this subsection which occurs after the date determined under paragraph (b) of this section.

(d) In the event a Principal dies and the death is determined by the Agency Head to be incident to that individual being a captive, payments shall be available under this subsection for education or training of a spouse or child of the Principal which occurs after the date of death, up to the maximum that may be authorized under § 192.44.

(e) Family benefits under this subsection shall not be available for any spouse or child who is eligible for assistance under chapter 35 of title 38 U.S.C., or similar assistance under any other law.

§ 192.42 Applicable benefits for captives.

(a) When authorized by the Agency Head, a Principal, following release from captivity, may be paid (by advancement or reimbursement) for expenses incurred for subsistence, tuition, fees, supplies, books and equipment, and other educational expenses while attending an educational or training institution approved in accordance with procedures established pursuant to chapter 35 and 36 of title 38 U.S.C. Payments shall be available under this subsection for education or training which occurs on or before—

(1) The end of any semester or quarter (as appropriate) which begins before the date which is 10 years after the day on which the Principal ceases to be in a captive status, or

(2) If the educational or training institution is not operated on a semester or quarter system, the earlier of the end of any course which began before such date or the end of the sixteen-week period following that date.

(b) A person eligible for benefits under this subsection shall not be required to separate from Government service in order to undertake the training or education. However, no educational assistance allowance shall be paid to any eligible person who is attending a course of education or training paid for under the Government Employees' Training Act and whose full salary is being paid to such person while so training.

§ 192.43 Administration of benefits.

(a) Any person desiring benefits under this part, shall apply in writing to the Director General of the Foreign Service, Department of State, Washington, DC 20502. The application shall specify the benefits desired and the basis of eligibility for those benefits. The Director General of the Foreign Service, on behalf of the Secretary of State, shall make determinations of eligibility for benefits under this part, and shall forward certified applications to the Department of Veterans' Affairs and advise the applicant of the name and address of the office in the Department of Veterans' Affairs that will counsel the eligible persons on how to obtain the benefits that have been approved. Persons whose applications are disapproved shall be advised in writing of the reason for the disapproval. Applications for foreign service nationals and their dependents shall be made with the Office of Foreign Service National Personnel, Department of State. That office will handle the administrative details and benefits using the criteria specified in this subchapter.

(b) The Department of Veterans' Affairs shall provide the same level and kind of assistance, including payments (by advancement or reimbursement) for authorized expenses up to the same maximum amounts, to spouses and children of captives, and to Principals following their release from captivity as it does to eligible spouses and children of veterans and to eligible veterans, respectively, under chapters 35 and 36 of title 38 U.S.C. The Department of Veterans' Affairs shall, under procedures it has established to administer section 1724 of title 38, U.S.C., discontinue assistance for any individual whose conduct or progress is unsatisfactory under standards consistent with those established pursuant to such section 1724.

(c) An Advisory Board shall be established to advise on eligibility for benefits under paragraphs (c) and (d) of § 192.41. The Board shall be composed of the Under Secretary of State for Management as Chair, the Director of the Office of Medical Services of the Department of State, the Executive Director of the regional bureau of the Department of State in whose region the relevant hostile action occurred, the Director of Personnel or other designee of the applicable employing agency, and a representative of the Department of Veterans' Affairs designated by the Secretary.

(d) If an application is received from a spouse or child for extended training under § 192.41(c), the Director General of the Foreign Service of the Department of State shall determine with the advice of the Advisory Board whether the Principal, following release from captivity, is incapacitated by the captive experience—

(1) To the extent that he or she has not returned to full-time active duty and is unlikely to be able to resume the normal duties of his or her position or career, or

(2) In the event of a separation from Government service, that the Principal is unable to assume a comparable position or career, for at least six months from the date of release from captivity. If the Secretary makes such a determination, he or she may approve, within the limits of § 192.44, an application under § 192.41(c) for up to one year of education or training. If the Principal remains incapacitated, the Secretary may approve additional training or education up to the maximum authorized under 192.44.

§ 192.44 Maximum limitation on benefits.

(a) In no event may assistance be provided under this subpart for any individual for a period in excess of 45 months, or the equivalent thereof in part-time education or training.

(b) The eligibility of a spouse for benefits under paragraph (c) or (d) of § 192.41 shall expire on a date which is 10 years after the date of the release of

the captive or the death of the captive while in captivity, respectively. The eligibility of a dependent child for benefits under § 192.41 (c) and (d) shall expire on the 21st birthday of such child.

Subpart F—Compensation for Disability or Death

§ 192.50 Eligibility for benefits.

(a)(1) The Federal Employees' Compensation Act (5 U.S.C. 8101 *et seq.*) provides for medical coverage and the payment of compensation for wage loss and for permanent impairment of specified members and functions of the body incurred by employees as a result of an injury sustained while in the performance of their duties to the United States. The Office of Workers' Compensation Programs (OWCP), Department of Labor, administers the program. All individuals employed by the U.S. Government as defined by 5 U.S.C. 8101(1) are eligible to apply for wage-loss and medical benefits under the FECA. Family members of such employees may apply for death benefits. An application must be made with OWCP by such individual or on behalf of such individuals, prior to the determination of eligibility or payment of any benefits under this subpart.

(2) In the case of foreign service national employees covered for work related injury or death under the local compensation plan established pursuant to 22 U.S.C. 3968, such applications should be filed with the organizational authority in the country of employment which provides such coverage. Benefit levels payable to foreign service national employees under this subpart shall be no less than comparable benefits payable to U.S. citizen employees under FECA. Eligibility determination and payment of supplemental benefits, if any, is the responsibility of the Director General of the Foreign Service for the State Department.

(b) Any death or disability benefit payment made under this section shall be reduced by the amount of any other death or disability benefits funded in whole or in part by the United States, except that the amount shall not be reduced below zero. The cash payment under § 192.11(b) of subpart B is excluded from the offset requirement.

(c) Compensation under this section may include payment (whether advancement or reimbursement) for any medical or health expenses relating to the death or disability involved to the extent that such expenses are not covered under subpart D of these regulations. Procedures of subpart D of these regulations shall apply in making such determinations.

§ 192.51 Death benefit.

(a) The Secretary of State or Agency Head may provide for payment, by the employing agency, of a death benefit to the surviving dependents of any eligible individual under § 192.1(a) who dies as a result of injuries caused by hostile action whose death was the result of the individual's relationship with the Government.

(b) The death benefit payment for an employee shall be equal to one year's salary at the time of death. Such death benefit is subject to the offset provisions under § 192.50(b) including the Federal Employees' Compensation Act. The death benefit for an employee's spouse and other eligible individuals under § 192.1(b) of subpart A shall be equal to one year's salary of the principal at the time of death.

(c) A death benefit payment for an adult under this section shall be made as follows:

(1) First, to the widow or widower.

(2) Second, to the dependent child, or children in equal shares, if there is no widow or widower.

(3) Third, to the dependent parent, or dependent parents in equal shares, if there is no widow, widower, or dependent child.

(4) Fourth, to adult, non-dependent children in equal shares.

If there is no survivor entitled to payment under this paragraph (c), no payment shall be made.

(d) A death benefit payment for a child under this section shall be made as follows: To the surviving parents or legal guardian. If there are no surviving parents or legal guardian, no payment shall be made.

(e) As used in this section—each of the terms ''widow'', ''widower'', and ''parent'' shall have the same meaning given such term by section 8101 of title

5, U.S.C.; ''child'' has the meaning given in § 192.3(b)(2).

§ 192.52 Disability benefits.

(a) Principals who qualify for benefits under § 192.1 and are employees of the U.S. Government are considered for disability payments under programs administered by the Office of Workers' Compensation Programs (OWCP), Department of Labor, or in the case of foreign service national employees, the programs may be administered by either OWCP or the organizational authority in the country of employment which provides similar coverage under the local compensation plan established pursuant to 22 U.S.C. 3968. Normal filing procedures as specified by either OWCP or the local organizational authority which provides such coverage should be followed in determining eligibility. Duplicate benefits may not be received from both OWCP and the local organizational authority for the same claim. Additional benefits to persons qualifying for full FECA or similar benefits would not normally be payable under this subpart, except to foreign service national employees whose benefit levels are below comparable benefits payable to U.S. citizen employees under FECA. Foreign service national employees whose benefit levels are below comparable benefits payable to U.S. citizens under FECA may receive benefits under this subpart so that total benefits received are comparable to the benefits payable to U.S. citizen employees under FECA.

(b) Family members who do not qualify for either OWCP benefits or benefits from the organizational authority in the country of employment which provides similar coverage, and anyone eligible under § 192.1(a) who does not qualify for full benefits from OWCP, must file an application for disability benefits with the Office of Medical Services, Department of State, for a determination of eligibility under this subpart, if connected with hostile action abroad. Applications made in connection with hostile action in domestic situations will be directed to the Agency Head. Such applications for disability payments will be considered using the same criteria for determination as established by OWCP.

(c) Family members who are determined to be disabled by the Office of Medical Services, or Agency Head using the OWCP criteria, are eligible to receive a lump-sum payment based on the following guidelines:

(1) *Permanent total disability rate.* A lump-sum payment equal to two year's salary of the Principal at the time of the qualifying incident.

(2) *Temporary total disability rate.* A lump-sum payment computed at 66⅔ percent of the monthly pay rate of the Principal for each month of temporary total disability, not to exceed one year's salary of the Principal.

(3) *Partial disability rate.* A lump-sum payment authorized in accordance with 5 U.S.C. 8106, equal to 66⅔ percent of the difference between the monthly pay at the time of the qualifying incident and the monthly wage-earning capacity of the family member after the beginning of the partial disability, not to exceed one year's salary of the Principal. For family members with no wage-earning history, a lump-sum payment equal to 66⅔ percent of the difference between the estimated monthly wage-earning capacity of the family member at the time of the qualifying incident and the monthly wage-earning capacity after the beginning of the partial disability, not to exceed one year's salary of the Principal may be authorized, using the criteria established by OWCP for such determination.

(4) *Special loss schedule.* In addition to the temporary disability benefits payable in accordance with this subsection, if there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, a lump-sum payment may be authorized at the rate of 25 percent of the payment authorized in accordance with the schedule and procedures in 5 U.S.C. 8107 and 20 CFR 10.304. The Director General of the Foreign Service of State or the Agency Head, may at their discretion, authorize payments under this subpart in addition to payments for those organs and members of the body specified in 5 U.S.C. 8107 and in 20 CFR 10.304. The provisions of 20 CFR part 10, subpart D, which prevent the payment

of disability compensation and scheduled compensation simultaneously, shall not apply to these regulations.

Cash payments under this subpart are the responsibility of the employing agency.

[54 FR 12597, Mar. 28, 1989; 54 FR 16195, Apr. 21, 1989]

PART 193—BENEFITS FOR HOSTAGES IN IRAQ, KUWAIT, OR LEBANON

Sec.
193.1 Determination of hostage status.
193.2 Definitions.
193.3 Applications.
193.4 Consideration and denial of claims: Notification of determinations.

AUTHORITY: Section 599C, Pub. L. No. 101–513, 104 Stat. 2064, unless otherwise noted.

SOURCE: 55 FR 52838, Dec. 24, 1990, unless otherwise noted.

§ 193.1 Determination of hostage status.

(a) The Secretary of State shall, upon his or her own initiative or upon application under § 193.3, notify the appropriate federal authorities, in classified or unclassified form as he or she determines to be necessary in the best interests of the affected individuals, the names of persons whom he or she determines to be in a hostage status within the meaning of subsection 599C)(d) of Public Law No. 101–513.

(b) In the case of Iraq and Kuwait, hostage status may be accorded to United States nationals, or family members of United States nationals,

(1) who are or who have been in a hostage status as defined in paragraph (b)(2) of this section in Iraq or Kuwait at any time during the period beginning on August 2, 1990 and terminating on the date on which United States economic sanctions are lifted, and

(2) who are being or who have been held in custody by governmental or military authorities of such country or who are taking or have taken refuge in the country in fear of being taken into such custody (including residing in any diplomatic mission or consular post in that country.)

(c) In the case of Lebanon, hostage status may be accorded to United States nationals, which, for purposes of this paragraph, includes lawful permanent residents of the United States, who have been forcibly detained, held hostage, or interned for any period of time after June 1, 1982, by any government (including the agents thereof) or group in Lebanon for the purpose of coercing the United States or any other government.

(d) Determinations of the Secretary regarding questions of eligibility status under 599C of the Act shall be final, but interested persons may request administrative reconsideration on the basis of information which was not considered at the time of the original determination. The criteria for such determinations are those which are prescribed in the Act and in these regulations.

(e) Eligibility determinations made under these regulations shall not be deemed to confer federal employment status for any purpose.

(f) Eligibility for benefits shall be subject to the availability of funds under subsection 599C(e) of the Act.

[55 FR 52838, Dec. 24, 1990, as amended at 57 FR 3283, Jan. 29, 1992]

§ 193.2 Definitions.

(a) For purposes of eligibility, the term *covered family members* shall be defined as prescribed by the Office of Personnel Management in accordance with 5 CFR § 890.1202.

(b) The term *United States economic sanctions against Iraq* means the exercise of authorities under the International Emergency Economic Powers Act by the President with respect to financial transactions with Iraq.

(c) The term *United States national* means any individual who is a citizen of the United States or who, though not a citizen of the United States, owes permanent allegiance to the United States.

(d) The term *lawful permanent resident* means any individual who has been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

[55 FR 52838, Dec. 24, 1990, as amended at 57 FR 3283, Jan. 29, 1992]

§ 193.3 Applications.

(a) Individuals who claim any eligibility under section 599C of the Act may apply for benefits in accordance with the procedures described herein. Family members may submit applications on behalf of persons who are unable to do so by reason of their hostage status.

(b) All applications for benefits[1] shall be attested to by a declaration under penalty of perjury as prescribed in section 1746 of title 28 of the United States Code.

(c) Applications shall contain all identifying and other data to support the claim, including, where appropriate, copies of relevant documents respecting status, salary, and health and life insurance coverage.

(d) All applications shall be mailed to: Kuwait/Iraq/Lebanon Hostage Benefits Program, room 4817, Department of State, Washington, DC 20520–4818.

(e) Applications should be filed as quickly as possible, because benefits are available only until the funds allocated under the Act have been spent. When funds have been expended, the Department will publish a notice in the FEDERAL REGISTER so stating.

(f) The Department of State may require of applicants such additional verification of hostage status and other pertinent information as it deems necessary.

[55 FR 52838, Dec. 24, 1990, as amended at 57 FR 3283, Jan. 29, 1992]

§ 193.4 Consideration and denial of claims: Notification of determinations.

(a) No application under this subpart may be denied by the Department except upon the written concurrence of the Assistant Legal Adviser for Consular Affairs.

(b) All applications shall be considered, evaluated, and/or prepared by the Federal Benefits Section of the Office of Overseas Citizens Consular Services. All federal agencies or other interested persons should contact the office at the address listed in § 193.3(d).

(c) The Department of State shall, where possible, notify individuals in writing of their eligibility for benefits under the Act, or ineligibility therefor, within thirty days of the Department's decision.

[55 FR 52838, Dec. 24, 1990, as amended at 57 FR 3283, Jan. 29, 1992]

[1] Application form may be obtained from the Office of Citizens Consular Services, Department of State, Washington, DC 20520.

SUBCHAPTER U—INTERNATIONAL COMMERCIAL ARBITRATION

PART 194—INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION RULES OF PROCEDURE

Sec.
194.1 Authority and scope of application.
APPENDIX A TO PART 194—INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION RULES OF PROCEDURE (AS AMENDED APRIL 1, 2002)

AUTHORITY: 9 U.S.C. 306.

SOURCE: 67 FR 8862, Feb. 27, 2002, unless otherwise noted.

§ 194.1 Authority and scope of application.

In accordance with the authority in chapter III of the Federal Arbitration Act (9 U.S.C. 306), the Department of State has determined that the amended Rules of Procedures of the Inter-American Commercial Arbitration Commission (IACAC) should become effective in the United States and will come into force on April 1, 2002, at the same time as for all states party to the Inter-American Convention on International Commercial Arbitration. The IACAC's amended Rules of Procedure set forth the procedures for the initiation and conduct of arbitration of certain international commercial disputes to which the Inter-American Convention on International Commercial Arbitration applies. The amended Rules of Procedure are set out in full in appendix A to this part.

APPENDIX A TO PART 194—INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION RULES OF PROCEDURE (AS AMENDED APRIL 1, 2002)

TABLE OF CONTENTS

Art. 1 Scope of Application
Art. 2 Notice, Calculation of Periods of Time
Art. 3 Notice of Arbitration
Art. 4 Representation and Assistance
Art. 5 Appointment of Arbitrators
Art. 6 Challenge of Arbitrators
Art. 7 Challenge of Arbitrators
Art. 8 Challenge of Arbitrators
Art. 9 Challenge of Arbitrators
Art. 10 Replacement of an Arbitrator
Art. 11 Repetition of Hearings in the Event of the Replacement of an Arbitrator
Art. 12 General Provisions
Art. 13 Place of Arbitration
Art. 14 Language
Art. 15 Statement of Claim
Art. 16 Statement of Defense
Art. 17 Amendments to the Claim or Defense
Art. 18 Plea as to the Jurisdiction of the Arbitral Tribunal
Art. 19 Further Written Statements
Art. 20 Periods of Time
Art. 21 Evidence and Hearings
Art. 22 Evidence and Hearings
Art. 23 Interim Measures of Protection
Art. 24 Experts
Art. 25 Default
Art. 26 Closure of Hearings
Art. 27 Waiver of Rules
Art. 28 Decisions
Art. 29 Form and Effect of the Award
Art. 30 Applicable law, Amiable Compositeur
Art. 31 Settlement or Other Grounds for Termination
Art. 32 Interpretation of the Award
Art. 33 Correction of the Award
Art. 34 Additional Award
Art. 35 Costs
Art. 36 Costs
Art. 37 Costs
Art. 38 Costs: Deposit of Costs
Art. 39 Transitory Article

RULES OF PROCEDURE (AS AMENDED APRIL 1, 2002)

Section I. Introductory Rules

Scope of Application

Article 1

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the IACAC Rules of Procedure, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing and the IACAC may approve.

2. These Rules shall govern the arbitration, except that where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee in person or via fax, telex or any other means agreed to by the parties, or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last known habitual residence or at his last known place of business. Notice shall be deemed to have been received on the day it is so delivered by any of the means stated in these rules.

2. For the purposes of calculating a period of time under these rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Notice of Arbitration

Article 3

1. The party initiating recourse to arbitration (hereinafter referred to as the ''claimant'') shall give to the other party (hereinafter referred to as the ''respondent'') a notice requesting arbitration and shall provide a copy to the Director General of the IACAC, either directly or through the IACAC National Section if one exists in his country of domicile.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The request for arbitration shall at least include the following:

(a) A request that the dispute be submitted to arbitration;

(b) The names and addresses of the parties;

(c) A copy of the arbitration clause or the separate arbitration agreement;

(d) A reference to the contract out of which, or in relation to which, the dispute has arisen, and a copy thereof if the claimant deems it necessary;

(e) The general nature of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) If three arbitrators are to be appointed, designation of one arbitrator, as referred to in Article 5, paragraph 3.

4. The request for arbitration may also include the statement of claim referred to in Article 15.

5. Upon receipt of the notice of arbitration, the Director General of the IACAC or the IACAC National Section shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

Representation and Assistance

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Section II. Composition of the Arbitral Tribunal

Appointment of Arbitrators

Article 5

1. If the parties have not otherwise agreed, three arbitrators shall be appointed.

2. When the parties have agreed that the dispute will be resolved by a single arbitrator, he may be appointed by the mutual agreement of the parties. If the parties have not done so within thirty (30) days from the date on which the notice of arbitration is received by the respondent, the arbitrator will be designated by the IACAC.

3. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator, who will act as the presiding arbitrator of the tribunal.

4. If within thirty (30) days after receipt of the claimant's notification of the appointment of an arbitrator, the other party has not notified the first party with a copy to the Director General of the IACAC either directly or through the IACAC National Section if one exists in his country of domicile, of the arbitrator he has appointed, the arbitrator will be designated by the IACAC.

5. If within thirty (30) days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator will be appointed by the IACAC.

6. In making appointments, the IACAC shall have regard to such considerations as are likely to secure the appointment of independent and impartial arbitrators, and shall also take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

7. The IACAC may request from either party any information it deems necessary in order to discharge its functions.

Challenge of Arbitrators

Article 6

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances

likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties and to the IACAC, if appointed by the IACAC, unless they have already been informed by him of these circumstances.

Article 7

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 8

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in Articles 6 and 7 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and to the Director General of the IACAC. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 5 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 9

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made by the IACAC.

2. If the IACAC sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in these rules.

Replacement of an Arbitrator

Article 10

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to fulfill his functions or in the event of the *de jure* or *de facto* impossibility of performing his function, or if the IACAC determines that there are sufficient reasons to accept the resignation of an arbitrator, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

3. If an arbitrator on a three-person tribunal does not participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and make any decision, ruling or award, notwithstanding the refusal of the third arbitrator to participate. In deciding whether to continue the arbitration or to render any decision, ruling or award, the two other arbitrators shall take into account the stage of the arbitration proceedings, the reasons, if any, stated by the third arbitrator for not participating, as well as such other matters they consider appropriate in the circumstances of the case. If the two arbitrators decide not to continue the arbitration without the participation of the third arbitrator, the IACAC on proof satisfactory to it shall declare the office vacant, and the party that initially appointed him shall proceed to appoint a substitute arbitrator within thirty (30) days following the vacancy declaration. If the designation is not made within the stated term, then the substitute arbitrator will be appointed by the IACAC.

Repetition of Hearings in the Event of the Replacement of an Arbitrator

Article 11

If under Articles 8 to 10 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Section III. Arbitral Proceedings

General Provisions

Article 12

1. Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or

whether the proceedings shall be conducted on the basis of documents and other evidence.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

Place of Arbitration

Article 13

1. If the parties have not reached an agreement regarding the place of arbitration, the place of arbitration may initially be determined by the IACAC, subject to the power of the tribunal to determine finally the place of arbitration within sixty (60) days following the appointment of the last arbitrator. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the case.

2. Notwithstanding the foregoing, the tribunal may meet in any place it may deem appropriate to hold hearings, hold meetings for consultation, hear witnesses, or inspect property or documents. The parties shall be given sufficient written notice to enable them to be present at any such proceeding.

Language

Article 14

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defense, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of Claim

Article 15

1. Unless the statement of claim was contained in the request for arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators, with a copy to the IACAC. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Statement of Defense

Article 16

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defense in writing to the claimant and to each of the arbitrators, with a copy to the IACAC.

2. The statement of defense shall reply to the particulars (b), (c) and (d) of the statement of claim (Article 15, paragraph 2). The respondent may annex to his statement the documents on which he relies for his defense or may add a reference to the documents or other evidence he will submit.

3. In his statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim arising out of the same contract, or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The requirements provided in Article 15, paragraph 2, of these Rules shall apply to both any counterclaim or to any claim presented for the purposes of a set-off.

Amendments to the Claim or Defense

Article 17

During the course of arbitral proceedings either party may amend or supplement his claim or defense unless the arbitral tribunal considers it inappropriate to allow such amendment, having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Plea as to the Jurisdiction of the Arbitral Tribunal

Article 18

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause or an arbitration agreement forms a part.

For the purposes of this Article, an arbitration clause that forms part of a contract and that provides for arbitration under these rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause or the arbitration agreement.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counterclaim, in the reply to the counterclaim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.

Further Written Statements

Article 19

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defense, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of Time

Article 20

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed forty-five days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Evidence and Hearings (Articles 21 & 22)

Article 21

1. Each party shall have the burden of proving the facts relied on to support his claim or defense.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence that that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 22

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, and the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Interim Measures of Protection

Article 23

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Experts

Article 24

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant document or goods that he may require of them. Any dispute between a party and such expert as to the relevance of

the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 22 shall be applicable to such proceedings.

Default

Article 25

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings.

2. If one of the parties, duly notified under these rules, fails to appear at a hearing without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of Hearings

Article 26

1. The arbitral tribunal may inquire of the parties if they have any further proofs to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of Rules

Article 27

A party who knows that any provision of, or requirement under, these rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance shall be deemed to have waived his right to object.

Section IV. The Award

Decisions

Article 28

The arbitral tribunal shall adopt its decisions by a majority vote. When there is no majority, the decision shall be made by the president of the tribunal.

Form and Effect of the Award

Article 29

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties and subject to no appeal. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made, which shall be the place designated in Article 13. Where there are three arbitrators and one of them fails to sign, the award shall state the reasons for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Applicable law, Amiable Compositeur

Article 30

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Settlement or Other Grounds for Termination

Article 31

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 29, paragraphs 2 and 4, shall apply.

INTERPRETATION OF THE AWARD

Article 32

1. Within thirty days after the receipt of the award, either party may request that the arbitral tribunal give an interpretation of the award. The tribunal shall notify the other party or parties to the proceedings of such request.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 29, paragraphs 2 to 7, shall apply.

Correction of the Award

Article 33

1. Within thirty days after the receipt of the award, either party may request the arbitral tribunal, which shall notify the other party, to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of Article 29, paragraphs 2 to 7, shall apply.

Additional Award

Article 34

1. Within thirty days after the receipt of the award, either party may request the arbitral tribunal, which shall notify the other party, to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of Article 29, paragraphs 2 to 7, shall apply.

Costs (Articles 35 to 38)

Article 35

The arbitral tribunal shall fix the costs of arbitration in its award. The term ''costs'' includes only:

(a) The fees of the arbitral tribunal, to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 36;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) The administrative fee and other service charges of the IACAC; which shall be set by the Arbitrator Nominating Committee of the IACAC in accordance with the schedule in effect at the time of the commencement of the arbitration. The committee may set a provisional fee when the proceedings are instituted and the final amount before the award is rendered, so that such amount may be taken into account by the tribunal when rendering its award.

Article 36

1. The fees of the arbitral tribunal and the administrative fees for the IACAC shall be set in accordance with the schedule in effect at the time of commencement of the arbitration. The fees shall be calculated on the basis of the amount involved in the arbitration; if that amount cannot be determined, the fees shall be set discretionally.

2. The amount between the maximum and minimum range in the schedule shall be set in accordance with the nature of the dispute,

the complexity of the subject matter and any other relevant circumstances of the case.

Article 37

1. The costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in Article 35 in the text of that order or award.

3. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 32 to 34.

Article 38

Deposit of Costs

1. The arbitral tribunal, on its establishment, or the Arbitrator Nominating Committee of the IACAC within its purview, may request each party to deposit an equal amount as an advance for the costs referred to in Article 35, paragraphs (a), (b), (c) and (f).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. When a party so requests, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the IACAC, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amounts of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. Should one of the parties fail to pay its deposits in full, the other party may do so in its stead. If payment in full is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Transitory Article

Article 39

Any disputes arising under contracts that stipulate resolution of such disputes pursuant to the IACAC Rules of Procedure and that have not been submitted to an arbitral tribunal as of the date on which these rules enter into effect shall be subject to these rules in their entirety.

PART 196—THOMAS R. PICKERING FOREIGN AFFAIRS/GRADUATE FOREIGN AFFAIRS FELLOWSHIP PROGRAM

Sec.
196.1 What is the Fellowship Program?
196.2 How is the Fellowship Program administered?
196.3 Grants to post-secondary education institutions.
196.4 Administering office.

AUTHORITY: 22 U.S.C. 2719.

SOURCE: 67 FR 50803, Aug. 6, 2002, unless otherwise noted.

§ 196.1 What is the Fellowship Program?

The Thomas R. Pickering Foreign Affairs/Graduate Foreign Affairs Fellowship Program is designed to attract outstanding men and women at the undergraduate and graduate educational levels for the purpose of increasing the level of knowledge and awareness of and employment with the Foreign Service, consistent with 22 U.S.C. 3905. The Program develops a source of trained men and women, from academic disciplines representing the skill needs of the Department, who are dedicated to representing the United States' interests abroad.

§ 196.2 How is the Fellowship Program administered?

(a) *Eligibility*. Eligibility will be determined annually by the Department of State and publicized nationwide. Fellows must be United States citizens.

(b) *Provisions*. The grant awarded to each individual student shall not exceed $250,000 for the total amount of time the student is in the program. Fellows are prohibited from receiving grants from one or more Federal programs, which in the aggregate would exceed the cost of his or her educational expenses. Continued eligibility for participation is contingent upon the Fellow's ability to meet the educational requirements set forth in paragraph (c) of this section.

(c) *Program requirements*. Eligibility for participation in the program is conditional upon successful completion of

pre-employment processing specified by the Department of State, including background investigation, medical examination, and drug testing. As a condition of eligibility for continued receipt of grant funds, fellows are required to complete prescribed coursework and maintain a satisfactory grade point average as determined by the Department of State. Fellows are also required to accept employment with the Department of State's Foreign Service upon successful completion of the program, and Foreign Service entry requirements. Fellows must continue employment for a period of one and one-half years for each year of education funded by the Department of State.

§ 196.3 Grants to post-secondary education institutions.

The Department of State may make a grant to a post-secondary education institution for the purpose of increasing the level of knowledge and awareness of and interest in employment with the Foreign Service, consistent with 22 U.S.C. 3905, not to exceed $1,000,000, unless otherwise authorized by law.

§ 196.4 Administering office.

The Department of State's Bureau of Human Resources, Office of Recruitment is responsible for administering the Thomas R. Pickering Foreign Affairs/Graduate Foreign Affairs Fellowship Program and grants to post-secondary institutions and may be contacted for more detailed information.

PARTS 197–199 [Reserved]

CHAPTER II—AGENCY FOR INTERNATIONAL DEVELOPMENT

Part		Page
200	Employee responsibilities and conduct	849
201	Rules and procedures applicable to commodity transactions financed by USAID	849
202	Overseas shipments of supplies by voluntary non-profit relief agencies	886
203	Registration of Private Voluntary Organizations (PVOs)	890
204	Housing guaranty standard terms and conditions	896
205	Participation by religious organizations in USAID programs	901
206	Testimony by employees and the production of documents in proceedings where A.I.D. is not a party	902
207	Indemnification of employees	904
209	Non-discrimination in federally-assisted programs of the Agency for International Development—effectuation of Title VI of the Civil Rights Act of 1964	905
211	Transfer of food commodities for food use in disaster relief, economic development and other assistance	914
212	Public information	940
213	Claims collection	951
214	Advisory committee management	968
215	Regulations for implementation of Privacy Act of 1974	975
216	Environmental procedures	984
217	Nondiscrimination on the basis of handicap in programs or activities receiving Federal financial assistance	997
218	Nondiscrimination on the basis of age in programs or activities receiving Federal financial assistance	1009

Part		Page
219	Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by International Development Cooperation Agency, Agency for International Development	1014
221	Israel loan guarantee standard terms and conditions	1020
223	Administrative enforcement procedures of post-employment restrictions	1024
224	Implementation of the program fraud civil remedies act	1025
225	Protection of human subjects	1041
226	Administration of assistance awards to U.S. non-governmental organizations	1051
227	New restrictions on lobbying	1083
228	Rules for procurement of commodities and services financed by USAID	1095
229	Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance	1101
230	Israel loan guarantees issued under the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. 108–11—Standard terms and conditions	1118
231	Arab Republic of Egypt loan guarantees issued under the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11—standard terms and conditions	1122
232	Republic of Tunisia loan guarantees issued under the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Div. I, Pub. L. 112–74—Standard terms and conditions	1126
233	Hashemite Kingdom of Jordan loan guarantees issued under the Further Continuing Appropriations Act, 2013, Div. F, Pub. L. 113–6—standard terms and conditions	1131
234–299	[Reserved]	

PART 200—EMPLOYEE RESPONSIBILITIES AND CONDUCT

CROSS REFERENCES: The regulations governing the responsibilities and conduct of employees of the Agency for International Development are codified as part 2635 of title 5, prescribed by the Office of Government Ethics.

PART 201—RULES AND PROCEDURES APPLICABLE TO COMMODITY TRANSACTIONS FINANCED BY USAID

Subpart A—Definitions and Scope of This Part

Sec.
201.01 Definitions.
201.02 Scope and application.
201.03 OMB approval under the Paperwork Reduction Act.

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for USAID Financing

201.10 Purpose.
201.11 Eligibility of commodities.
201.12 Eligibility of incidental services.
201.13 Eligibility of delivery services.
201.14 Eligibility of bid and performance bonds and guaranties.
201.15 U.S. flag vessel shipping requirement.

Subpart C—Procurement Procedures; Responsibilities of Importers

201.20 Purpose.
201.21 Notice to supplier.
201.22 Procurement under public sector procedures.
201.23 Procurement under private sector procedures.
201.24 Progress and advance payments.
201.25 Bid and performance bonds and guaranties.
201.26 Expenditure of marine insurance loss payments.

Subpart D—Responsibilities of Suppliers

201.30 Purpose.
201.31 Suppliers of commodities.
201.32 Suppliers of delivery services.

Subpart E—General Provisions Relating to USAID Financing of Commodities and Commodity-Related Services

201.40 Purpose.
201.41 Audit and inspection.
201.42 Reexport of USAID-financed commodities.
201.43 Diversion clause.
201.44 Vesting in USAID of title to commodities.
201.45 Termination or modification of a loan, grant or implementing document.
201.46 Compensation to supplier if shipment is prohibited.
201.47 Use of marine insurance loss proceeds.

Subpart F—Payment and Reimbursement

201.50 Purpose.
201.51 Methods of financing.
201.52 Required documents.
201.53 Final date for presentation of documents.

Subpart G—Price Provisions

201.60 Purpose and applicability of this subpart.
201.61 Meaning of terms in this subpart.
201.62 Responsibilities of borrower/grantee and of supplier.
201.63 Maximum prices for commodities.
201.64 Application of the price rules to commodities.
201.65 Commissions, discounts and other payments, credits, benefits and allowances.
201.66 Side payments.
201.67 Maximum freight charges.
201.68 Maximum prices for commodity-related services.
201.69 Cooperating country taxes and fees.

Subpart H—Rights and Responsibilities of Banks

201.70 Purpose.
201.71 Terms of letters of credit.
201.72 Making payments.
201.73 Limitations on the responsibilities of banks.
201.74 Additional documents for USAID.
201.75 Termination or modification.

Subpart I—Rights and Remedies of USAID, and Waiver Authority

201.80 Purpose.
201.81 Rights of USAID against borrower/grantees.
201.82 Rights of USAID against suppliers.
201.83 No waiver of alternative rights or remedies by USAID.
201.84 Limitation on period for making refund requests.
201.85 Legal effect of USAID approvals and decisions.
201.86 Waiver and amendment authority.
APPENDIX A TO PART 201—SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID 282)

APPENDIX B TO PART 201—APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY (AID 11)

AUTHORITY: 22 U.S.C. 2381.

SOURCE: 55 FR 34232, Aug. 22, 1990, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 201 appear at 62 FR 38027, July 16, 1997.

Subpart A—Definitions and Scope of This Part

§ 201.01 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) *The Act* means the Foreign Assistance Act of 1961, as amended from time to time.

(b) *USAID* means the U.S. Agency for International Development or any successor agency, including when applicable, each USAID Mission abroad.

(c) *USAID Geographic Code* means a code in the USAID Geographic Code Book which designates a country, a group of countries, or an otherwise defined area. Principal USAID geographic codes are described in § 201.11(b)(4) of this part.

(d) *USAID/W* means the USAID in Washington, DC 20523, including any office thereof.

(e) *Approved applicant* means the individual or organization designated by the borrower/grantee to establish credits with banks in favor of suppliers or to instruct banks to make payments to suppliers, and includes any agent acting on behalf of such approved applicant.

(f) *Bank* means a banking institution organized under the laws of the United States, or any State, commonwealth, territory, or possession thereof, or the District of Columbia.

(g) *Borrower/grantee* means the government of any cooperating country, or any agency, instrumentality or political subdivision thereof, or any private entity, to which USAID directly makes funds available by loan or grant.

(h) *Commission* means any payment or allowance made or agreed to be made by a supplier to any person for the contribution which that person has made to securing the sale for the supplier or which the person makes to securing similar sales on a continuing basis for the supplier.

(i) *Commodity* means any material, article, supply, goods, or equipment.

(j) *Commodity Approval Application* means the Application for Approval of Commodity Eligibility (Form AID 11) which appears as appendix B to this part 201.

(k) *Commodity-related services* means delivery services and/or incidental services.

(l) *Cooperating country* means the country receiving the USAID assistance subject to provisions of this part 201.

(m) *Delivery* means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

(n) *Delivery service* means any service customarily performed in a commercial export transaction which is necessary to effect a physical transfer of commodities to the cooperating country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. *Delivery services* may also include work and materials necessary to meet USAID marking requirements.

(o) *Implementing document* means any document, including a letter of commitment, issued by USAID which authorizes the use of USAID funds for the procurement of commodities and/or commodity related services and which specifies conditions which will apply to such procurement.

(p) *Importer* means any person or organization, governmental or otherwise, in the cooperating country who is authorized by the borrower/grantee to use USAID funds under this Regulation for the procurement of commodities, and includes any borrower/grantee who undertakes such procurement.

(q) *Incidental services* means the installation or erection of USAID-financed equipment, or the training of

personnel in the maintenance, operation and use of such equipment.

(r) *Mission* means the USAID Mission or representative in a cooperating country.

(s) *Non-vessel-operating common carrier* (NVOCC) under Section 3(17) of the Shipping Act of 1984 means a common carrier pursuant to Section 3(6) of such Act that does not operate any of the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean carrier.

(t) *Purchase contract* means any contract or similar arrangement under which a supplier furnishes commodities and/or commodity-related services financed under this part.

(u) *Responsible bidder* is one who has the technical expertise, management capability, workload capacity, and financial resources to perform the work successfully.

(v) *Responsive bid* is a bid that complies with all the terms and conditions of the invitation for bids without material modification. A material modification is a modification which affects the price, quantity, quality, delivery or installation date of the commodity or which limits in any way responsibilities, duties, or liabilities of the bidder or any rights of the importer or USAID as any of the foregoing have been specified or defined in the invitation for bids.

(w) *Schedule B* means the ''Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States'' issued and amended from time to time by the U.S. Bureau of the Census, Department of Commerce and available as stated in 15 CFR 30.92.

(x) *Source* means the country from which a commodity is shipped to the cooperating country, or the cooperating country if the commodity is located therein at the time of the purchase. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, source means the country from which the commodity was shipped to the free port or bonded warehouse.

(y) *State* means the District of Columbia or any State, commonwealth, territory or possession of the United States.

(z) *Supplier* means any person or organization, governmental or otherwise, who furnishes commodities and/or commodity-related services financed under this part 201.

(aa) *Supplier's Certificate* means Form AID 282 ''Supplier's Certificate and Agreement with the Agency for International Development,'' including the ''Invoice and Contract Abstract'' on the reverse of such form (which appears as appendix A to this part 201), or any substitute form which may be prescribed in the letter of commitment or other pertinent implementing document.

(bb) *United States* means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

(cc) *Vessel operating common carrier* (VOCC) means an ocean common carrier pursuant to section 3(18) of the Shipping Act of 1984 which operates the vessel by which ocean transportation is provided.

§ 201.02 Scope and application.

(a) The appropriate implementing documents will indicate whether and the extent to which this part 201 shall apply to the procurement of commodities or commodity-related services or both. Whenever this part 201 is applicable, those terms and conditions of this part will govern which are in effect on the date of issuance of the direct letter of commitment to the supplier; if a bank letter of commitment is applicable, the terms and conditions govern which are in effect on the date of issuance of an irrevocable letter of credit under which payment is made or is to be made from funds made available under the Act, or, if no such letter of credit has been issued, on the date payment instructions for payment from funds made available under the Act are received by the paying bank.

(b) The borrower/grantee is responsible for compliance with the applicable provisions of this part by importers and suppliers and for assuring that importers and suppliers are informed of the extent to which this part applies.

(c) Unless otherwise indicated, references in this part 201 to subparts or to sections relate to subparts or sections of this part 201.

§ 201.03 OMB approval under the Paperwork Reduction Act.

(a) OMB has approved the following information collection and recordkeeping requirements established by this part 201 (OMB Control No. 0412–0514, expiring July 31, 2000):

Sec.

201.13(b)(1)
201.13(b)(2)
201.15(c)
201.31(f)
201.31(g)
201.32(b)
201.32(c)
201.51(c)
201.52(a)
201.74

(b) USAID will use the information requested in these sections to verify compliance with statutory and regulatory requirements and to assist in the administration of USAID-financed commodity programs. The information is required from suppliers in order to receive payment for commodities or commodity-related services. The public reporting burden for this collection of information is estimated to average a half hour per response, including the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Procurement, Policy Division (M/OP/P), U.S. Agency for International Development, 1300 Pennsylvania Avenue, Washington, DC 20523–7801, and the Office of Management and Budget, Paperwork Reduction Project (0412–0514), Washington, DC 20503.

[64 FR 17535, Apr. 12, 1999]

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for USAID Financing

§ 201.10 Purpose.

This subpart sets forth requirements for USAID financing applicable to transactions for the procurement of commodities and/or commodity-related services.

§ 201.11 Eligibility of commodities.

To qualify for USAID financing, a commodity procurement transaction shall satisfy the following requirements:

(a) *Description and condition of the commodity*. The commodity shall conform to the description in the implementing document. Unless otherwise authorized by USAID/W in writing, the commodity shall be unused, and may not have been disposed of as surplus by any governmental agency.

(b) *Source*. The authorized source for procurement shall be a country or countries authorized in the implementing document by name or by reference to a USAID geographic code. The source and origin of a commodity must be an authorized source country. The applicable rules on source, origin and nationality for commodities and commodity-related services are in subparts (B), (C), and (F) of part 228 of this chapter.

(c) *Date of shipping documents*. The documents required as evidence of shipment under § 201.52(a)(4) shall show that the date of shipment was within the shipping period, if any, specified in the implementing document.

(d) *Medium of transportation*. Shipment shall not be effected:

(1) By a transportation medium owned, operated or under the control of any country not included within USAID Geographic Code 935; or

(2) Under any ocean or air charter which has not received prior approval by USAID/W, Office of Procurement (Transportation Division).

(e) *Marine insurance*. In accordance with the provisions of § 228.23 of this chapter, USAID may require that any USAID-financed commodity shipped to

the cooperating country shall be insured against marine risks and that such insurance shall be placed in the United States with a company or companies authorized to do marine insurance business in a State of the United States.

(f) *Timely submission of documents.* All documents required under § 201.52 to be submitted by a supplier in order to receive payment or reimbursement shall be submitted to USAID under direct letters of commitment or to a designated bank under bank letters of credit on or before the terminal date specified in the letter of commitment or letter of credit, respectively.

(g) *U.S. Treasury Department regulations.* Procurement transactions shall comply with the requirements of the U.S. Treasury Department Foreign Assets, Sanctions, Transactions and Funds Control Regulations published in 31 CFR parts 500 through 599, as from time to time amended.

(h) *Commodities shipped out of a free port or bonded warehouse.* No commodity shipped out of a free port or bonded warehouse is eligible for USAID financing if it was shipped to the free port or bonded warehouse without compliance with the requirements set forth in paragraph (d)(1) of this section, or if it was shipped from the free port or bonded warehouse without compliance with the requirements set forth in paragraphs (d) (1) and (2) of this section.

(i) *Purchase price.* The purchase price for the commodity shall satisfy the requirements of subpart G.

(j) *Purchases from eligible suppliers.* Commodities procured with funds made available under this part 201 shall be purchased from eligible suppliers. The rules on the nationality of suppliers of commodities are in section 228.14 of this chapter.

(k) *Determination of commodity eligibility.* The commodity shall be approved in writing by USAID for each purchase transaction as eligible for USAID financing. Such approval shall be indicated on the Application for Approval of Commodity Eligibility (Form AID 11) submitted to USAID by the supplier.

[55 FR 34232, Aug. 22, 1990, as amended at 58 FR 48797, Sept. 20, 1993; 62 FR 38027, July 16, 1997]

§ 201.12 Eligibility of incidental services.

Incidental services may be financed under the same implementing document which makes funds available for the procurement of equipment only if:

(a) Such services are specified in the purchase contract relating to the equipment;

(b) The price satisfies the requirements of § 201.68;

(c) The portion of the total purchase contract price attributable to such services does not exceed 25 percent; and

(d) The supplier of such services, prior to approval of the USAID Commodity Approval Application, has neither been suspended or debarred by USAID under part 208 of this chapter, nor has been placed on the ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs,'' published by the U.S. General Services Administration.

(e) The supplier of such services meets the requirements of § 228.25 of this chapter.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.13 Eligibility of delivery services.

(a) *General.* Delivery of USAID-financed commodities may be financed under the implementing document provided the delivery services meet the requirements of this section and the applicable provisions in part 228, subpart C of this chapter.

(b) *Transportation costs.* USAID will not finance transportation costs:

(1) For shipment beyond the point of entry in the cooperating country except when intermodal transportation service covering the carriage of cargo from point of origin to destination is used, and the point of destination, as stated in the carrier's through bill of lading, is established in the carrier's tariff; or

(2) On a transportation medium owned, operated or under the control of any country not included in Geographic Code 935; or

(3) Under any ocean or air charter covering full or part cargo (whether for a single voyage, consecutive voyages, or a time period) which has not received prior approval by USAID/W, Office of Procurement, Transportation Division); or

(4) Which are attributable to brokerage commissions which exceed the limitations specified in § 201.65(h) or to address commissions, dead freight, demurrage or detention.

(c) *Inspection services.* USAID will finance inspection of USAID-financed commodities when inspection is required by USAID, or in those cases where inspection is required by the importer and such inspection is specified in the purchase contract, performed by independent inspectors and is either customary in export transactions for the commodity involved or is necessary to determine conformity of the commodities to the contract. Section 228.24 of this chapter covers the nationality requirements for suppliers of inspection services.

(d) *Marine insurance.* (1) Unless otherwise authorized, USAID will finance premiums for marine insurance including war risk on USAID-financed commodities only if:

(i) The insurance is placed in a country included in the authorized Geographic Code: Provided, that if the authorized Geographic Code is any other than USAID Geographic Code 000, the cooperating country itself shall be recognized as an eligible source; and

(ii) Such insurance is placed either in accordance with the terms of the commodity purchase contract or on the written instructions of the importer; and

(iii) Insurance coverage relates only to the period during which the commodities are in transit to the cooperating country, except that it may include coverage under a warehouse-to-warehouse clause; and

(iv) The premiums do not exceed the limitations contained in § 201.68; and

(v) The insurance provides that loss payment proceeds shall be paid in U.S. dollars or other freely convertible currency.

(2) Within the meaning of § 201.11(e), as well as this paragraph, insurance is placed in a country only if payment of the insurance premium is made to, and the insurance policy is issued by, an insurance company office located in that country.

(e) *Suspension and debarment.* In order to be eligible for USAID financing, the costs of any delivery services must be paid to carriers, insurers, or suppliers of inspection services who, prior to approval of the USAID Commodity Approval Application, have neither been suspended nor debarred under USAID Regulation 8, 22 CFR part 208, nor included on the ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' published by the U.S. General Services Administration.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.14 Eligibility of bid and performance bonds and guaranties.

The cost of any bid bond or guaranty posted by a successful bidder or of any performance bond or guaranty posted by a supplier is eligible for financing under the implementing document, provided that the bond or guaranty conforms to the requirements of the invitation for bids or the contract, as applicable, and to the extent that the principal amount of the bond or guaranty does not exceed the amount customary in international trade for the type of transaction and commodity involved. Bonds or guaranties may be payable in U.S. dollars, or a freely convertible currency or local currency, and shall be posted in favor of the purchaser. Nationality requirements for sureties, insurance companies or banks who issue bonds or guaranties under USAID-financed transactions are set forth in § 228.38(b) of this chapter.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.15 U.S. flag vessel shipping requirements.

(a) *General requirements.* Unless USAID determines that privately owned U.S. flag commercial ocean vessels are not available at fair and reasonable rates for such vessels:

(1) At least fifty percent (50%) of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers from each of two geographic

areas—the U.S. and all other countries) of all goods financed by USAID which are transported on ocean vessels shall be transported on privately owned U.S. flag commercial vessels; and

(2) At least fifty percent (50%) of the gross freight revenue generated by all shipments of USAID-financed commodities which are transported to the territory of the borrower/grantee on dry cargo liners shall be paid to or for the benefit of privately owned U.S. flag commercial vessels.

(b) *Methods of compliance.* (1) Compliance with these requirements with respect to dry cargo liner vessels shall be achieved for the total of liner shipments made during the term of the loan or grant agreement. If USAID determines at any time during the term of the agreement that compliance may not be achieved, USAID may require that all subsequent shipments be made on U.S. flag liners until compliance is assured.

(2) Compliance with these requirements with respect to dry bulk carriers and tankers shall be achieved for each quantitative unit of cargo. A quantitative unit of cargo is the total tonnage of a commodity or commodities included in one invitation for bids or other solicitation of offers from ocean carriers for the transportation of cargo which may move in full shipload lots. USAID shall approve a charter or other contract of affreightment for a non-U.S. flag vessel only if USAID has determined that at least 50% of the quantitative unit will move on U.S. flag vessels, to the extent that such vessels are available at fair and reasonable rates for such vessels. U.S. flag dry cargo liners whose offers are responsive to the terms of the invitation for bids or other solicitation of vessels may be used for achieving compliance for the quantitative unit.

(c) *Nonavailability of U.S. flag vessels.* Upon application of the borrower/grantee or the supplier, USAID/W, Office of Procurement, Transportation Division, shall determine and advise the applicant whether or not privately owned U.S. flag vessels are available for any specific shipment of commodities at fair and reasonable rates. A determination that U.S. flag vessels are not available does not carry with it the authorization for USAID to finance freight on a vessel not otherwise authorized; this requires a separate waiver approval in accordance with § 201.13(b)(1)(ii).

(d) *Responsibility.* The borrower/grantee is responsible for compliance with the requirements of this section and for imposing upon subborrowers, contractors and importers such requirements regarding shipping arrangements with suppliers as will assure discharge of this responsibility.

(e) *Privately owned U.S. flag commercial vessels.* For purposes of this section the term ''privately owned U.S. flag commercial vessels'' shall not include any vessel which, subsequent to September 21, 1961, shall have been either built outside the U.S., rebuilt outside the U.S. or documented under any foreign registry until such vessel shall have been documented under the laws of the U.S. for a period of 3 years.

Subpart C—Procurement Procedures; Responsibilities of Importers

§ 201.20 Purpose.

This subpart prescribes procurement procedures which shall apply to an importer whenever a commodity procurement is to be financed by USAID subject to this part 201.

§ 201.21 Notice to supplier.

The importer is responsible for providing the supplier with the following information (either through the invitation for bids, the request for quotations or otherwise):

(a) Notice that the transaction is to be financed by USAID under this part 201;

(b) The identification number of the implementing document;

(c) All additional information prerequisite to USAID financing and contained in the instructions from the borrower/grantee to the importer (for example, eligible source of commodity, periods during which deliveries must be made, shipping provisions, and documentation requirements); and, where appropriate,

(d) Notice of the marking requirements in § 201.31(d), when the importer is the government of the cooperating

country or any if its subdivisions or instrumentalities.

§ 201.22 Procurement under public sector procedures.

(a) *General requirements.* When the importer is the government of the cooperating country or any of its subdivisions, agencies or instrumentalities, all purchase contracts for commodities shall be awarded under public sector procedures in this section unless otherwise authorized by USAID. Such contracts shall be awarded on a competitive basis unless otherwise authorized by USAID under paragraph (g) of this section.

(b) *Formal competitive bidding.* Formal competitive bidding procedures shall be used for all procurements estimated to exceed $100,000 or the equivalent, exclusive of ocean or air transportation costs, except when other procedures are authorized in accordance with this section. Formal competitive bidding procedures may also be used for procurements under $100,000 at the option of the importer. Formal competitive bidding procedures include advertising the availability of an invitation for bids in accordance with paragraph (h) of this section, issuance of the invitation for bids, public opening of sealed bids, evaluation of bids, and award of the contract, except as provided in § 201.22(b)(3), to the lowest responsive bid by a responsible bidder.

(1) *Contents of the invitation for bids.* The invitation for bids and every attachment and amendment thereto shall be in the English language and shall be available to prospective suppliers free of charge unless otherwise authorized by USAID. The following minimum requirements are applicable:

(i) *Statement of requirements.* The invitation for bids shall state specifically that the formal competitive bidding procedures set forth in this § 201.22 apply. The terms and conditions of the procurement shall be clearly indicated, including any factors other than price to be used in the evaluation. Commodity specifications shall be stated in a non-restrictive manner and in sufficient detail to permit maximum response from prospective suppliers. The metric system of measurements shall be used for specifications unless USAID determines in writing that such use is impractical or is likely to cause significant inefficiencies or the loss of markets to U.S. firms.

(ii) *Statement regarding submission of bids.* The invitation for bids shall be appropriately numbered and state the complete physical address, as well as any post office box number, to which bids or offers are to be sent, the closing hour and date for submission and the date, hour and place of the public opening of the bids. If additional drawings, details, regulations or forms are necessary for submitting a bid, the invitation shall state where such material may be obtained.

(iii) *Statement regarding this part 201.* The invitation for bids shall expressly indicate the extent to which any resulting contract is subject to the requirements of this part 201.

(iv) *Statement regarding late bids.* The invitation for bids shall state that no bid received at the address designated in the invitation after the closing hour and date for submission will be considered for award unless its late arrival at that address is attributable solely to mishandling of the bid documents by the importer or any of its agents directly associated with receiving or processing the bids. In no case will the importer consider a bid which was not received at the place of public opening before the award was made.

(2) *Handling bids.* Bids received shall be held intact and sealed and shall be safeguarded against disclosure of contents prior to bid opening. The bids shall be opened publicly as specified in the bid invitation, and all properly submitted bids shall be considered. Direct submission of a bid by a prospective supplier, rather than through an agent or other representative of the supplier in the cooperating country, shall not be cause for rejection.

(3) *Awards.* Every award shall be made to that responsible bidder whose responsive bid is lowest in price. If any factor other than price is used in evaluating bids, each such factor shall be computed in accordance with the formula in the invitation for bids.

(c) *Two-stage formal competitive bidding.* Subject to the approval of USAID, two-stage formal competitive bidding

may be used in the procurement of specialized equipment, where requirements are stated in performance-type specifications. Two-stage bidding involves a request for technical proposals for the equipment being purchased, submission of proposals without price information, discussions with the offerors as necessary to clarify proposals, followed by a request for priced bids for those proposals found to be fully acceptable following discussions between the offerors and the purchaser. The priced bids shall be publicly opened. Handling and award of the bids shall comply with paragraphs (b) (2) and (3) of this section.

(d) *Competitive negotiation procedures.* (1) If approved by USAID based on a written record of the reasons therefor, a competitive negotiation procedure may be used. Competitive negotiation procedures include advertising the availability of a request for quotations in accordance with paragraph (h) of this section, issuance of the request for quotations, receipt and evaluation of offers, negotiation (when appropriate), and award of the contract to the offeror submitting the most advantageous offer, price and other factors considered. Competitive negotiation procedures may be approved in the following circumstances:

(i) When it is impossible to develop adequate commodity specifications for use in an invitation for bids;

(ii) When price alone would not be an effective means of determining an award (*i.e.*, when criteria, such as time of delivery or service capability need to be evaluated);

(iii) When emergency procurement is justified by a demonstration that the time required for formal competitive bid procedures would result in an unacceptable delay in delivering the commodities;

(iv) When proprietary procurement is justified; or

(v) When adherence to formal competitive procedures would impair program objectives.

(2) When formal competitive bidding procedures have failed, all bids have been rejected, and further use of such procedures would clearly not be productive, the Mission Director may authorize the use of competitive negotiation procedures. Further advertising is not required. The request for quotations may be prepared as a new document or may incorporate appropriate provisions of the invitation for bids. It shall be submitted to those potential suppliers who originally submitted bids in response to the invitation for bids.

(e) *Small value procurement.* When the estimated value of the contract does not exceed $100,000 or equivalent (exclusive of ocean and air transportation costs), the purchaser may award a contract by advertising the procurement in accordance with paragraph (h) of this section and soliciting quotations from a reasonable number of sources, including, where feasible, producers of the commodity, taking into consideration:

(1) The nature of the commodities to be purchased;

(2) The number of sources which can supply the commodities;

(3) The value of the procurement; and

(4) The administrative cost of procuring the commodities.

The contract shall be awarded to the offeror with the most advantageous offer, price and other factors considered.

(f) *Proprietary procurement.* Purchasing by brand or trade name or by a restrictive specification (proprietary procurement) may be justified for reasons such as:

(1) Substantial benefits, such as economies in maintenance of spare parts inventories, stronger local dealer organization, better repair facilities, or greater familiarity by operating personnel, can be achieved through standardizing on a particular brand;

(2) Compatibility with equipment on hand is required; or

(3) Special design or operational characteristics are required.

The need for proprietary procurement may serve as the basis for approving the use of competitive negotiation procedures in accordance with paragraph (d) of this section or a waiver for negotiation with a single source in accordance with paragraph (g) of this section.

(g) *Negotiation with a single source*—(1) *Circumstances.* Competition may be waived and negotiation with a single

source authorized by USAID under one of the following circumstances:

(i) the purchaser can demonstrate the existence of an emergency situation in which the requirement for competition would result in an unacceptable delay in the procurement of the commodities;

(ii) proprietary procurement is justified and the necessary commodities or spare parts are available from only one source, taking into account any special requirements such as the need for in-country service capability; or

(iii) adherence to competitive procedures would result in the impairment of the objectives of the United States foreign assistance program or would not be in the best interest of the United States.

(2) *Amendments.* Negotiation with a single source to amend an existing contract outside the scope of the contract must be justified under one or more of the criteria in paragraph (g)(1) of this section and formally approved by USAID.

(h) *Advertising*—(1) *Requirements.* (i) For each procurement estimated to exceed $25,000, or equivalent (exclusive of ocean and air transportation costs), notice of the availability of the invitation for bids, request for quotations or specific information about procurements under $100,000 shall be published by the USAID Office of Small and Disadvantaged Business Utilization/Minority Resource Center in the appropriate USAID Bulletin. The purchaser shall submit three copies of each invitation for bids or request for quotations (if any) to the USAID Mission with its request for advertising. The Mission will forward the request for advertising and the procurement documents to USAID/W. The request for advertising should arrive in the Office of Small and Disadvantaged Business Utilization/Minority Resource Center at least 45 days prior to the final date for receiving bids or quotations. The purchaser may, in addition, advertise in appropriate local, regional, and international journals, newspapers, etc., and otherwise, in accordance with local practice.

(ii) Additionally, if the estimated value of the contract is more than $100,000, or equivalent (exclusive of ocean and air transportation costs), the notice of availability of the invitation for bids or request for quotations shall be published in the ''Commerce Business Daily'' of the U.S. Department of Commerce.

(2) *Exceptions.* (i) When negotiation with a single source has been authorized, advertising is not required.

(ii) When formal competitive bid procedures have failed to result in an award pursuant to paragraph (d)(2) of this section and a determination is made to follow competitive negotiation procedures, no further advertising is required.

(iii) The requirements for advertising as set forth above may be waived by USAID to avoid serious procurement delays in certain circumstances, provided, however, that efforts shall be made to secure bids or offers from a reasonable number of potential suppliers.

(i) *USAID approvals.* (1) Each invitation for bids or request for quotations for an USAID-financed procurement which is estimated to exceed $100,000, or equivalent (exclusive of ocean and air transportation costs), must be approved by USAID prior to issuance.

(2) Each contract in excess of $100,000, or equivalent (exclusive of ocean and air transportation costs), must be formally approved by USAID prior to finalization with the supplier.

(3) USAID may require that contracts under $100,000 be formally approved prior to finalization with the supplier.

§ 201.23 Procurement under private sector procedures.

(a) *General requirements.* Procurements under private sector procedures will normally be carried out by importers using negotiated procurement procedures, unless the importer chooses to follow the procedures in § 201.22. Procurement on a negotiated basis shall be in accordance with good commercial practice. Solicitations by the importer for quotations or offers shall be made uniformly to a reasonable number of prospective suppliers, including, where feasible, producers of a commodity, and all quotations or offers received, whether or not specifically solicited, shall be given consideration before making an award.

(b) *Publicizing*. To provide suppliers in the United States with an opportunity to participate in furnishing commodities which may be purchased on a negotiated basis under USAID financing, USAID will periodically publish for each cooperating country a list of commodities which may be expected to be imported and the names and contact information for the importers which have traditionally purchased those commodities. Interested suppliers may then make offers or furnish quotations on the products they desire to sell directly to the importers of those products. USAID will not publicize specific proposed purchases which are to be undertaken by private sector importers on a negotiated basis unless specifically requested to do so by the importer in accordance with the provisions of paragraph (c) of this section.

(c) *Notification*. If the importer elects to solicit quotations and offers for specific proposed purchases through publication by USAID, USAID will notify prospective suppliers of the export opportunity through the appropriate USAID bulletin. Requests for such notification shall be submitted to the Office of Small and Disadvantaged Business Utilization/Minority Resource Center, USAID, Washington, DC 20523–7700, and shall contain the name and contact information for the importer, a full description of the commodities and any commodity related services required, applicable price and delivery terms and other relevant procurement data, in the English language. The metric system of measurements shall be used for specifications unless USAID determines in writing that such use is impractical or is likely to cause significant inefficiencies or the loss of markets to U.S. firms.

(d) *Notice of quotations and offers received*. USAID may require that the importer furnish an abstract in the English language and identify thereon all offers or quotations received, the offer accepted or order placed, the price, the quantity, the name and address of all persons submitting offers or quotations and of their principals, if any (including manufacturers or processors of the commodity).

(e) *Procurement under special supplier-importer relationships*—(1) Solicitation of offers from more than one supplier is not required if:

(i) The importer is purchasing for resale or processing, as the supplier's regularly authorized distributor or dealer, a commodity which, under the terms of the distributorship or dealer agreement, the importer is precluded from buying from another supplier; or

(ii) The importer is purchasing for resale a registered brand-name commodity from a supplier who is the exclusive distributor of that commodity to the area of the importer.

(2) USAID may require the importer to furnish, or cause to be furnished, to USAID documentary evidence of the existence of the relationships described in paragraph (e)(1) of this section.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.24 Progress and advance payments.

(a) *Definitions*—(1) *Progress payments*. Progress payments are payments made prior to shipment under a fixed price procurement contract, which are based on actual costs incurred or on an actual stage or percentage of completion accomplished.

(2) *Advance payments*. Advance payments are payments to a supplier prior to, and in anticipation of, performance under a procurement contract. They are not based on actual performance or actual costs incurred.

(b) *Progress payments*—(1) *Conditions for eligibility*. USAID will approve progress payments only if:

(i) The period between the commencement of work and the first required delivery will exceed four months;

(ii) There will be substantial predelivery costs that may have a material impact on a suppliers's working capital;

(iii) The total FAS purchase price will exceed $200,000;

(iv) The supplier must establish a performance bond or guaranty in favor of the borrower/grantee providing adequate security for the amount of the progress payments; and

(v) The amount of the progress payments does not exceed 95 percent of the total FAS purchase price.

(2) *Notice*. In order for progress payments to be eligible under a competitive procurement, the solicitation document must state that such payments will be allowed and that a request for progress payments will not be considered an adverse factor in the award of the contract.

(3) *Approval*. All progress payments must be approved in writing by USAID.

(c) *Advance payments*—(1) *Conditions for eligibility*. Advance payments may be authorized only if USAID has made a positive determination in writing that:

(i) USAID will benefit therefrom, in terms of increased competition and/or lower prices, prior to the issuance of the solicitation or prior to award of a noncompetitive contract; and

(ii) The supplier has a financial management system which is adequate for controlling and accounting for U.S. government funds.

(2) *Amount*. The amount of the advance is based on an analysis of the working capital required under the procurement contract, taking into consideration the availability of the supplier's own working capital and shall be limited to the minimum amount needed for immediate disbursing needs.

(3) *Security*. The supplier must establish an advance payment bond or guaranty in favor of the borrower/grantee providing adequate security for the amount of the advance payment.

(4) *Notice*. In order for advance payments to be eligible under a competitive procurement, the solicitation document must state that such payments will be allowed and that a request for advance payments will not be considered an adverse factor in the award of the contract.

(5) *Approvals*. All advance payments must be approved by USAID in writing.

§ 201.25 Bid and performance bonds and guaranties.

Whenever the importer requires the posting of a bid bond or guaranty or performance bond or guaranty, the type of bond or guaranty (certified check, irrevocable letter of credit, bank bond, bank guaranty, or surety bond) shall be at the option of the bidder or supplier. Posted bid bonds or guaranties shall be returned to unsuccessful bidders promptly after an award is made. Unless converted to a required performance bond or guaranty, any bid bond or guaranty posted by the successful bidder shall also be returned promptly. Performance bonds or guaranties (as distinguished from commodity warranties of quality or performance) shall be canceled no later than 30 days after completion of the contract performance guarantied.

§ 201.26 Expenditure of marine insurance loss payments.

Unless otherwise authorized by USAID, any marine insurance loss payment under a marine insurance policy financed pursuant to this part 201 received by the importer, either directly or indirectly, shall be used by the importer as follows:

(a) To procure from a source specified in the implementing document which originally provided the USAID funds, commodities which have been designated by USAID to the borrower/grantee as eligible for USAID financing; or

(b) To cover the cost of repairs to commodities damaged during shipment.

Subpart D—Responsibilities of Suppliers

§ 201.30 Purpose.

This subpart establishes the responsibilities of suppliers who furnish commodities and/or commodity-related services.

§ 201.31 Suppliers of commodities.

(a) *Performance of the sales contract*. The supplier of commodities shall comply with the terms and conditions of its contract with the importer and any letter of credit or direct letter of commitment under which it secures payment.

(b) *Responsibilities relating to eligibility of commodities*. The supplier shall fulfill its responsibilities under § 201.11 by assuring that:

(1) The commodity conforms to the description contained in its contract and letter of credit or direct letter of

commitment and, unless otherwise authorized by USAID in writing, the commodity is unused and has not been disposed of as surplus by any governmental agency;

(2) The source of the commodity complies with the provisions of § 201.11(b) relating to source as required by its contract, letter of credit or direct letter of commitment;

(3) The provisions of § 201.11(d) relating to the medium of transportation are complied with to the extent that the supplier arranges such transportation;

(4) All documents required by § 201.52 to be submitted by the supplier to receive payment are submitted by it on or before the terminal date specified in the letter of credit, direct letter of commitment, or, if payment is to be made at sight, the purchase contract;

(5) The provisions of the U.S. Treasury Department Foreign Assets, Sanctions, Transactions and Funds Control Regulations published in 31 CFR parts 500 through 599, as from time to time amended, are complied with; and

(6) The purchase price of the commodity meets the requirements of subpart G of this part applicable to the supplier.

(c) *Responsibilities relating to eligibility of delivery services.* The supplier of commodities shall be responsible for assuring that any delivery services obtained by it for its own or for the importer's account comply with the requirements of § 201.13 and, if required by USAID, for assuring that any shipping documents obtained by it contain an appropriate diversion clause pursuant to § 201.43. The supplier shall deliver to USAID any shipping documents available to it whenever such delivery is requested by USAID.

(d) *Marking of shipping containers and commodities*—(1) *Affixing emblems and identification numbers.* The supplier of commodities shall be responsible for assuring that all export packaging, whether shipped from the United States or from any other source country, carries the official USAID (clasped hands) emblem. Additionally, except as USAID may otherwise prescribe, when the supplier is given notice by the importer that the importer is the government of the cooperating country or any of its subdivisions or instrumentalities, the supplier shall also be responsible for assuring that, in addition to the shipping cartons or other export packaging, all commodities carry the USAID emblem. The USAID financing document number shall be marked on each export shipping carton and box in characters at least equal in height to the shipper's marks. When commodities are shipped as containerized freight in a reusable shipping container, the container is not considered export packaging within the meaning of this paragraph and the outside of the container need not be marked; however, the cartons, boxes, etc., inside the container must be marked.

(i) *Durability of emblems.* Emblems shall be affixed by metal plate, decalcomania, stencil, label, tag or other means, depending upon the type of commodity or export packaging and the nature of the surface to be marked. The emblem placed on commodities shall be as durable as the trademark, commodity or brand name affixed by the producer; the emblem on each export packaging unit shall be affixed in a manner which assures that the emblem will remain legible until the unit reach the consignee.

(ii) *Size of emblems.* The size of an emblem may vary depending upon the size of the commodity and the size of the export packaging. The emblem shall in every case be large enough to be clearly visible at a reasonable distance.

(iii) *Design and color of emblems.* Emblems shall conform in design and color to samples available from the Office of Procurement, Commodity Support Division, USAID, Washington, DC 20523–1415, and from the Mission.

(2) *Exception to requirement for affixing emblems.* To the extent compliance is impracticable, emblems shall not be required for:

(i) Raw materials shipped in bulk (including grain, coal, petroleum, oil, and lubricants);

(ii) Vegetable fibers packaged in bales; and

(iii) Semifinished products which are not packaged in any way.

(3) *Waiver.* If compliance with the marking requirement is found to be impracticable with respect to other commodities not excepted by paragraph

(d)(2) of this section, the supplier (or, when appropriate, the borrower/grantee) may request a waiver from USAID (Regional Assistant Administrator or his/her designee).

(e) *Export licenses and approvals.* The supplier shall be solely responsible for assuring that all necessary export licenses and approvals are obtained.

(f) *Distribution of shipping documents.* The supplier shall make the customary commercial document distribution, as well as any special distribution (e.g., to the USAID Mission in the importing country) which may be specified in the letter of credit, direct letter of commitment or other payment instruction covering the transaction. Prior to presenting the documents specified in § 201.52 for payment, the supplier shall mail not later than 30 days from the date of shipment a legible copy of all rated ocean bill(s) of lading described in § 201.52(a)(4)(i) to: Maritime Administration, Division of National Cargo, 400 Seventh Street SW., Washington, DC 20590–0001; and Transportation Division, Office of Procurement, USAID, Washington, DC 20523–7900.

(g) *Adjustment refunds, credits, and allowances.* All adjustments in the purchase price in an USAID-financed transaction in favor of the importer arising out of the terms of the contract or the customs of the trade shall be made by the supplier in the form of a dollar payment to USAID. Any such payment shall be transmitted to the Office of Financial Management, USAID, Washington, DC 20523–7702, and shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed. USAID will advise the borrower/grantee of such adjustment refunds received. Despatch earned by the supplier, other than despatch earned at the port of loading on c.i.f. and c. & f. shipments, shall be refunded to USAID in accordance with § 201.67(a)(5).

(h) *Vesting in USAID of title to commodities.* The supplier shall be responsible for compliance with the provisions of § 201.44 applicable to it.

(i) *Termination or modification of USAID-financing.* The supplier shall be responsible for compliance with the provisions of § 201.45 applicable to it.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.32 Suppliers of delivery services.

(a) *Performance of the service contract.* The supplier of delivery services financed by USAID shall comply with the terms and conditions of its contract to supply delivery services.

(b) *Adjustment in the price of delivery services.* The supplier of delivery services shall pay to the Office of Financial Management, USAID, Washington, DC 20523–7792, all adjustments in the purchase price in favor of the importer (or person purchasing the ocean transportation services) arising out of the terms of the contract or the customs of the trade. Any such payment shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer or other person for whom the adjustment is made, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed.

(c) *Marine insurance reporting requirement.* With respect to any loss payment exceeding $10,000 in value which a supplier of marine insurance makes under a marine insurance policy financed pursuant to this part, the supplier of marine insurance shall, within 15 days of making such payment, report to the Commodity Support Division, Office of Procurement, USAID, Washington, DC 20523–7900, the amount and date of the payment, a description of the commodity, the USAID identification number, name of the carrier, vessel, and voyage number (alternatively, flight or inland carrier run number), date of the bill(s) of lading, the identity and address of the assured, and the identity and address of the assignee of the assured to whom payment has actually been made.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

Subpart E—General Provisions Relating to USAID Financing of Commodities and Commodity-Related Services

§ 201.40 Purpose.

This subpart sets forth certain provisions of general application to transactions subject to this part.

§ 201.41 Audit and inspection.

The borrower/grantee shall maintain records adequate to document the arrival and disposition in the cooperating country of all commodities financed by USAID, and to identify the importer (or the first purchaser or transferee if the commodity is imported by the borrower/grantee) for a period of 3 years following the date of payment or reimbursement by USAID or for such other period as USAID and the borrower/grantee agree. In addition, the borrower/grantee or the importer shall, to the extent either exercises control or custody over the commodities, permit USAID or any of its authorized representatives at all reasonable times during the 3-year or other agreed period to inspect the commodities at any point, including the point of use, and to inspect all records and documents pertaining to such commodities.

§ 201.42 Reexport of USAID-financed commodities.

Unless specifically authorized by USAID, commodities imported into a cooperating country under USAID-financing may not be exported in the same or substantially in the same form from the cooperating country. In the event of any unauthorized reexport, the borrower/grantee shall pay promptly to USAID, upon demand, the entire amount reimbursed or such lesser or greater amount as USAID may deem appropriate under the circumstances of the particular transaction. Such an amount shall in no event, however, exceed the greater of either the amount reimbursed or the amount realized from the reexport.

§ 201.43 Diversion clause.

USAID may require that charter parties, bills of lading, or other ocean shipping documents covering USAID-financed commodities contain a clause substantially as follows:

> USAID may at any time prior to unloading prescribe a different port of discharge from among the ports covered by the applicable tariff. Diversion charges shall apply in accordance with the tariff or contract of affreightment. Deviation insurance and extra handling costs actually incurred shall be reimbursed.

§ 201.44 Vesting in USAID of title to commodities.

(a) *Vesting upon order of USAID* USAID may direct that title to USAID-financed commodities in transit to a cooperating country shall be vested in USAID if, in the opinion of USAID, such action is necessary to assure compliance with the provisions or purposes of any act of Congress.

(1) *Rights of USAID upon vesting of title.* In accordance with instructions by USAID, the borrower/grantee, supplier, and bank shall transfer such negotiable bills of lading, suppliers' invoices, packing lists, inspection certificates or other designated documents relating to the commodities as are in, or may come into, their possession.

(2) *Diversion of commodities.* USAID may direct the master or operator of a vessel or an inland carrier carrying the commodities to divert them away from the port or other destination specified in the shipping documents and to deliver them at such other destination as USAID may designate.

(b) *Financial responsibility of USAID under vesting order.* (1) USAID will reimburse a supplier who has not already received payment under the purchase contract for all commodities with respect to which USAID has taken title under a vesting order.

(2) USAID will assume the responsibility for any extra costs (including the costs of marine insurance and handling) which are incurred as a result of a diversion. Such costs shall not exceed diversion charges as per tariff (liner shipments) or contract of affreightment (charters), and shall include only those deviation insurance and extra handling costs which are actually incurred.

(3) USAID shall incur no liability to the borrower/grantee, the importer, or to the approved applicant by reason of any order which vests in USAID title

to commodities, or by reason of any request for the diversion of commodities.

§ 201.45 Termination or modification of a loan, grant or implementing document.

(a) *Effect of termination or modification*. (1) Except as provided in paragraph (a)(2) of this section, the availability of USAID funds to finance the procurement of commodities and commodity-related services shall terminate or shall be modified, whenever and to the same extent that the implementing document which relates to such delivery is terminated or modified by operation of provisions contained in the document, or by the exercise of rights otherwise reserved to USAID.

(2) Unless the supplier and USAID agree otherwise, to the extent that the supplier has received an irrevocable letter of credit from a bank under an USAID letter of commitment, the purchase contract shall be affected only to the extent necessary to comply with any vesting order issued by USAID in accordance with § 201.44.

(b) *Responsibilities of parties after termination or modification of USAID-financing*. Upon termination or modification of USAID-financing of commodities or commodity-related services, the supplier, importer and approved applicant shall make such arrangements as are necessary to obtain the cancellation or modification of any letter of credit in favor of the supplier.

§ 201.46 Compensation to supplier if shipment is prohibited.

(a) *Payment to supplier*. USAID shall make appropriate payment to a supplier for the value of USAID-financed commodities available for immediate shipment from the United States if all the following conditions are satisfied:

(1) Shipment is prohibited by order of the U.S. Government and such order has general application to all shipments to the cooperating country.

(2) Payment may not be made by the bank under the terms of the letter of credit or payment instructions.

(3) The supplier is unable to dispose of the commodities without loss.

(4) The supplier tenders to USAID a negotiable warehouse receipt covering the commodities in question and presents to USAID such other documentation required by § 201.52 as may be appropriate under the circumstances.

(b) *Other settlement*. In lieu of accepting title to the commodities, USAID may negotiate with the supplier such other settlement as may be fair and equitable under the circumstances.

§ 201.47 Use of marine insurance loss proceeds.

The borrower/grantee shall pay promptly to USAID a sum equal to the proceeds received by an importer or its assignee in settlement of a marine insurance claim under a marine insurance policy financed pursuant to this part 201, if such proceeds are not expended in the manner provided by § 201.26 within a reasonable period after receipt by the importer.

Subpart F—Payment and Reimbursement

§ 201.50 Purpose.

This subpart describes:

(a) The methods by which USAID will make payment or reimbursement for commodities and commodity related services which have been furnished;

(b) The documentation required to be submitted to USAID for the purpose of obtaining such payment or reimbursement; and

(c) The terminal date for presentation of documents which USAID requires as a condition for payment or reimbursement.

§ 201.51 Methods of financing.

Under procurements subject to this part 201, the following methods of financing may be employed by USAID In each case, the method of financing shall be consistent with provisions in the pertinent implementing documents.

(a) *Direct reimbursement*. Upon presentation to USAID of the documents specified in § 201.52, a borrower/grantee will be reimbursed for the cost of commodities and commodity-related services procured by the borrower/grantee directly or procured by other importers with the authorization of the borrower/

grantee, if such commodities or services are eligible under the implementing document and under this part 201 for USAID-financing.

(b) *Letter of commitment to a bank.* At the request of the borrower/grantee, USAID will issue a letter of commitment to a bank for a specified amount in dollars. Reimbursement to a bank will be in accordance with the terms of such letter of commitment for sight payments made for the account of an approved applicant. Any such payment by a bank made in anticipation of a letter of commitment and falling within the scope of payments authorized by such letter of commitment when issued, will be deemed to be a payment to be reimbursed by USAID thereunder.

(1) *Requests for bank letters of commitment.* All requests for bank letters of commitment shall be in the English language and shall be submitted to USAID by the borrower/grantee in duplicate. They shall contain the following:

(i) Identification of the loan or grant agreement;

(ii) The dollar amount of the letter of commitment;

(iii) The name and address of the bank to which the letter of commitment is to be issued;

(iv) The name and address of the approved applicant;

(v) The expiration date to be stated in the letter of commitment, which shall be not later than the final date specified in the implementing document for submission of documentation to the bank as a basis for disbursement against the letter of commitment, except that, if a terminal shipping date is provided in the implementing document, the expiration date shall be the last day of the month following the month in which the terminal shipping date occurs.

(vi) Identification of the items to be financed under the letter of commitment (including the Schedule B identification).

(2) *Approved applicant's request to bank*—(i) *Form and effect of request.* An approved applicant may apply to the bank holding a letter of commitment for the issuance, confirmation, or advice of a commercial letter of credit for the benefit of a supplier, or may instruct the bank to make payments at sight to such supplier, or may instruct the bank to make payments at sight to or for the account of the borrower/grantee.

(ii) *Borrower/grantee assignment under a letter of commitment.* The borrower/grantee's request to USAID for a letter of commitment shall be deemed notification to USAID of assignment of any rights to receive reimbursement for the specified funds under the related implementing document. USAID, by issuance of the letter of commitment, shall be deemed to have consented to such assignment. Any such assignment or consent shall inure to the benefit of the bank's legal successors and assignees.

(iii) *Requirements imposed by bank.* The borrower/grantee and the approved applicant shall be deemed to have consented to imposition by the bank upon the beneficiary of any letter of credit or payment instruction of such requirements as the bank deems necessary in order to comply with its applicable obligations to USAID. Such consent shall be deemed an express condition incorporated in any request of the approved applicant under paragraph (b)(2)(i) of this section.

(3) *Reimbursement of bank.* Upon presentation to USAID of the documents described in § 201.52, USAID will reimburse the bank for any amounts paid by it in dollars to or on behalf of the approved applicant pursuant to a letter of commitment, subject, however, to compliance by the bank with the requirements of subpart H. Such documents in the normal course should be presented to USAID promptly. Bank charges will be eligible for reimbursement if authorized in the letter of commitment. Reimbursement normally will be made within 7 days by an electronic funds transfer.

(c) *Bank charges under letters of commitment.* (1) To claim reimbursement for commissions, transfers or other charges, not including interest on advances, the bank shall submit the Voucher SF 1034 and shall attach thereto a copy of the payment advice which identifies the costs being billed.

(2) To claim reimbursement for interest on advances, the bank shall claim

reimbursement on the Voucher SF 1034, attaching thereto:

(i) The monthly statement of advance account established under the letter of commitment, in duplicate, showing:

(A) The opening balance;

(B) The date and amount of each type of charge attributable to the letter of commitment, indicating the number of the letter of commitment, subsidiary letter of credit, or payment instruction or request under which the charge was made;

(C) The date and amount of each USAID reimbursement to the bank, indicating either the USAID bureau voucher number or the number of the letter of commitment, subsidiary letter of credit, or payment instruction or request under which the payment was made; and

(D) The closing balance;

(ii) The bank's monthly advice of charge, in duplicate, showing:

(A) The outstanding balance in the advance account on each day of the period covered; and

(B) The amount of interest charged during the period.

(3) *Certification*. Each claim for reimbursement shall have endorsed thereon or attached thereto a certification by an authorized representative of the bank that the charges for which payment is being claimed are in accordance with the schedule of charges agreed on between the bank and the approved applicant or beneficiary.

(4) *Report*. The bank shall submit a report showing the financial status of each letter of commitment issued to it by USAID. The content, format and frequency of the report shall be prescribed in the letter of commitment. The report shall be prepared in an original and two copies, and distributed as follows: USAID/W (original), approved applicant (copy) and cognizant Mission (copy). The report to USAID/W should be sent to the Office of Financial Management, Cash Management and Payment Division (M/FM/CMP), USAID, Washington, DC 20523–7702. The report shall be certified by an authorized signatory of the bank.

(d) *Direct letter of commitment to a supplier*. (1) At the request of a borrower/grantee, USAID may issue a direct letter of commitment to a supplier assuring payment by USAID of specified amounts to cover the cost of commodities and commodity-related services. The letter of commitment to a supplier will identify the purchase contract to which it relates and the implementing document under which it is issued.

(2) Assignment may be permitted as provided for in the direct letter of commitment.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.52 Required documents.

(a) *Commodities and commodity-related services*. Claims for reimbursement or payment with respect to commodities and commodity-related services shall be supported by the documents listed in paragraphs (a)(1) through (8) of this section or by such other documents as may be required in the letter of commitment or other applicable implementing document. Each document shall indicate the identification number of the letter of commitment or other applicable implementing document.

(1) *Voucher*. Voucher SF 1034 with three copies, to be prepared by the borrower/grantee, by the approved applicant, by the bank as assignee or agent for the approved applicant, or, in the case of a direct letter of commitment, by the supplier.

(2) *Supplier's invoice*. (i) One copy of the supplier's detailed invoice showing the following:

(A) The name and address of the importer;

(B) The quantity and the description of each item shipped, in sufficient detail, including the U.S. Department of Commerce Schedule B number, for ready identification;

(C) The total gross sales price;

(D) The total net sales price (determined by deducting from the total gross sales price the amounts required to be deducted under § 201.65(d));

(E) The sales price for each item net of all trade discounts under § 201.65(d);

(F) The delivery terms (e.g., f.o.b., f.a.s., c.i.f. or c. & f.);

(G) The type and dollar amount of each incidental service which is not included in the price of the commodity

and for which reimbursement is claimed;

(H) The type and dollar amount of each delivery service obtained by the supplier of the commodity for the importer's account which is not included in the price of the commodity and for which reimbursement is claimed;

(I) To the extent that the commodity price includes commodity-related services, a list of each such service and the dollar amounts attributable to each such service; and

(J) Unless a Supplier's certificate covering marine insurance is submitted, the name and address of the supplier of such insurance and the dollar cost thereof.

(ii) Each invoice submitted under a bank letter of commitment shall be marked PAID by the supplier, or alternatively, the bank may certify by an endorsement on or attachment to the invoice that payment has been made in the amount shown on the invoice.

(iii) Each invoice must contain certifications from the supplier to the effect that:

(A) The USAID marking requirements set forth in § 201.31(d) have been met;

(B) Unless otherwise specified by USAID, the supplier has airmailed to the USAID Mission in the capital city of the cooperating country one copy each of the invoice, packing list and bill(s) of lading;

(C) If shipment is effected by ocean vessel, one copy of all bill(s) of lading described in § 201.52(a)(4) has been mailed to: Maritime Administration, Division of National Cargo, 400 Seventh Street SW., Washington, DC 20590–0001; and Transportation Division, Office of Procurement, USAID, Washington, DC 20523–7900.

(3) *Charter party*. A copy (or photostat) of any approved charter party under which shipment is made, submitted:

(i) By the commodity supplier whenever USAID-finances any portion of the dollar price of a commodity sale under c.&f. or c.i.f. delivery terms, or

(ii) By the supplier of ocean transportation whenever USAID-finances the freight under any freight reimbursement arrangement.

If shipment is made under a consecutive voyage or time charter and the person or organization seeking reimbursement or payment has previously submitted to USAID a copy (or photostat) of said charter party in support of a prior claim for reimbursement or payment, such person or organization may, in lieu of further submission of the charter party, certify to the fact of prior submission.

(4) *Evidence of shipment*. (i) A copy (or photostat) of the bill(s) of lading (ocean, charter party, air, rail, barge, or truck) or parcel post receipt evidencing shipment from the point of export in the source country or free port or bonded warehouse. The bill(s) of lading shall indicate the carrier's complete statement of charges, including all relevant weights, cubic measurements, rates and additional charges, whether or not freight is financed by USAID If an NVOCC is used, rated copies of both the NVOCC's through bill of lading and the bill(s) of lading of all VOCCs must be included.

(ii) When the commodity is transported to the cooperating country under its own power (e.g., a fishing vessel), USAID will require a certificate signed by the importer or its authorized agent, certifying that the commodity has been received by the importer, to be submitted instead of a bill of lading.

(iii) When the supplier is not responsible under the terms of its agreement with the importer for assuring that the commodities are loaded on board the vessel, such as when delivery terms are f.a.s. port of shipment, the importer may request and the Commodity Support Division, Office of Procurement, USAID, Washington, DC 20523–7900 may authorize the following documents, instead of a bill of lading, to be submitted with a claim for reimbursement or payment for the commodities:

(A) A dock or warehouse receipt containing the commodity description, weight and cubic measurement, port of loading, and, if available, name and flag of vessel; the receipt must show consignment of the commodities to a person or organization designated by the importer; and

(B) A letter from the consignee addressed to USAID undertaking to arrange for shipment of the goods to the cooperating country and to deliver to: FM/CMPD, Office of Financial Management, USAID, Washington, DC 20523–7702, within 15 days from the date of shipment, a copy of the bill of lading evidencing shipment to the cooperating country. The bill of lading shall indicate the carrier's complete statement of charges, as in paragraph (a)(4)(i) of this section.

(5) *Documentation on shipments to a free port or bonded warehouse.* When a commodity is shipped out of a free port or bonded warehouse, the supplier shall:

(i) Provide as an attachment to a copy of the invoice, a copy of the bill of lading (bearing a notation of the freight cost) covering the shipment of the commodity into the free port or bonded warehouse, or

(ii) If such a bill of lading is not available to the supplier, provide the following information and certify to the accuracy of the information: the country or area from which the commodities were shipped to such free port or bonded warehouse; the name and flag of the vessel which transported the commodities from the source country to the free port or bonded warehouse; the cost of the freight for such shipment; and the free port or bonded warehouse to which shipment was made from the source country, or

(iii) If commodities have been commingled in the warehouse in such a way that shipments out of the warehouse cannot be related to particular shipments into the warehouse, the supplier shall certify to the best of its knowledge and belief that a portion of the commodities was transported to the free port or bonded warehouse as required by § 201.13(b)(1)(i)(D), and the quantity for which USAID-financing is sought does not exceed that amount.

(6) *Supplier's Certificate (form AID 282).* An original and one copy of the Supplier's Certificate executed, without modification, by:

(i) The supplier of the commodity for the cost of the commodity and any commodity-related services furnished by the commodity supplier;

(ii) The carrier for the cost of ocean or air transportation financed by USAID;

(iii) The insurer for the cost of marine insurance financed by USAID if such cost exceeds $50.

(7) *Freight forwarder's invoice.* One copy of the freight forwarder's invoice, if any, marked PAID and containing a complete, individually priced itemization of all charges and fees billed by or through the forwarder.

(8) *Commodity approval application (form AID 11).* One signed original of the Commodity Approval Application executed by the commodity supplier and countersigned by USAID. In the case of a claim for reimbursement or payment for partial shipment presented subsequent to submission of the original Commodity Approval Application, one reproduced copy of the original countersigned Commodity Approval Application, appropriately certified as such by the supplier.

(b) *Execution of Certificates.* (1) The original of each Supplier's Certificate and Commodity Approval Application shall be signed by hand and shall bind the person or organization in whose behalf the execution is made.

(2) The Supplier's Certificate covering the cost of marine insurance may be executed on behalf of the marine insurer by an insurance broker or by a commodity supplier if the commodity supplier is the assured under an open cargo insurance policy issued by the marine insurer and is authorized under such policy to bind the marine insurer by issuing insurance certificates or policies in favor of importers. In each such case, the insurance broker or commodity supplier shall indicate on the Supplier's Certificate the name and address of the insurance company which is acting as the supplier of marine insurance and shall describe itself below its signature as a commodity supplier issuing a certificate under an open cargo insurance policy or as an insurance broker.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.53 Final date for presentation of documents.

(a) *Direct reimbursement.* Prescribed documents shall be presented to USAID

by the borrower/grantee no later than the terminal date specified in the implementing document.

(b) *Letter of commitment to a bank.* Prescribed documents shall be presented by the bank to USAID and shall cover:

(1) Payments or negotiations made under letters of credit expiring no later than the expiration date stated in the letter of commitment, or

(2) Payments to a supplier, the approved applicant, or, at the request of an approved applicant, to a person other than the supplier, made no later than such expiration date.

(c) *Direct letter of commitment to supplier.* Documents prescribed for payment under a direct letter of commitment to a supplier shall be presented by the supplier to USAID no later than the expiration date stated therein. Such documents must evidence shipment no later than the terminal shipment date provided in the direct letter of commitment.

Subpart G—Price Provisions

§ 201.60 Purpose and applicability of this subpart.

This subpart prescribes rules relating to prices, discounts, commissions, credits, allowances, and other payments. These rules shall be observed in the procurement of commodities and commodity-related services financed under this part. The rules implement and supplement the requirements of the Act relating to prices in such procurement. The general purpose of these rules is to assure the prudent use of USAID funds.

(a) *Statutory price limitations.* (1) Section 604(a) of the Act provides *inter alia* that funds made available under this Act may be used for procurement outside the United States only if the price of any commodity procured in bulk is lower than the market price prevailing in the United States at the time of procurement adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(2) Section 604(b) of the Act provides that no funds made available under this Act shall be used for the purchase in bulk of any commodities at prices higher than the market price prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(b) *Transactions covered.* The rules and conditions prescribed by this subpart apply to all USAID-financed transactions subject to this regulation, whether or not the commodities are purchased in bulk.

(c) *Compliance.* Compliance with this subpart G and with any additional price requirement contained in the implementing document shall be a condition to the financing by USAID of procurement transactions under this part. Post-audit of transactions will be made by USAID to determine whether there has been such compliance.

§ 201.61 Meaning of terms in this subpart.

(a) *Class of purchaser* means any group of purchasers which is separately identifiable and which is distinguishable from other purchasers on the basis of quantity purchased, distribution function or established trade practice.

(b) *Commission.* See § 201.01(h).

(c) *Comparable domestic sale* means any comparable sale not in export transactions.

(d) *Comparable export sale* means any comparable sale in export transactions.

(e) *Comparable sale* means any sale of or bona fide offer to sell the same commodity, or (in the absence of such a sale or offer to sell) any sale of or offer to sell a similar commodity which, with respect to the quantity, quality, grade, period of delivery, supply area, terms of sale, or class of purchaser, either:

(1) Is not sufficiently different from the sale being tested to result customarily in a price different from the price in the sale being tested; or

(2) Can be related to the sale being tested through application of a customary price differential. A sale which is otherwise comparable to another sale is not rendered noncomparable by virtue of its being made out of a free port or bonded warehouse. The fact that a sale is made out of a free port or bonded warehouse shall not cause that

sale to differ from otherwise comparable sales with respect to terms of sale, supply area, or period of delivery.

(f) The *date the purchase price is fixed* means the date on which the parties agree on the price. If, however, the parties establish the price as of any other date which is subsequent to the date of such agreement and not later than the date of delivery, the term means such other date regardless of whether it precedes, coincides with or follows the legally effective date of the purchase contract.

(g) *Export differential* means the customary difference in price, if any, between domestic sales and otherwise comparable export sales.

(h) *Period of delivery* means the length of time between the date the purchase price is fixed or the date of the purchase contract, whichever is later, and the date by which delivery is to be completed.

(i) *Producer* means any person who grows, mines, manufactures, processes, or assembles a commodity in the form in which it is exported.

(j) *Purchase price* means the total amount which the purchaser agrees to pay or make available to or for the benefit of the supplier (including any person or organization designated by the supplier to receive such payment) for any commodity or commodity-related service which is wholly or partly financed by USAID.

(k) *Representative of the importer* means any entity affiliated with the importer by ownership or management ties, and any office or employee of such entity.

(l) *Similar commodity* means a commodity which is functionally interchangeable with the commodity in the sale being tested, and affords the purchaser substantially equivalent serviceability.

(m) *Supply area* means the source country, or if the commodity is customarily sold at different prices (exclusive of transportation costs) from different geographic areas within a source country, the specific geographic area within the source country from which the commodity is shipped to the cooperating country.

(n) *Time of purchase* means that period encompassing the date the purchase price is fixed during which prices in comparable sales remain substantially constant.

(o) *Transportation cost* means the cost of all transportation by land, sea, or air from the port of export to the destination in the cooperating country, plus the cost of marine insurance, if any, covering such transaction. Such costs are financed by USAID only to the extent provided in § 201.13.

§ 201.62 Responsibilities of borrower/grantee and of supplier.

(a) *Responsibilities of borrower/grantee.* The borrower/grantee shall:

(1) When required by USAID, develop and periodically update, or cooperate with USAID in the development and updating of, lists of importers who have traditionally imported the commodities which may be purchased under the loan or grant. Such listings shall be by commodity groupings selected by USAID, cover all commodities eligible for financing, and, to the extent such information is available, show the names and addresses of all importers, regardless of the source from which their imports originated.

(2) Insure that the importer

(i) Procures in accordance with the conditions set forth in subpart C as applicable, and

(ii) Except as provided otherwise in § 201.22, pays no more than the lowest available competitive price, including transportation cost, for the commodity.

(b) *Responsibility of supplier.* In accordance with the provisions contained in the Supplier's Certificate, which the supplier must execute in order to receive payment, the supplier is responsible for compliance with the provisions of this subpart G, other than paragraph (a) of this section.

§ 201.63 Maximum prices for commodities.

(a) *U.S. prevailing market price—U.S. source.* The purchase price for a commodity, the source of which is the United States, shall not exceed the market price prevailing in comparable export sales in the United States at the time of purchase, adjusted for differences in the transportation cost: *Provided, however,* That if there are no

such comparable export sales, then the purchase price, excluding transportation cost, may not exceed the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential.

(b) *U.S. prevailing market price—non-U.S. source.* The purchase price, including transportation cost, for a commodity the source of which is not the United States shall be lower than the market price prevailing in comparable export sales in the United States at the time of purchase including transportation cost: *Provided, however,* That if there are no such comparable export sales in the United States, then the purchase price from the source outside the United States, including transportation cost, must be lower than the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential and transportation cost.

(c) *Supplier's comparable export price—U.S. and non-U.S. sources.* (1) The purchase price excluding transportation cost, shall not exceed prices generally charged by the supplier in comparable export sales from the source country at the time of purchase.

(2) The requirement in paragraph (c)(1) of this section shall not apply to the purchase price:

(i) In any sale under formal competitive bid procedures; or

(ii) In any sale of a commodity generally traded on an organized commodity exchange.

(3) *Comparable export sales* for the purpose of paragraph (c) of this section shall not include sales:

(i) Under formal competitive bid procedures; or

(ii) Of a commodity by a supplier to affiliates if the supplier demonstrates an established practice of selling the commodity to affiliates at prices lower than the prices it charges to nonaffiliates.

(d) *Source country prevailing market price—non-U.S. source.* The purchase price, excluding transportation cost, shall not exceed the market price prevailing in the source country in comparable export sales at the time of purchase: *Provided, however,* That, if there are no such comparable export sales, then the purchase price, excluding transportation cost, shall not exceed the market price prevailing in comparable domestic sales in the source country at the time of purchase, adjusted upward or downward by the appropriate export differential.

(e) *Price test in the absence of comparable sales at time of purchase*—(1) *Sale by supplier who is not the producer.* The purchase price shall not exceed the sum of:

(i) The lower of the following: The price paid by the supplier for the commodity or the price charged by the producer in the original sale of that specific commodity; and

(ii) A markup over the amount allowed in paragraph (e)(1)(i) of this section which may not exceed the lower of the following: The markup over direct cost that is usual and customary in sales by the supplier of the same commodity, if any, or the most similar commodity, or, the markup over direct cost that is usual and customary in such sales by the competitors of the supplier; and

(iii) To the extent not included in paragraph (e)(1)(i) of this section an amount not to exceed the cost at prevailing rates of those expenses recognized in § 201.64(a) and actually incurred in moving the commodities supplied from the point of purchase to a position alongside or on board the vessel or other export conveyance at point of export.

(2) *Sale by a supplier who is the producer.* The purchase price shall not exceed a price established in accordance with the customary pricing practices of the supplier for other products of the same general class as the commodity sold.

(f) *Additional rules for sales through or out of a free port or bonded warehouse.* (1) The purchase price, including transportation costs to a cooperating country, of a commodity which has passed through a free port or bonded warehouse shall not exceed:

(i) The maximum price f.o.b. or f.a.s. source country eligible for USAID-financing under the foregoing provisions of this § 201.63: plus

(ii) Transportation cost calculated on the basis of the prevailing ocean freight rate for shipments using the most direct route from the source country to the cooperating country on the type and flag of vessel on which the commodity actually moved from the free port or bonded warehouse to the cooperating country.

(2) The purchase price of a commodity f.o.b. or f.a.s. a free port or bonded warehouse shall not exceed the maximum price established in paragraph (f)(1) of this section, minus transportation costs from the free port or bonded warehouse to the cooperating country, calculated on the basis of the prevailing ocean freight rate from the free port or bonded warehouse to the cooperating country for the type and flag of vessel on which the commodity actually moved between those points.

(g) *Commodity price subject to escalation.* If a purchase contract contains a price escalation clause, USAID will finance:

(1) The purchase price of the commodity before the operation of the escalation clause to the extent that it does not exceed the applicable price limitations contained in this subpart; and

(2) That portion of the commodity price attributable to the operation of the price escalation clause if such clause:

(i) Uses a formula based on variations in a cost factor which is reasonably related to the price of the commodity subject to escalation and is readily determinable;

(ii) Provides for downward as well as upward adjustment of the price; and

(iii) Accords with recognized trade practices.

§ 201.64 Application of the price rules to commodities.

(a) *Calculation of commodity prices on a common basis.* In testing whether the purchase price of a commodity exceeds the price in comparable export sales or in comparable domestic sales, as applicable under § 201.63 (a), (c), (d) and (e), it is necessary to insure that the price being tested as well as the prices being used as a test or measurement are calculated on the basis of delivery alongside or on board the vessel or other export conveyance. Such prices will include, therefore, in addition to the price of the commodity at an internal point in the source country, transportation from that point to the port of export in the source country, and to the extent not already included in the price at the internal point, inspection, export packing, forwarder's fees at customary rates, the cost of placing the commodities on board the vessel or export conveyance (unless this cost is covered in the export freight), and other necessary costs customary in the trade.

(b) *Calculation of commodity prices which involve transportation costs.* (1) In testing the purchase price which includes transportation cost (customarily known as a c. & f. or c.i.f. price) for compliance with the requirements of § 201.63 (a), (c), (d) and (e), USAID will subtract transportation cost as calculated by reference to the freight rate, for the type and flag of vessel on which the commodity was shipped, prevailing on the date the purchase price is fixed. In the absence of evidence to the contrary, the actual transportation cost paid by the supplier shall be presumed to be the transportation cost calculated in accordance with the formula contained in the foregoing sentence.

(2) In testing a purchase price involving transportation cost for compliance with § 201.62 and § 201.63(b), the test or measurement prices shall be:

(i) Prices based upon transportation by a U.S.-flag vessel if the price tested involves transportation by such vessel; or

(ii) Prices based upon transportation by either a U.S.-flag or a foreign-flag vessel, whichever is lower, if the price tested involves transportation by a foreign-flag vessel.

(c) *Calculation of amount eligible for financing when shipment is through or out of a free port or bonded warehouse.* (1) When a shipment to a cooperating country has passed through a free port or bonded warehouse, USAID will finance no more than the lower of the following:

(i) The maximum price described in § 201.63(f)(1), or

(ii) The maximum price described in § 201.63(f)(1)(i), plus any transportation costs into the free port or bonded warehouse which meet the requirements of § 201.13(b)(1)(i)(D), and any transportation costs out of the free port or bonded warehouse on a vessel flying the flag of a country included in the authorized geographic code.

(2) When a shipment is f.o.b. or f.a.s. a free port or bonded warehouse, USAID will finance no more than the lower of the following:

(i) The maximum price described in § 201.63(f)(2), or

(ii) The maximum price described in § 201.63(f)(1)(i), plus any transportation costs into the free port or bonded warehouse which meet the requirements of § 201.13(b)(1)(i)(D).

(d) *Determination of prevailing prices.* In the determination of any prevailing market price of any commodity or any prevailing price or maximum eligible freight rate for a commodity related service, relevant published and unpublished price information will be considered.

§ 201.65 Commissions, discounts and other payments, credits, benefits and allowances.

(a) *General.* This section sets forth the rules which govern the eligibility of commissions, discounts and certain other payments, credits, benefits and allowances for USAID-financing.

(b) *Commissions to sales agents.* Unless otherwise provided in the implementing document, a commission paid, or to be paid, to a bona fide agent of the supplier is eligible for financing under this part, if such agent either has made a direct and substantial contribution toward securing the purchase contract for the supplier or is engaged on a continuing basis in securing similar contracts for the supplier. Such commissions are eligible to the extent they comply with § 201.65(f).

(c) *Commissions and other payments, credits, benefits or allowances to importers, purchasing agents and others.* Unless otherwise authorized by USAID, no commission or other payment, credit, benefit or allowance of any kind shall be paid, made, or given, or agreed to be paid, made or given, in connection with any sale subject to this part by the supplier or its agent:

(1) To or for the benefit of the importer;

(2) To or for the benefit of a purchasing agent or other agent or representative of an importer, even though such agent or representative may also have an agreement with a supplier to represent the supplier; or

(3) To any third party in connection with a sale by the supplier to its dealer, distributor, or established agent in the cooperating country.

(d) *Trade discounts.* To arrive at the net amount eligible for USAID-financing, all trade discounts, whether in the form of payments, credits, or allowances, to which the importer is entitled shall be deducted from the gross amount of the supplier's invoice submitted under § 201.52(a)(2)(i)(D).

(e) *Commissions and other payments or benefits attributable to USAID-financing.* Every commission or other payment, credit, benefit, or allowance of any kind paid, made or given, or agreed to be paid, made or given, in connection with the sale of commodities financed under this part to any person described in § 201.65(c) (1), (2) or (3) shall be presumed conclusively to have been paid from USAID funds and shall thereby be subject to the requirements of this part 201.

(f) *Maximum commission.* A commission shall not exceed the lesser of the amount which the supplier customarily pays in connection with similar transactions or the amount which is customary in the trade.

(g) *Reporting.* All commissions and other payments, credits, benefits or allowances of any kind paid, made or given, or agreed to be paid, made or given, by the supplier in connection with USAID-financed sales of commodities and commodity-related services shall be fully reported on the Invoice-and-Contract Abstract of the Supplier's Certificate required under § 201.52(a)(6). Any such amounts not reported shall be ineligible for USAID-financing.

(h) *Brokerage commission.* In connection with ocean freight services, USAID will finance a brokerage commission only if:

(1) Such commission does not exceed 2½ percent of the ocean freight charge

(exclusive of deadfreight, demurrage and detention);

(2) Such commission is payable to an individual resident in a country included in the authorized source code; a non-resident citizen of a country included in the authorized source code; or a corporation or partnership organized under the laws of a country included in the authorized source code; and

(3) The names of all persons receiving such commissions appear on the face of the charter party.

(i) *Address commissions.* An address commission to or for the benefit of a charterer shall be deemed a discount on the stated freight rate or freight charge which the supplier of transportation services shall deduct from the cost of transportation financed by USAID. If the supplier of the commodity is the charterer, it shall refund to USAID any address commission received by it. If the supplier of the commodity is not the charterer, the borrower/grantee shall be responsible for making a refund to USAID of any such commissions received by the charterer.

§ 201.66 Side payments.

Any payment which an importer makes to a supplier, whether or not indicated on the supplier's invoice and whether or not financed by USAID, in connection with an USAID-financed transaction, shall be disclosed by the supplier on the Supplier's Certificate and shall be considered as part of the actual purchase price in applying the rules of this subpart G.

§ 201.67 Maximum freight charges.

(a) *Ocean freight rates*—(1) *Similar shipments. Similar shipments* means shipments which are similar with respect to type of commodity, commodity rate classification, quantity, vessel flag category (U.S.-or foreign-flag), choice of ports, and other pertinent factors. In determining whether shipments are similar, no effect shall be given to the identity of the shipper or the circumstance that the shipment is or is not financed by the Government of the United States.

(2) *Maximum charter rates.* (i) USAID will not finance ocean freight under any charter which has not been submitted to and received prior approval by USAID/W. USAID will not approve a charter if the freight rate exceeds:

(A) The rate prevailing for similar shipments; or

(B) The lowest rate charged by the vessel for similar shipments on the same voyage.

(ii) In determining the rate prevailing for similar shipments, recognized sources of charter market rate information will be consulted and, if necessary, will be supplemented by other information which contributes to a realistic determination of the prevailing charter rate.

(3) *Effect of USAID approval of a charter.* USAID prior approval of a charter shall be confirmed by USAID in writing and shall then be final except in cases where the freight rate exceeds the lowest rate charged by the vessel for similar shipments on the same voyage or where USAID's prior approval is based on false or misleading representations made to USAID by the charterer or vessel owner(s).

(4) *Maximum liner rates.* USAID will not finance ocean freight for a cargo liner shipment at a rate which exceeds the lowest of the following:

(i) The conference contract rate or the conference noncontract rate, whichever is lower;

(ii) The rate named in any tariff or other rate listing for the same destination and commodities on file at the Federal Maritime Commission; or

(iii) The lowest rate charged by the VOCC for similar shipments on the same voyage.

(5) *Despatch.* (i) The borrower/grantee, or the supplier with respect to despatch earned by the supplier, shall be responsible for refunding to USAID all despatch earned:

(A) At the port of unloading on c.i.f. or c. & f. shipments, or

(B) At the port of loading or unloading on f.o.b. or f.a.s. shipments, to the extent that despatch exceeds demurrage incurred on the same voyage.

(ii) Refunds of despatch, supported by the vessel's signed laytime statement(s), must be transmitted to the Office of Financial Management, USAID, Washington, DC 20523–7702, within 90 days after date of discharge of cargo on which the despatch was earned.

(b) *Airfreight rates*. USAID will not finance airfreight which exceeds the following:

(1) The rate under any air charter approved by USAID covering the transaction;

(2) The lowest rate charged by the carrier for similar shipments on the same flight; or

(3) The rate prevailing in the industry for similar shipments. A similar shipment is one which is similar with respect to type of commodity, commodity rate classification, quantity, flag category, choice of airport, and other pertinent factors.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.68 Maximum prices for commodity-related services.

(a) The price for an USAID-financed commodity-related service, other than ocean or air transportation, shall not exceed the lower of:

(1) The prevailing price, if any, for the same or similar services; or

(2) The price paid to the supplier under similar circumstances by other customers.

(b) The eligible price of services covered by an NVOCC bill of lading is limited to the sum of the costs of individual delivery services eligible under § 201.13 of this part, and only to the extent that the cost of each such service is eligible for USAID-financing under § 201.67 or § 201.68(a) of this part.

§ 201.69 Cooperating country taxes and fees.

USAID will not finance any taxes or fees imposed under the laws in effect in the cooperating country, including customs duties, consular and legalization fees, and other levies.

Subpart H—Rights and Responsibilities of Banks

§ 201.70 Purpose.

This subpart sets forth the rights and responsibilities of banks with regard to reimbursement under a letter of commitment opened pursuant to an USAID request. Banks will not be held responsible for the requirements of subparts B, C, D, E (excluding § 201.44(a)(1)), and subpart G except insofar as provisions of these subparts are included in this subpart H or in a letter of commitment issued by USAID to a bank.

§ 201.71 Terms of letters of credit.

Any letter of credit issued, confirmed or advised under an USAID letter of commitment and any agreement relating to such letter of credit or to instructions for payment issued by an approved applicant shall not be inconsistent with or contrary to the terms of the letter of commitment. Any such letter of credit or agreement may be modified or extended at any time in such a manner and to such extent as is acceptable to the approved applicant and the bank: *Provided*, That such modification or extension may not be inconsistent with or contrary to the terms of the letter of commitment. In the case of any inconsistency or conflict between the terms and conditions of the letter of commitment and the instructions of the approved applicant, the terms and conditions of the letter of commitment shall control.

§ 201.72 Making payments.

(a) *Collection of documents*. The bank shall be responsible for obtaining the documents specified in subpart F and in the letter of commitment when making payment under a letter of credit pursuant to instructions of an approved applicant.

(b) *Examination of documents other than Supplier's Certificate*. The bank shall examine the documents (other than the Supplier's Certificate and the Commodity Approval Application) to be submitted to USAID in accordance with good commercial practice to determine whether such documents comply with the requirements of paragraphs (b) (1) through (7) of this section in the following particulars, and no other.

(1) *Shipment*. The documents submitted as evidence of the shipment of commodities under § 201.52(a)(4) shall be dated within the shipping period, if any, specified in the letter of commitment. The bill of lading shall contain the carrier's statement of charges whether or not freight is financed by USAID.

(2) *Source of commodities.* The documents submitted in connection with the claim for reimbursement on commodities may not indicate that the source of the commodities is inconsistent with the USAID geographic code designation contained in the letter of commitment.

(3) *Destination.* The documents submitted shall indicate that the destination of the commodities, by shipment, transshipment, or reshipment, is the cooperating country named in the letter of commitment.

(4) *Description.* The documents shall describe and identify the commodities or services in a manner which, according to good commercial practice, is not inconsistent with the description contained in the letter of credit or payment instructions issued under a letter of commitment. The bank shall not be required to determine whether the supplier's invoice meets the detailed requirements of § 201.52(a)(2)(i).

(5) *Discounts and purchasing agents' commissions.* If the documents disclose that the invoice price includes either discounts or commissions payable to purchasing agents, the bank shall not make payment of such discounts and commissions. In the absence of such information, however, the bank shall not be required to make independent inquiry as to whether the invoice price includes such items.

(6) *Certifications.* Each supplier's invoice presented for payment shall contain such other certifications as may be required in the letter of commitment. The bank shall accept only certifications which, to the best of its knowledge and belief, have been signed by hand.

(7) *Other requirements.* The documents submitted shall contain such other information as required by the letter of commitment, except that the bank shall have responsibility in this regard only to the extent specifically indicated in the letter of commitment.

(c) *Acceptance of certificates.* A bank shall not accept for submission to USAID the original of the Supplier's Certificate, or the Commodity Approval Application, unless, to the best knowledge and belief of the bank, each such original has been signed by hand by the supplier and the Commodity Approval Application has been countersigned by USAID.

§ 201.73 Limitations on the responsibilities of banks.

The following general limitations on the responsibilities of banks issuing, advising, or confirming letters of credit and making payments under letters of credit or otherwise shall apply.

(a) *Sufficiency and completeness of documents.* Any document, including the Supplier's Certificate and the Commodity Approval Application, submitted by a bank to USAID in support of a claim for reimbursement, shall be sufficient if it purports to be the sort required to be delivered and if it has been accepted by the bank in the ordinary course of business in good faith. Except as may be required in the discharge of its responsibilities under § 201.72 (b) and (c), the bank's right of reimbursement shall not be affected by the fact that any document required to be submitted by it is incomplete or may indicate noncompliance with any provision of this part.

(b) *Reimbursement right notwithstanding certain deficiencies.* A bank's right to reimbursement from USAID for payments which the bank has made will not be affected by the fact that the Commodity Approval Application or the Invoice-and-Contract Abstract on the reverse of the Supplier's Certificate may be incomplete, or may indicate noncompliance with any provision of this part 201, the letter of commitment, or any other implementing document, or may be inconsistent with other documents required for reimbursement.

(c) *Nonresponsibility of bank for truth or accuracy of statements or certifications.* The bank shall not be responsible for the truth or accuracy of any information or statement contained in any Supplier's Certificate or any other document certification to be submitted by it to USAID, notwithstanding any knowledge or information in the actual or constructive possession of the bank to the contrary. The bank shall not be obligated to look beyond the documents, including any certifications endorsed thereon, to be submitted by it or to make any independent investigation as to the truth or accuracy of any

information or statement contained therein.

(d) *Protection of bank making payment.* Acceptance by the bank of any document in the ordinary course of business in good faith as being a genuine and valid document and sufficient in the premises, and the delivery thereof to USAID, shall constitute full compliance by the bank with any provision of this part, the letter of commitment requiring delivery of a document of the sort that the document actually so delivered purports to be. The bank shall be entitled to receive and retain reimbursement of the amount of all payments made by it against documents so accepted, notwithstanding that such payments may be made in connection with a purchase in excess of the price calculated in accordance with the applicable provisions of subpart G.

(e) *Payment to third persons.* The bank's right of reimbursement shall not be affected by the fact that payment is made to the approved applicant or at the request of the approved applicant or such beneficiary to a person other than the supplier under the contract to which such payment relates, if the bank has complied with all other requirements of the letter of commitment and has satisfied itself in good faith that the person to whom it makes payment has, in turn, made payment to the supplier.

(f) *Bank procedures with regard to certain suppliers.* In the event a bank receives written advice from USAID concerning special conditions which are applicable to transactions of particular suppliers, such bank will use reasonable care to maintain procedures designed to ensure that accommodations thereafter furnished by it with respect to such suppliers by means of the issuance, confirmation, advising or transfer of letters of credit, or the making of payments not under letters of credit shall reflect such special conditions. While banks are expected to comply with the foregoing obligation, a bank which has used reasonable care to establish and maintain such procedures will not be responsible for any inadvertent furnishing of any such accommodation not containing applicable special conditions or the making of payment thereunder. For the purpose of ascertaining whether the supplier is a person or organization subject to an USAID advice concerning special conditions applicable to its transactions under this paragraph, a bank, in making payment under a letter of credit or otherwise, may consider as supplier the person or organization issuing the invoice.

(g) *Provision of implementing documents.* A bank shall not be responsible for compliance with any provision of an implementing document other than a letter of commitment.

§ 201.74 Additional documents for USAID.

In addition to the documents required for reimbursement, a bank shall retain in its files for a period of at least 3 years and shall make available to USAID promptly upon request a copy of any of the following documents which may pertain to an USAID-financed transaction:

(a) Each letter of credit issued, confirmed, or advised by it, together with any extension or modification thereof;

(b) Payment instructions received from the approved applicant;

(c) Each application and agreement relating to such letter of credit or instructions for payment, together with any extension or modification thereof;

(d) A detailed advice of the interest, commissions, expenses, or other items charged by it in connection with each such letter of credit or payment instructions.

§ 201.75 Termination or modification.

If USAID directs that the delivery of commodities be terminated, orders that title to commodities be vested in it, or modifies any implementing document concerning the disposition of documents, USAID shall give written notice thereof to the banks holding applicable letters of commitment and shall instruct each bank with regard to the disposition of documents. Each such bank shall be relieved of any liability whatsoever to the approved applicant for anything done or omitted to be done under instruction of USAID. Notwithstanding the foregoing, a bank shall comply with the instructions of USAID only to the extent that it may do so without impairing or affecting

any irrevocable obligation to any person or organization except an approved applicant, and in the event the bank shall incur any costs, expenses, or liabilities, including any liability to the approved applicant, it shall be repaid and reimbursed by USAID in respect thereof.

Subpart I—Rights and Remedies of USAID, and Waiver Authority

§ 201.80 Purpose.

This subpart sets forth certain USAID rights and remedies against borrower/grantees and suppliers, and prescribes certain general provisions relating to the waiver by USAID of this part.

§ 201.81 Rights of USAID against borrower/grantees.

If any transaction financed hereunder violates the requirements of this part or any U.S. statute or any rule or regulation of USAID promulgated under any such statute, USAID may require the borrower/grantee to refund the amounts USAID determines are attributable to such violation and may exercise any right of acceleration or termination contained in the implementing document. The borrower/grantee shall be deemed to have agreed to make such refund or accelerated payment promptly upon request by USAID and shall be deemed to have consented to any modification of the implementing document determined by USAID to be necessary to reflect any such refund or acceleration.

§ 201.82 Rights of USAID against suppliers.

Without limiting the responsibility of the borrower/grantee or other parties, USAID may require an appropriate refund to it by a supplier under any transaction which violates the requirements of this part, whenever in USAID's opinion the failure of the supplier to comply with the rules and other requirements of this part has contributed to such violation. Any refund requested will include interest from the time of payment to the supplier. Interest will be charged at the rate established by the Secretary of the Treasury in accordance with the Internal Revenue Code, 26 U.S.C. 6621(b).

§ 201.83 No waiver of alternative rights or remedies by USAID.

No right reserved to USAID in this subpart to seek a refund from a borrower/grantee, and no exercise of such right, whether or not successful, shall in any way limit or affect, under the doctrine of the election of remedies or otherwise, USAID's rights against a supplier under this subpart I or under the laws of the United States, or of any other country or political subdivision thereof, nor shall any right or remedy herein reserved to USAID against a supplier in any way derogate from or otherwise limit any other rights or remedies which may accrue to USAID under such laws.

§ 201.84 Limitation on period for making refund requests.

USAID will endeavor, but shall not be bound, to make any requests for refunds from a borrower/grantee within three years from the date of the last disbursement of USAID funds for the transaction to which such request relates.

§ 201.85 Legal effect of USAID approvals and decisions.

In any transaction subject to this part 201, USAID may reserve certain rights to approve the transaction for USAID-financing. USAID, in reserving any approval rights, acts solely as a financing entity to assure the proper use of United States Government funds. Any decision by USAID to exercise or refrain from exercising these approval rights shall be made as a financier and shall not be construed as making USAID a party to the contract or incurring any liability to the parties jointly or to any of them.

§ 201.86 Waiver and amendment authority.

USAID may waive, withdraw, or amend at any time any or all of the provisions of this part.

APPENDIX A TO PART 201—SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID 282)

INVOICE-AND-CONTRACT ABSTRACT

1. COMMODITY SUPPLIER'S NAME AND ADDRESS

2. FOR A.I.D. USE

3. A.I.D. IMPLEMENTATION NUMBER

4. IMPORTER'S NAME AND ADDRESS

5. VESSEL

6. FLAG

7. PORT OF LOADING

8. COMMODITY INFORMATION

a. Description of Commodity and Schedule B No.	b. Gross Weight	c. Measurement

9. INVOICE INFORMATION

a. Number

b. Date

c. Amount After Discount

10. CONTRACT INFORMATION

a. Number

b. Date

c. Total Amount

d. Source/Origin (Country)

11. SUPPLIER INFORMATION

a. Small Business ☐ Yes ☐ No (Complete b)

b. Estimated Value (% of Block 9c) Furnished From Small Businesses _____%

c. Socially and Economically Disadvantaged Enterprise ☐ Yes ☐ No (Complete d)

d. Estimated Value (% of Block 9c) Furnished From Socially and Economically Disadvantaged Enterprises _____%

e. Women-Owned Business ☐ Yes ☐ No (Complete f)

f. Estimated Value (% of Block 9c) Furnished From Women-Owned Business _____%

12. INSURANCE INFORMATION

a. Insured Value

b. Premium

c. ☐ All-Risk Rate_____ ☐ War Risk Rate_____ ☐ Other (Specify) _____ Rate_____

13. TRANSPORTATION INFORMATION

a. Vessel Type ☐ Bulk ☐ Berth ☐ Tnkr. ☐ Air

b. B/L or Air Waybill Number

c. B/L or Air Waybill Date

d. Freight Rate

Other Freight Charges

Total Freight Charges

14. INFORMATION AS TO COMMISSIONS, CREDITS, ALLOWANCES, SIMILAR PAYMENTS, AND SIDE PAYMENTS

a. Recipient's Name	b. Recipient's Address	c. Amount Paid or To Be Paid

15. ADDITIONAL INFORMATION AND REMARKS

16. If Certification On Other Side Is Made By ☐ Carrier Or ☐ Insurer, Type Or Print Name And Address Of Company.

AID 282 (5-90) (OMB No. 0412-0012 Exp. 11/30/91) Page 1

SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT

The supplier hereby acknowledges that the sum claimed on the accompanying invoice to be due and owing under the terms of the purchase contract identified on the reverse hereof ('said contract') is to be paid, in whole or in part, out of funds made available by the United States Agency for International Development (A.I.D.) under the Foreign Assistance Act of 1961, as amended. In consideration of the receipt of such sum, the supplier agrees with and certifies to A.I.D. as follows:

1. The undersigned is the supplier of the commodities or commodity-related services indicated in the Invoice-and-Contract Abstract on the reverse hereof, has complied with the applicable provisions of Regulation 1 (22 CFR Part 201), as in effect on the date hereof is entitled under said contract and under the applicable letter of credit, credit advice, or other payment instructions to payment of the sum claimed, and is executing this Certificate and Agreement to obtain such payment from A.I.D. funds.

2. On the basis of information from such sources as are available to the supplier upon reasonable investigation and to the best of its information and belief, the purchase price is not higher than the maximum price permitted under each of the applicable price rules of suabpart G of A.I.D. Regulation 1.

3. The supplier will, upon request of A.I.D., promptly refund to A.I.D. any amount by which the purchase price exceeds the maximum price permitted under such provisions of subpart G of Regulation 1, plus interest from the time of payment to the supplier.

4. The supplier will, upon request of A.I.D., promptly make appropriate refund to A.I.D., plus interest from the time of payment to the supplier, in the event of

(a) its nonperformance, in whole or in part, under said contract, or including any failure to pay despatch or

(b) any breach by it of any of its undertakings in this Certificate and Agreement, or

(c) any false certification or representation made by it in this Certificate and Agreement or in the Invoice-and-Contract Abstract on the reverse hereof.

5. The amount shown on the reverse hereof in block 9c is net of all trade discounts, whether in the form of payments, credits, or allowances by the supplier or its agent to or for the account of the importer, including quantity and prompt payment discounts allowed other customers under similar circumstances. The supplier will promptly pay to A.I.D. (Office of Financial Management, A.I.D., Washington, D. C. 20523-0209) any adjustment refunds, credits, or allowances which hereafter become payable to or for the account of the importer arising out of the terms of said contract or the customs of the trade.

6. The supplier has complied with the provisions of Section 201.65 of A.I.D. Regulation 1 and has not compensated any person to obtain said contract except to the extent, if any, indicated on the reverse hereof.

7. The supplier or its agent has not given or received and will not give or receive a side payment, "kickback", commission, or any other payment, credit, allowance or benefit of any kind in connection with the said contract or any transaction or series of transactions of which said contract is a part, other than those payments or benefits permitted under Section 201.65 of A.I.D. Regulation 1 and those referred to in paragraphs 1 and 5 above.

8. Any commodity supplied under said contract

(a) is accurately described on the reverse hereof and, unless otherwise authorized by A.I.D., is new and unused, is not rebuilt or reconditioned, does not contain any rebuilt or reconditioned components, and has not been disposed of as surplus by any government agency; and

(b) on the basis of information from such sources as are available to the supplier upon reasonable investigation, and to the best of its information and belief, meets the requirements of Section 201.11(b) of A.I.D. Regulation 1 as to source, country where mined, grown, or produced, and limitation on components.

9. If the supplier is the producer, manufacturer, or processor of the commodity, said contract is not a cost-plus-percentage-of-cost contract.

10. The supplier will for a period of not less than three (3) years after the date hereof maintain all business records and other documents which bear on its compliance with any of the undertakings and certifications herein and will, at any time requested by A.I.D., promptly make such records and documents available to A.I.D.for examination and promptly furnish to A.I.D. additional information in such form as A.I.D. may request concerning the purchase price, the cost to the supplier of the commodities and/or commodity-related services involved, and/or any other facts, data, or business records relating to the supplier's compliance with its undertakings and certifications in this certificate and agreement.

11. The supplier has complied with the provisions contained and referred to in subpart D of A.I.D. Regulation 1.

12. The supplier was not ineligible to act as a supplier or otherwise participate in A.I.D.-financed transactions at the time of approval of the A.I.D. Commodity Approved Application.

13. The commodity supplier certifies that it has submitted a copy of every ocean bill of lading, applicable to the commodities and transactions described on the reverse hereof to: (i) the Maritime Administration, National Cargo Division, 400 Seventh Street, S. W., Washington, D. C. 20590-0001; and (ii) Office of Procurement, Transportation Division, A.I.D., Washington, D. C. 20523-1419; and that such bill(s) of lading state all the carrier's charges including the basis for calculation such as weight or cubic measurements.

14. The supplier has filled in all applicable portions of the Invoice-and-Contract Abstract on the reverse hereof and certifies to the completeness and correctness of the information shown therein.

PERSONAL CERTIFICATION BY NATURAL PERSON SIGNING THIS CERTIFICATE AND AGREEMENT

The natural person who signs this Certificate and Agreement hereby certifies either that he/she is the supplier or that he/she has actual authority to sign on behalf of the supplier and to bind the supplier with regard to all certifications and agreements contained in this Certificate and Agreement. He/she further certifies, if he/she is not personally the supplier, that he/she is either an employee of the supplier or has written power of attorney to sign for and bind the supplier. He/she acknowledges signing and submitting this Certificate and Agreement to receive payment from A.I.D. funds and that A.I.D. in making such payment will rely on the truth and accuracy of this Personal Certificate as well as of all other representations in this Certificate and Agreement.

The Supplier's Certificate and Agreement and the Personal Certificate herein shall be governed by and interpreted according to the laws of the United States of America.

_____

Type or print name and title of official authorized to sign

_____

Signature of official authorized to sign for (check one) Date

☐ Commodity Supplier ☐ Carrier ☐ Insurer

_____

Place executed (City, County, State, Country)

NOTES: (a) Any amendments of or additions to the printed provisions of this Supplier's Certificate and Agreement are improper and will not be considered a part hereof. (b) False statements herein are punishable by United States Law. (c) The word "Copy" must be written after the signature on all copies other than the original.

AID 282(5-90) (OMB No. 0412-0012 Exp. 11/30/91) Page 2

INSTRUCTIONS FOR COMPLETING FORM AID 282

PAPERWORK REDUCTION ACT NOTICE. Information furnished will be used to verify compliance with legal requirements, as a basis for recourse in the event of noncompliance, and to monitor participation in A.I.D. programs. It will be disclosed outside A.I.D. only as provided by law. Submission of this information has been determined to be necessary to receive payment from A.I.D. funds pursuant to 22 U.S.C. 2381.

Public reporting burden for this collection of information is estimated to average thirty minutes per response, including the 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to:

Agency For International Development
Office of Procurement Policy, Planning
& Evaluation, MS/PPE
Washington, D. C. 20523-1435;
and
Office of Management and Budget
Paperwork Reduction Project (0412-0020)
Washington, D. C. 20503

EXECUTION OF FORM. This form is designed for use with the U.S. Standard Master for International Trade. An original and one (1) copy of this form, completed by the following suppliers, as applicable, must accompany each invoice for which payment is requested:

(a) Commodity Supplier - executed by the commodity supplier covering the cost of the commodity, including the cost of any commodity-related service paid by the commodity supplier for its own or the buyer's account;

(b) Transportation Supplier (Carrier) - executed by each carrier or in the case of a through Bill of Lading, the issuing carrier, for the cost of the ocean or air transportation financed by A.I.D., whether or not the transportation is paid by the commodity supplier;

(c) Insurance Supplier (Insurer) - executed by the insurer (or under the circumstances set forth in Section 201.52(b) (2) of A.I.D. Regulation 1, by an insurance broker or the commodity supplier), whether or not the insurance is paid by the commodity supplier, for the cost of marine insurance financed by A.I.D. when such cost exceeds $50.

The original *must* be signed by a person authorized by the supplier who shall indicate his/her title and certify to his/her authority.

LANGUAGE. The form must be completed in the English language *only* and all amounts of money must be shown in U.S. dollars.

OBTAINING FORMS. The form (as well copies of A.I.D. Regulation 1 referenced in this form) may be obtained in limited quantities from banks holding A.I.D. Letters of Commitment, from district offices of the Department of Commerce, the A.I.D. office in the supplier's country, or the Resources Management Division, Agency for International Development, Washington, D. C. 20523-1410. The form may be reproduced, providing the reproduction is identical in size and format.

INSTRUCTIONS FOR COMPLETING ENTRIES ON INVOICE-AND-CONTRACT ABSTRACT

GENERAL INSTRUCTIONS

Except as provided in the instructions for specific blocks, suppliers must complete all blocks or enter the letters 'NA' (Not Applicable), as follows:

Commodity Supplier - Complete all Blocks except 12 and 13; however, if the commodity supplier has paid for the transportation and/or insurance for its own or the buyer's account, Blocks 12 and/or 13 will also be completed by the commodity supplier. Block 11 is to be completed only when the address in block 1 is a U.S. address.

Transportation Supplier (Carrier) - Complete Blocks 1 through 8 as well as 13, 14, and 16.

Insurance Supplier (Insurer) - Complete Blocks 1 through 8a as well as 12, 14, and 16.

INSTRUCTIONS FOR INDIVIDUAL BLOCKS

Block 1: Enter the commodity supplier's name and address. *Caution: if the form is executed by the carrier or the insurer, enter the commodity supplier's name and address in Block 1 and complete Block 16.*

BLOCK 2: For A.I.D. use *only*.

BLOCK 3: Enter A.I.D. implementing document number furnished in the Letter of Credit or Importer's instructions. This number will normally be the Letter of Commitment number.

BLOCK 4: ENTER THE IMPORTER'S NAME AND ADDRESS. *Caution: on other documents prepared from the Standard Master, such as the Bill of Lading, the corresponding block may call for the name and address of the party whom the carrier is to give notice of arrival. When such party is not the importer; be sure to enter the importer's name and address.*

BLOCK 5: Enter the name of the vessel.

BLOCK 6: Enter the flag of registry.

BLOCK 7: Enter the port shown on the Bill of Lading.

BLOCK 8: COMMODITY INFORMATION

a. Enter the description of each commodity and its U.S. Department of Commerce Schedule B number, if available. For multi-item invoices, enter a summary description of the group of items and the appropriate Schedule B number (s), if available.

b. Enter the Bill of Lading weight.

c. Enter the Bill of Lading measurement.

BLOCK 9: INVOICE INFORMATION

a. Enter the number of the accompanying invoice to which this abstract relates.

b. Enter the invoice date.

c. Enter the net amount for which the supplier seeks payment (*see paragraphs 5 and 6 of the Supplier's Certificate*).

BLOCK 10: CONTRACT INFORMATION

a. Enter the contract number.

b Enter the date of the contract.

c. Enter the total contract amount

d. Enter the country of source as defined in Section 201.01 of A.I.D. Regulation 1.

BLOCK 11: SUPPLIER INFORMATION

Complete *only* when a U.S. address is indicated in Block 1. The information is required to enable A.I.D. to compile reports requested by Congress.

a. Indicate whether the supplier is a small business concern as defined in FAR 19.101 (CFR Title 48). "Small business concern" means a concern, including its affiliates, that is independently owned and operated (for profit), not dominant in its field of operations, and qualified as a small business under the criteria and size standards in 13 CFR 121 (see FAR 19.102). If there is no size standard in 13 CFR 121 for the industry, field of operation, or activity in which a concern is engaged, the concern is a small business if, including its affiliates, it is independently owned and operated (for profit), is not dominant in the field of operation, and, for manufacturing concerns -- has no more than 500 employees, or for concerns offering services -- its average annual receipts for its preceding 3 fiscal years do not exceed $3.5 million.

b. If the supplier is not a small business, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are small business concerns.

c. Indicate whether the supplier is an socially and economically disadvantaged enterprise. "Socially and economically disadvantaged enterprise" means a business-

(i) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by one or more socially disadvantaged individuals, and

(ii) whose management and daily business operations are controlled by one or more such individuals.

"Socially disadvantaged" individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

INSTRUCTIONS FOR COMPLETING FORM AID 282

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged. Women and individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged.

"Subcontinent Asian Americans" means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.

"Asian Pacific Americans" means United States citizens whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia.

"Native Americans" means American Indians, Eskimos, Aleuts, and native Hawaiians.

d. If the supplier is not a socially and economically disadvantaged enterprise, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are socially and economically disadvantaged enterprises.

e. Indicate whether the supplier is a women-owned business. "Women-owned business " means a business which is at least 51 percent owned by one or more women who are United States citizens and who also control and operate the business.

f. If the supplier is not a women-owned business, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are women-owned businesses.

BLOCK 12: INSURANCE INFORMATION

COMPLETE BLOCK 12 *only* if the insurance premium exceeds $50.

a. Enter the insured value of the shipment.

b. Enter the total premium.

c. Enter the type of coverage and insurance rate. If "Other" is checked, explain below or in Block 15.

BLOCK 13: TRANSPORTATION INFORMATION

a. Check vessel type.

b. Enter Bill of Lading or air waybill number.

c. Enter Bill of Lading or air waybill date.

d. Enter the freight rate, other freight charges and the total dollar amount of freight charges after discount.

BLOCK 14: INFORMATION AS TO COMMISSIONS, CREDIT, ALLOWANCES, SIMILAR PAYMENTS AND SIDE PAYMENTS

Enter information on (a) all commissions and other payments, credits, allowances or benefits of any kind, paid or to be paid by the supplier to or for the benefit of its agent, the importer, or the importer's agent as required by Section 201.65 of A.I.D. Regulation 1; and (b) any side payments, not shown on the invoice, made or to be made by the importer to the supplier, in connection with the transaction, as required by Section 201.66 of A.I.D. Regulation 1. If there is insufficient space to furnish the required information in block 14, continue in block 15 or enter "Continued" or "See attached" in block 14a, and attach a separate sheet to the form. If no commissions or other payments, credits, allowances, benefits, or side payments are involved, enter "NONE" in block 14.

BLOCK 16: If the Supplier's Certificate is completed by the carrier or insurer, check the appropriate box and print or type carrier's or insurer's name and address.

DO NOT INCLUDE THE INSTRUCTIONS ON PAGES 3 AND 4 WITH THE SUBMISSION OF THE COMPLETED FORM.

APPENDIX B TO PART 201—APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY (AID 11)

OMB No. 0412-0004
Expiration Date: 5/31/93

APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY | **Transaction No.** *(Assigned by A.I.D.)*

TRANSACTION IDENTIFICATION

1. AID No.	2. Payment Terms			
	Letter of Credit		Name and Address of U.S. Bank	Other Payment Terms
	No.	Date		

3. Import License		4. Supplier's Relationship to Authorized Source Country
No.	Date	☐ Corporation or Partnership Organized under Source Country Laws ☐ Individual: Citizen or Permanent Resident of Source Country ☐ Controlled Foreign Corporation ☐ Other

5. Supplier's Name and Address	6. Importer's Name and Address

7. Contract		8. Shipping Plans at Time of Application			
Total Amount	Date	a. Partial Shipment ☐ No ☐ Yes $ _____	b. Loading Port	c. Destination Port	d. Month(s) of Shipment

COMMODITY IDENTIFICATION

9. Schedule B 10-Digit Code(s)	10. Commodity Description, Quantity, Size	11. Unit and Unit Price, FAS/FOB Vessel *(Named Port of Loading)*
(a)		
(b)		
(c)		
(d)		
(e)		

12. Commodity Condition:
- ☐ New and Unused
- ☐ Used - Not Rebuilt or Reconditioned
- ☐ Rebuilt
- ☐ Reconditioned
- ☐ Other

13. Source			14. Components		
a. Authorized Area	b. Shipped From	c. Produced In	a. From Other than 13.a Source ☐ Yes ☐ No	b. If 14.a is "Yes", Country Imported From	c. Cost Per Unit of 14.b Components

AID 11 (6-90)

AID 11 (6-90) Back

OMB No. 0412-0004
Expiration Date: 5/31/93

15. Remarks and Additional Information

16. SUPPLIER'S CERTIFICATIONS

As a condition for securing a determination of commodity eligibility for funds made available by the United States under the Foreign Assistance Act of 1961, as amended, in payment in whole or in part in the transaction described and for the commodity identified on this form, the undersigned, acting on behalf of the supplier whose name appears in block 5 above and authorized to bind the supplier, agrees with and certifies to A.I.D. as follows:

1. The supplier has contracted with the importer named in block 6 for the purchase of the commodity described on this form, and the supplier has either attached to this form a copy of such contract or has furnished in block 2 information concerning a letter of credit confirmed or advised in its favor under a payment obligation assumed by the importer in the contract.

2. The supplier has filled in the applicable portions of this form and certifies to the correctness of the information shown herein.

3. The supplier agrees that the commodity will be shipped and invoiced in accordance with the information shown herein; that if any change in commodity identification takes place after A.I.D. has approved this transaction, the supplier will resubmit this form to A.I.D. for review and further approval for financing in light of the changed commodity; and that this Commodity Approval Application which the supplier proposes to use as a basis for securing payment from A.I.D. funds, is in every respect the original or true copy of the original application approved by A.I.D. The supplier acknowledges that any commodity, other than a commodity described on this form by the supplier and approved by A.I.D. below, is ineligible for A.I.D. financing with respect to the purchase transaction for which this form must be submitted as a condition for payment.

4. The supplier certifies that it is an individual citizen or lawfully admitted permanent resident of a country included in the authorized source code; a corporation or partnership organized under the laws of a country included in the authorized source code and with a place of business in such country; or a controlled foreign corporation (within the meaning of § 957 et seq. of the Internal Revenue Code) as attested by current information on file with the Internal Revenue Service of the United States (on IRS Form 959, 2952, 3646, or any substitute or successor forms) submitted by shareholders of the corporation, or a joint venture or unincorporated association consisting entirely of individuals, corporations or partnerships which fit any of the foregoing categories. If the supplier is a controlled foreign corporation without a regular place of business in the United States, the supplier appoints any shareholder or officer thereof agent for the supplier to receive service of process in the United States in connection with any dispute arising between the supplier and A.I.D. and relating to the commodity sale financed by A.I.D.

5. The supplier has not, at the time of submission of this application, been debarred or suspended by A.I.D. or placed on the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs," published by the General Services Administration, or the Treasury Department's "Consolidated List of Designated Nationals", and thereby rendered ineligible to receive A.I.D. funds. To the best of its knowledge upon reasonable investigation, the supplier has not acquired, nor will it acquire, for resale under A.I.D. financing the goods described on this form from any supplier included on the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs," or included on the Treasury "Consolidated List of Designated Nationals" or from any affiliate of such a person.

6. The supplier acknowledges that this application, when approved, is not valid for shipments having a delivery date on or after the expiration date shown below.

Typed or Printed Name and Title | *Signature of Authorized Representative of Supplier* | *Date*

17. A.I.D. APPROVAL

By the signature and seal which appear below, A.I.D. has given limited approval to the sale described on this form. This approval is limited strictly to a determination that the commodity which the supplier has described is of a description, condition, and source eligible for A.I.D. financing. This approval and determination of commodity eligibility do not represent an approval of the purchase price and do not in any way preclude an A.I.D. refund claim based upon a detailed post-audit of the transaction in accordance with the provisions of A.I.D. Regulation 1 (22 CFR Part 201). A.I.D. expressly reserves such rights as it may have under that Regulation and under such other A.I.D. forms as the supplier may be required to submit by the terms of financing documents and by the terms of Regulation 1.

APPROVED FOR A.I.D._____
Authorized signature

EXPIRATION DATE_____

_____
Date

18. CERTIFICATE FOR PARTIAL SHIPMENT

I hereby certify that the partial shipment for which payment is being requested from A.I.D. funds is being made under the contract by the original validated form AID 11 of which this is a true copy.

Typed or Printed Name and Title | *Signature of Authorized Representative of Supplier* | *Date*

AID 11 (6-90)

OMB No. 0412-0004
Expiration Date: 5/31/93

GENERAL INSTRUCTIONS

Paperwork Reduction Act Notice. Information furnished will be used to verify compliance with legal requirements, as a basis for recourse in the event of noncompliance, and to monitor participation in A.I.D. programs. It will be disclosed outside A.I.D. only as provided by law. Submission of this information has been determined to be necessary to receive payment from A.I.D. funds pursuant to 22 U.S.C. 2381.

Public reporting burden for this collection of information is estimated to average fifteen minutes per response, including the 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to:

Agency for International Development
Office of Procurement Policy, Planning &
Evaluation, MS/PPE
Washington, D. C. 20523-1435;
and
Office of Management and Budget
Paperwork Reduction Project (0412-0020
Washington, D. C. 20503

Requirement for Payment. Section 201.11(k) of A.I.D. Regulation 1 declares that a commodity purchase transaction is eligible for A.I.D. financing only if A.I.D. provides a determination of the commodity eligibility on the Commodity Approval Application. Section 201.52(a)(8) of the Regulation states that to secure payment a supplier must submit the signed original of this form, countersigned by A.I.D. As appropriate, a reproduced copy of the validated form, certified as provided in the second paragraph following, is required with each subsequent claim for partial shipments made under the original validated form AID-11. Alterations to Block 16 are not acceptable.

Approval by A.I.D. To secure A.I.D. approval, a supplier must submit the signed and properly executed original and one copy of the form, addressed to the Agency for International Development, Office of Procurement, Washington, D. C. 20523-1412. A.I.D. will indicate its approval in Block 18 of the form if the form is properly executed and if A.I.D. has no objection to financing the described commodity. If A.I.D. refuses approval, the Agency will return the form to the supplier with an explanation for refusal. In either case, an identification number will be assigned by A.I.D. in the upper right-hand corner of the form. Any follow-up correspondence between the supplier and A.I.D. should refer to this number.

Partial Shipments. In the event a supplier expects to make more than one shipment under a single contract, letter of credit, or collection document, it may either submit a separate form AID-11 covering each shipment, or submit a single form AID-11 covering the entire contract. In the latter case, the original AID-approved form will be presented to the paying bank with the supplier's first request for payment and a reproduced copy of the approved form, properly certified in Block 18, will be presented with each request for payment for subsequent partial shipments. See detailed instructions for Block 8.

Duration of A.I.D. Approval. A.I.D. approval remains valid for 6 months as evidenced by the expiration date entered by A.I.D. in Block 17. If the letter of credit is valid for a longer period, upon request from the supplier and submission of a copy of the letter of credit, A.I.D. will provide an approved expiration date corresponding to the expiration date of the letter of credit. If the A.I.D. approval expires prior to delivery, the supplier must reapply for approval, making reference to the transaction number assigned by A.I.D.

Timing of Submission. Under letter of credit financing the application should be submitted subsequent to receiving confirmation or advice of credit, but prior to shipment. The form may, however, be submitted prior to receipt of such credit provided that an original or true copy of the purchase contract accompanies the application. Under any other method of financing, the application will be submitted following receipt of instructions that the transaction is to be A.I.D.-financed and must be accompanied by an original or true copy of the contract with the importer. The form should not be submitted prior to the time supplier is able to furnish all required information in Blocks 12 through 15.

Language. Every commodity description which appears on the form must be stated in English. If a supplier furnishes as an attachment to this form a contract in a language other than English, an English translation of the commodity description must also be furnish.

Completeness. All numbered Blocks MUST be fully and appropriately completed. If the application contains incomplete blocks, it will NOT be processed but will be returned for completion.

Obtaining Forms. Forms may be obtained in limited quantities from banks holding A.I.D. letters of commitment, field offices of the Department of Commerce, the A.I.D. office in the supplier's country, or the Resources Management Division , Agency for International Development, Washington, D. C. 20523-1410. A supplier may reproduce the form provided the reproduction is identical with the original copy in every respect, including size, color, and format. A supplier may overprint its name and address in Block 5.

INSTRUCTIONS RELATING TO SPECIFIC ITEMS

BLOCK 1: Enter the letter of commitment number. If not available, enter the loan or grant agreement number. A.I.D. cannot act on an application unless one of these numbers is provided.

BLOCK 2: Indicate the method of financing. If by letter of credit, enter the letter of credit number assigned by the U.S. bank, the date the bank issued, advised, or confirmed the letter of credit, and the name and address of the bank concerned. If the application is submitted prior to receipt of this information, enter the words "Firm contract" and attach a copy of the contract.

If the transaction is not to be financed by letter of credit, enter the applicable payment terms (e.g., sight draft collection, open account) and attach a copy of the contract.

BLOCK 3: The importer should provide the supplier with this information. Generally the import license number appears on the letter of credit. If the information is not known or is not available at the time of submission of the application, enter "Unknown." (In some cases it may be necessary for A.I.D. to require this information before approving the application.)

Enter "N/A" (not applicable) if the importer has not been required by its government to secure an import license.

BLOCK 4: Check the appropriate box to indicate the supplier's relationship to a country or area in the authorized source code. This information relates to certification 4 in block 16. If "Other" is checked, furnish explanation of relationship in block 15.

BLOCK 5: Enter name and address. Please center the information in order to permit A.I.D. to use a window envelope in returning the form.

BLOCK 7: Enter the total purchase price, i.e., the total remuneration (in whatever currency and whether to be paid directly to the supplier or in whole or in part to a designee of the supplier) to be received under the contract. Enter contract date or date pro forma invoice was accepted.

AID 11 (6-90)

OMB No. 0412-0004
Expiration Date: 5/31/93

BLOCK 8: (a) Check the appropriate box to indicate whether the supplier expects to make partial shipments. If "yes" and a separate application form will be submitted for each partial shipment, enter the value of the shipment to which this application relates if only one application form will be submitted to cover all partial shipments, omit the dollar value.

(b) Enter the proposed loading port. If only the range of ports is known, enter the range of ports; e.g., North Atlantic, South Atlantic, Gulf, Pacific, Great Lakes. If expected that partial shipments will be made, but only one application form is to be submitted, entries under (b) and (c) will relate to the first shipment only.

(c) Enter the proposed destination port.

(d) Enter the month in which it is expected shipment will be made. In the case of partial shipments, indicate the estimated first and last months of shipments: e.g., April-September.

BLOCKS 9 and 10: Enter the U.S. Department of Commerce Schedule B 10-digit code in block 9 and describe the commodity in block 10, giving size, quantity, and a clear word description of the commodity, including any special formula or other distinguishing characteristics, such as substandard quality (e.g., reject, imperfect, second) which will help to identify it.

If the contract or letter of credit identifies the commodity by other than Schedule B code (e.g., importing country tariff classification), this identification should be furnished as part of the commodity description.

If the commodity description varies significantly within the same Schedule B Code, separate entries must be furnished for each commodity.

BLOCK 11: Enter the unit and unit price for the commodity on an FAS or FOB basis for the loading port specified in block 8.(b). For other delivery terms, enter a constructive price FAS or FOB vessel; i.e., subtract from a C&F or CIF price estimated ocean freight and marine insurance, or add to an inland price (e.g., ex plant, FOB rail cars (named point)) the estimated inland freight and accessorial costs necessary to place the commodity in the custody of the ocean carrier.

If the supplier is unable to compute a unit price FAS or FOB vessel, the unit price of the commodity may be shown on the basis of the inland price with estimated inland freight cost, if available, footnoted in an explanatory entry in block 15.

SPECIAL INSTRUCTIONS--MULTIPLE ITEMS: If the shipment (or contract) is made up of commodities bearing differing Schedule B codes, or if the commodity description varies significantly within the same Schedule B code, separate entries must be furnished for each code or description. When there are six or more items to be listed in blocks 9 through 11, a signed and dated accepted contract, order, invoice, or other separate listing of the information may be attached to the original and copy of the form AID 11, provided the full 10-digit Schedule B code, complete and accurate description of the commodity, and FAS or FOB vessel unit price are shown for each. If the information required by Clocks 12 through 14 is not common to all commodities listed, appropriate information related to each such commodity is also required to be shown either on the attachment or in the blocks 12 through 14 and related to the appropriate line of the attachment. If an attachment is used in lieu of entry of the information on form AID-11, complete blocks 9-11 inclusive, and 12-14 inclusive (when applicable) by entering the words "See attachment.

SPECIAL INSTRUCTIONS--BLOCKS 12 through 14: If more than one commodity is listed in block 9, provide information required by blocks 12 through 14 on separate lines in those blocks, identified to the corresponding line on which the commodity is listed in block 9. For example, information concerning a commodity listed on line (c) in block 9 would be identified as line (c) in block 12 through 14. When only one form AID-11 is submitted, information in these blocks should be descriptive of the total contract. If a separate form AID-11 is submitted for each shipment under the contract, the information in these blocks should cover only that single shipment.

BLOCK 12: Enter check mark in the appropriate box to indicate the condition of the commodity. If the commodity is other than new and unused, describe the condition in the space below or in block 15. For this purpose, any commodity declared surplus by the U. S. Government agency and any commodity which has been rebuilt or reconditioned or contains components which have been rebuilt or reconditioned are not considered as "unused."

BLOCK 13: See § 201.11(b)(4) of A.I.D Regulation 1 for countries and areas included in geographic code numbers.

(a) Enter in block 13(a) the authorized geographic source area stated in the letter of credit or A.I.D. direct letter of commitment.

(b) Enter in block 13(b) the country from which the commodity will be shipped to the importer. If the commodity will be shipped from a free port or bonded warehouse, indicate this fact in block 16 and give location.

(c) Enter in block 13(c) the country in which the commodity has been or will be mined, grown, or produced through manufacturing, processing or assembly.

BLOCK 14: (a) Enter in block 14(a) "Yes" if the commodity includes components imported into the country of production from a country not included in the authorized geographic source area indicated in block 13(a). If such components are not included, enter "no."

(b) If block 14(a) "Yes," identify in block 14b each country from which components were imported into the country of production.

(c) In block 14(c), enter the total cost, within each unit of the finished product, attributable to components imported from each country indicated in blocks 14(b). If the suppliers unable to furnish the information required by block 14(b) and 14(c) at the time of submission of the application and no componentry percentage other than the 50 percent set forth in § 201.11(b)(2)(ii)(b) of A.I.D. Regulation 1 has been authorized for the commodity, A.I.D. will accept a statement in these blocks or in block 15 that (1) the commodity contains no components from other than "free world" countries, and (2) the total cost of components imported into the country of production from other than countries included in the authorized geographic source code (or the cooperating country itself whenever Code 941 is authorized) per unit of finished commodity is no more than 50 percent of the lowest selling price per unit at which the supplier makes the commodity available for export. If A.I.D. has authorized a percentage of such components other than 50 percent, the supplier should state such other higher or lower modification of the percentage rule, with a citation to the pertinent modification, and the actual percentage of such components in the product, or an affirmation that the percentage of such components is not in excess of the percentage allowed by A.I.D. The supplier should thereafter be prepared to demonstrate the accuracy of these statements upon the request of A.I.D.

BLOCK 15: This block may be used to furnish explanation or additional information in connection with any entries on the form. Identify block (and line, as appropriate) to which entry relates.

BLOCK 16: The supplier, or its authorized representative, must manually sign this certification, showing name, title and date signed.

BLOCK 17: For A.I.D. use. Note that A.I.D. approval is not valid for deliveries on and after the expiration date shown in this block.

BLOCK 18: If reproduced copies of this original form are presented with the supplier's request for payment (see fifth paragraph of General Instructions), the supplier or its authorized representative must manually sign this certification in block 18 of the reproduced form, showing name, title and the date signed.

PART 202—OVERSEAS SHIPMENTS OF SUPPLIES BY VOLUNTARY NON-PROFIT RELIEF AGENCIES

Sec.

202.1 Definition of terms.
202.2 Shipments eligible for reimbursement of freight charges.
202.3 Freight reimbursement limitations.
202.4 Certificates.
202.5 Approval of programs, projects and services.

202.6 Applications for reimbursement of freight charges.
202.7 Documentation required for reimbursement.
202.8 Refund by suppliers and/or agencies.
202.9 Waiver authority.
202.10 Participation by faith-based organizations.

AUTHORITY: 22 U.S.C. 2381(a).

SOURCE: 44 FR 41425, July 17, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 202 appear at 62 FR 38027, July 16, 1997.

§ 202.1 Definition of terms.

(a) *The Administrator* means the Administrator of the Agency for International Development.

(b) *The Committee* means the Advisory Committee on Voluntary Foreign Aid of the Agency for International Development.

(c) *Supplies* means development, relief and rehabilitation supplies shipped in support of programs approved by AID as well as administrative supplies and equipment shipped in support of such programs. In no case shall such supplies include items for the personal use of representatives of the registered agency.

(d) *Agency* or *agencies* means the American Red Cross and any United States voluntary non-profit relief agency registered with and approved by the Committee.

(e) *Duty free* means exempt from all customs duties, and other duties, tolls, and taxes of any kind.

(f) *Recipient country* means any country or area in which voluntary non-profit relief agencies registered with and approved by the Advisory Committee on Voluntary Foreign Aid have programs approved by AID.

(g) *Reimbursement* means (1) payment directly to an agency by AID, or (2) payment to an agency by a banking institution in the United States acting under letter of commitment issued by AID guaranteeing subsequent reimbursement to the banking institution of such payment.

(h) *Port of entry* means an ocean port in the recipient country.

(i) *Point of entry* means the first customs point, or any otherwise designated point in a recipient country which receives imported commodities via an ocean port not located in the recipient country.

§ 202.2 Shipments eligible for reimbursement of freight charges.

(a) In order to further the efficient use of United States voluntary contributions for development, relief, and rehabilitation in nations or areas designated by the Administrator of AID from time to time, agencies may be reimbursed by AID within specified limitations for freight charges incurred and paid in transporting supplies donated to or purchased by such agencies from United States ports or, in the case of excess or surplus property supplied by the United States, from foreign ports to ports of entry in the recipient country or to points of entry in the recipient country in cases (1) of landlocked countries, (2) where ports cannot be used effectively because of natural or other disturbances, (3) where carriers to a specified country are unavailable, or (4) where a substantial savings in costs or time can be effected by the utilization of points of entry other than ports.

(b) Shipments shall be eligible for reimbursement of freight charges only as authorized by the issuance by AID of a Procurement Authorization (Form AID 1160–4).

(c) The Office of Commodity Management, Bureau for Program and Management Services, AID, shall be responsible for determining when carriers are ''unavailable.''

§ 202.3 Freight reimbursement limitations.

Economic utilization of AID funds available for reimbursement to agencies for freight charges incurred and paid by such agencies for the shipment of donated or purchased supplies to a recipient country requires the following limitations on amounts reimbursable:

(a) *Ocean freight*. The amount of ocean freight charges reimbursable to an agency is limited to the actual cost of transportation of the supplies as assessed by the delivering carrier either in accordance with its applicable tariff for delivery to the discharge port or in accordance with the applicable charter

or booking contract at a rate not exceeding the prevailing rate, if any, for similar freight services, or the rate paid to the supplier of ocean transportation for similar services by other customers similarly situated, as attested to by the supplier in Block 13 of Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate.'' (See § 202.4(a).)

(b) *Inland freight*. The amount of inland freight charges reimbursable to an agency is limited to the actual cost of transportation of supplies from pickup point in initial port of discharge to designated point of entry in the recipient country at a rate negotiated by the agency representative as attested to by such agency representative in Block 14 of Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate.'' (See § 202.4(b).)

(c) *Related shipping costs*. Where inland freight charges are reimbursed, expenses incurred in transferring supplies from ocean carrier to inland carrier may be reimbursed to the agency when such expenses are not for account of the ship nor included in the inland transportation charges.

§ 202.4 Certificates.

Certificates will be required as follows:

(a) *Ocean transportation*. The supplier of ocean transportation will execute Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate,'' in an original and two copies.

(b) *Inland transportation and related shipping costs*. Where inland transportation, including related shipping costs, is reimbursable under provisions of § 202.3, the representative of the agency will execute Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate,'' in an original and two copies when, in the absence of published tariffs or a prevailing rate, it is necessary to negotiate for the shipment of the supplies.

§ 202.5 Approval of programs, projects and services.

(a) Prior to applying for reimbursement for freight charges, an agency must obtain AID's written approval of its programs by submitting the following information to the Chief, Public Liaison Division, Office of Private and Voluntary Cooperation, Bureau for Private and Development Cooperation, Agency for International Development, Department of State, Washington, DC 20523.

(1) A narrative description detailing the agency's specific country programs, objectives, projects, or services of relief, rehabilitation, disaster assistance, development assistance and welfare;

(2) Except as provided for in paragraph (b) of this section, evidence that written assurances have been obtained from the government of the recipient country that:

(i) Appropriate facilities are or will be afforded for the necessary and economical operations of the program, project, or service;

(ii) The specific program, project, or service has been accepted;

(iii) The supplies provided in support of the program, project or service will be free of customs duties, other duties, tolls and taxes;

(iv) The supplies will be treated as a supplementary resource;

(v) The supplies will be identified, to the extent practicable, as being of United States origin; and

(vi) Insofar as practicable, the supplies will be received, unloaded, warehoused, and transported cost-free to points of distribution;

(3) Evidence that:

(i) Shipments will be made only to consignees reported to AID, and full responsibility is assumed by the agency for the noncommercial distribution of the supplies free of cost to the persons ultimately receiving them, or in special cases and following notice to AID, for the sale to recipients at nominal cost or as payment for work performed to promote projects of self-help and economic development, but in no case shall supplies be withheld from needy persons because of their inability to pay or work; and

(ii) Distribution is made solely on the basis of need without regard to race, color, religion, sex or national origin;

(iii) That paragraphs (a)(3) (i) and (ii) of this section are conducted under the supervision of the agency's representative specifically charged with responsibility for the program or project.

(b) Compliance with paragraph (a)(2) of this section is not required when the specific program, project, or service is within the scope of any agreement that has been concluded between the U.S. Government and the Government of the recipient country which furthers the operations of an agency acceptable to the recipient country.

(c) On approval of the agency's programs written notice thereof will be issued by AID to the agency.

§ 202.6 Application for reimbursement of freight charges.

(a) Any agency may make application for reimbursement of freight charges incurred and paid on shipments eligible under § 202.2 provided:

(1) The agency has received AID's written approval of the programs, projects, and services in accordance with § 202.5.

(2) The application for reimbursement of freight charges together with documentation required under § 202.7 is submitted to the Agency for International Development, Attention: Banking and Finance Division, Office of Financial Management, Washington, DC 20523, or to a U.S. bank holding an AID letter of commitment.

(b) In the case of ocean transportation, the application must be submitted within 60 days of the date of the related ocean bill of lading. In the case of inland transportation the application must be submitted within 180 days of the date of the related ocean bill of lading.

§ 202.7 Documentation required for reimbursement.

Claims for reimbursement of freight charges must be supported by the following documents:

(a) *Voucher SF 1034*. ''Public Voucher for Purchases and Services Other than Personal''—Voucher SF 1034 in original and three copies to be prepared by the agency requesting reimbursement of freight charges.

(b) *Bills of lading*—(1) *To ports of entry*. Where the shipment is made to a port of entry, ocean or charter party bill of lading (or photostat) evidencing shipment from an eligible port of export as prescribed in § 202.2(a) to the port of entry. The bill of lading shall indicate the carrier's complete statement of charges including all relevant weights, cubic measurements, rates, and any applicable tariff surcharges.

(2) *To points of entry*. (i) Where the shipment is made to a point of entry and through bills of lading to designated point of entry are not issued, an ocean or charter party bill of lading (or photostat) evidencing shipment from an eligible port of export as precribed in § 202.2(a) to the port of discharge, and a receipted copy of the rail, truck, or barge bills of lading (or other acceptable commercial document) covering the transportation of the supplies from the ocean carrier's point of delivery at port of discharge to point of entry in recipient country, correctly assessed at time of loading by the land carrier for freight on a weight, measurement, or unit basis to point of entry in recipient country and from point of entry to point of delivery in the recipient country. The bill of lading shall indicate the carrier's complete statement of charges including all relevant weights, cubic measurements, rates and any applicable tariff surcharges.

(ii) Where shipment is made to point of entry and through bills of lading are issued, a receipted copy of the through bill of lading evidencing shipment from an eligible port of export as prescribed in § 202.2(a) to point of entry in the recipient country. The bill of lading shall include the carrier's complete statement of charges including all relevant weights, cubic measurements, rates, and any applicable tariff surcharges.

(c) *Receipted invoices*. One copy (or photostat) of the detailed invoice of the supplier of the transportation evidencing payment by the agency to the carrier. If the bills of lading required by paragraph (b) of this section meet the requirements of this subparagraph, no invoice is required.

(d) *Voluntary Agency and Carrier Certificate, Form AID 1550–1*. (i) As provided in § 202.4(a), the original and two copies of the Voluntary Agency and Carrier Certificate executed by the supplier of ocean transportation, and

(ii) As provided in § 202.4(b), the original and two copies of the Voluntary Agency and Carrier Certificate executed by the Agency.

§ 202.8 Refund by suppliers and/or agencies.

(a) *By suppliers.* Any supplier of freight to whom freight charges have been financed by AID will promptly refund to AID upon demand the entire amount, or any lesser amount specified, of such freight charges determined by AID to be in excess of the prevailing rate at time of shipment, if any, or the rate paid the supplier for similar services by other customers similarly situated.

(b) *By agencies.* Any agency to which freight charges have been paid or reimbursed under this Regulation will promptly refund to AID upon demand the entire amount, or any lesser amount specified, of inland transportation and/or related shipping costs, (1) whenever AID determines that the reimbursements were improper as being in violation of the provisions of the Foreign Assistance Act of 1961, and relevant appropriation acts, or any rules, regulations, or procedures of AID promulgated under any of these acts, or (2) whenever it is determined by the agency or AID that any of the supplies for which reimbursement was made have not been accorded duty-free status by the recipient country.

§ 202.9 Waiver authority.

The Administrator may waive, withdraw, or amend from time to time any or all of the provisions of this part.

§ 202.10 Participation by faith-based organizations.

The procedures established under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[69 FR 61723, Oct. 20, 2004]

PART 203—REGISTRATION OF PRIVATE VOLUNTARY ORGANIZATIONS (PVOs)

Sec.

203.1 Purpose.
203.2 Definitions.
203.3 U.S. PVO conditions of registration.
203.4 U.S. PVO initial documentation requirements.
203.5 U S. PVO annual documentation requirements.
203.6 IPVO conditions of registration.
203.7 IPVO initial documentation requirements.
203.8 IPVO annual documentation requirements.
203.9 Denial of registration.
203.10 Termination of registration.
203.11 Access to records and communications.
203.12 Cooperative Development Organizations (CDOs).
203.13 Delegation of authority.

AUTHORITY: Sec. 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381).

SOURCE: 70 FR 25467, May 13, 2005, unless otherwise noted.

§ 203.1 Purpose.

(a) USAID registers PVOs to:

(1) Meet statutory and regulatory requirements that a U.S. PVO be registered with USAID as a condition for USAID funding.

(2) Provide USAID with information for computing the amount of USAID funding made available to PVOs.

(b) It is not the purpose of registration to allow or enable registered PVOs to make any representation to the public concerning the meaning of being registered with USAID. Promotional materials or advertisements suggesting otherwise will be grounds for removal from the USAID PVO Registry.

(c) Registration does not bring an organization within the Ambassador's authority and responsibility for the security of U.S. Government operations and personnel abroad.

§ 203.2 Definitions.

As used in this part:

(a) *Cooperative Development Organization (CDO)* means an organization designated by USAID as a voluntary, independent business enterprise formed to meet specific needs of its members through a common venture.

(b) *Foreign Assistance Act (FAA)* means the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151, *et seq.*

(c) *General public* means citizens and nongovernmental organizations (NGOs). The general public does not include government agencies in the United States or abroad, or public international organizations such as the

United Nations and the World Health Organization.

(d) *Headquarters* means the principal executive office where legal, accounting, and administrative information may be accessed in the daily course of conducting business.

(e) *International Private Voluntary Organization (IPVO)* means an entity that:

(1) Is non-U.S. based in that it is organized under the laws of the country in which it is domiciled;

(2) Is a private nongovernmental organization (NGO) that solicits and receives cash contributions from the general public;

(3) Is a charitable organization in that it is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; and

(4) Conducts, or anticipates conducting, program activities in one or more countries other than its country of origin that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(5) Is not recognized as a Public International Organization according to USAID's Automated Directives System (ADS) 308.3.

(f) *Local Private Voluntary Organization (LPVO)* means a non-U.S. based PVO that meets the definition of an International Private Voluntary Organization, except that it operates only in the same foreign country in which it is organized. LPVOs are not required to register with USAID/Washington but USAID Missions may require some other eligibility method when making awards.

(g) *Non-U.S. Private Voluntary Organization (Non-U.S. PVO)* means an entity that meets the definition of a U.S. PVO, but is not headquartered in the United States. Non-U.S. PVOs include both Local Private Voluntary Organizations and International Private Voluntary Organizations.

(h) *Nongovernmental Organization (NGO)* means any nongovernmental organization or entity, whether nonprofit or profit-making.

(i) *Nonprofit organization* means any corporation, trust, association, cooperative or other organization that is operated primarily for service, charitable, scientific, educational or other similar purposes; is not organized for profit; and uses its net proceeds to maintain, improve, and/or expands its operations.

(j) *Private Voluntary Organization (PVO)* See U.S. Private Voluntary Organization, International Private Voluntary Organization, and Local Private Voluntary Organization.

(k) *Public International Organization (PIO)* means a non-U.S. based organization (*i.e.*, composed principally of governments) in which the U.S. participates. (See USAID's Automated Directives System (ADS) 308.3).

(l) *Public Law 480* means the Agricultural Trade Development and Assistance Act of 1954, as amended, 7 U.S.C. 1691, *et seq*.

(m) *Solicits* means to undertake a substantial effort to obtain donations.

(n) *Supporting services* means the total of general and administration expenses plus fundraising expenses.

(o) *USAID* means the U.S. Agency for International Development.

(p) *U.S. Private Voluntary Organization (U.S. PVO)* means an entity that:

(1) Is organized under the laws of the United States and headquartered in the United States;

(2) Is a nongovernmental organization (NGO) that solicits and receives cash contributions from the U.S. general public;

(3) Is a charitable organization in that it is nonprofit and exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization established by a major political party in the United States, organization established, funded and audited by the U.S. Congress, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity

organized primarily for religious purposes; and

(4) Conducts, or anticipates conducting, overseas program activities that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

§ 203.3 U.S. PVO conditions of registration.

There are eight Conditions of Registration for U.S. organizations. The first four Conditions relate to whether an organization meets the definition of a U.S. PVO, as set forth in § 203.2 (p), while the last four Conditions establish standards by which the U.S. PVO is evaluated. An applicant must be registered with USAID as a U.S. PVO if USAID finds that the applicant has satisfied all of the following Conditions:

(a) *Condition No. 1 (U.S. based)*. Is U.S. based in that it:

(1) Is organized under the laws of the United States; and

(2) Has its headquarters in the United States.

(b) *Condition No. 2 (Private)*. Is a nongovernmental organization (NGO) and solicits and receives cash contributions from the U.S. general public.

(c) *Condition No. 3 (Voluntary)*. Is a charitable organization in that it:

(1) Is nonprofit and exempt from Federal income taxes under Section 501(C)(3) of the Internal Revenue Code; and

(2) Is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization established by a major political party in the United States, organization established, funded and audited by the U.S. Congress, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes.

(d) *Condition No. 4 (Overseas Program Activities)*. Conducts, or anticipates conducting, overseas program activities that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(e) *Condition No. 5 (Board of Directors)*. Has a governing body:

(1) That meets at least annually;

(2) Whose members do not receive any form of income for serving on the board; and

(3) Whose majority is not composed of the PVO's officers or staff members.

(f) *Condition No. 6 (Financial Viability)*. That it:

(1) Accounts for its funds in accordance with generally accepted accounting principles (GAAP);

(2) Has a sound financial position;

(3) Provides its financial statements to the public upon request; and

(4) Has been incorporated for not less than 18 months.

(g) *Condition No. 7 (Program Activities vs. Supporting Services)*. That it:

(1) Expends and distributes its funds in accordance with the annual report of program activities;

(2) Does not expend more than 40 percent of total expenses on supporting services.

(3) In order to maintain its registration, conducts international program activities within the last three years. For example, if a U.S. PVO did not have any international activities for 2004, the current year, or 2003, but did have activities in 2002, then it would remain registered. However, if it did not have any international activities in 2005, USAID would remove it from the Registry in 2006 because for the previous three years (2003, 2004, 2005), it did not conduct any international activities.

(h) *Condition No. 8 (General Eligibility)*. It is not:

(1) Suspended or debarred by an agency of the U.S. Government;

(2) Designated as a foreign terrorist organization by the Secretary of State, pursuant to Section 219 of the Immigration and Nationality Act, as amended; or

(3) The subject of a decision by the Department of State to the effect that registration or a financial relationship between USAID and the organization is contrary to the national defense, national security, or foreign policy interests of the United States.

§ 203.4 U.S. PVO initial documentation requirements.

(a) So that USAID can determine whether an applicant meets the Conditions of Registration, an application

must be submitted in duplicate. The application instructions and forms packet are available at USAID Web site *http://www.usaid.gov* Keyword: PVO Registration. The completed application must include:

(1) A cover letter with

(i) The reason for applying for registration; and

(ii) A description of current or intended overseas program activities;

(2) Articles of incorporation on state letterhead with state seal and authorizing state official's signature;

(3) Bylaws establishing the applicant's corporate structure;

(4) IRS Form 990 and a copy of an IRS letter of tax exemption;

(5) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with generally accepted accounting principles (GAAP) by an independent certified public accountant (CPA); an Office of Management and Budget (OMB) Circular A–133 audit, if applicable;

(6) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(7) AID Form 1550–2, PVO Annual Return; and

(8) AID Form 200–1, PVO Classification Form.

(b) In addition, each applicant must submit such other information as USAID may reasonably require to determine whether the organization meets the Conditions of Registration.

(c) USAID may revise this list of documents from time to time.

(d) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine an organization's eligibility for a particular grant or cooperative agreement.

(e) The completed application must be sent in duplicate to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.5 U.S. PVO annual documentation requirements.

(a) To maintain its registration, each registered PVO must submit documents and forms annually. The submission instructions and forms packet are available at USAID Web site *www.usaid.gov* Keyword: PVO Registration. The completed submission must include:

(1) Audited financial statements for the most recent fiscal year prepared on an Accrual basis in accordance with GAAP by an independent CPA; an OMB Circular A–133 audit, if applicable; or unaudited financial statements if total Support and revenue is less than $50,000.

(2) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(3) AID Form 1550–2, PVO Annual Return; and

(4) AID Form 200–1, PVO Classification Form.

(b) PVOs also must submit any amendments, if applicable, to its articles of incorporation, or bylaws and any changes in the tax-exempt status.

(c) Submission is due within six months after the close of the PVO's fiscal year if the PVO does not prepare an OMB Circular A–133 audit.

(d) Submission is due within nine months after the close of the PVO's fiscal year if the PVO does prepare an OMB Circular A–133 audit.

(e) In addition, each registrant must submit such other information as USAID may reasonably require to determine that the organization continues to meet the Conditions of Registration.

(f) USAID may revise this list of documents from time to time.

(g) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine the PVO's eligibility for a particular grant or cooperative agreement.

(h) The completed submission must be sent annually to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.6 IPVO conditions of registration.

There are eight Conditions of Registration for international organizations. The first four Conditions relate to whether an organization meets the definition of an IPVO, as set forth in § 203.2(e), while the last four Conditions establish standards by which the IPVO is evaluated. An applicant must be registered with USAID as an IPVO if USAID finds that the applicant has satisfied all of the following Conditions:

(a) *Condition No. 1 (Non-U.S based).* Is non-U.S. based in that it:

(1) Is organized under the laws of the country in which it is domiciled; and

(2) Has its headquarters in the same country.

(b) *Condition No. 2 (Private).* Is a nongovernmental organization (NGO) and solicits and receives cash contributions from the general public.

(c) *Condition No. 3 (Voluntary).* Is a charitable organization in that it:

(1) Is nonprofit and tax exempt under the laws of its country of domicile and operation;

(2) Is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; and

(3) Is not recognized as a Public International Organization according to USAID's ADS 308.3.

(d) *Condition No. 4 (International Program Activities).* Conducts, or anticipates conducting, program activities in one or more countries other than its country of origin and that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(e) *Condition No. 5 (Board of Directors).* Has a governing body:

(1) That meets at least annually;

(2) Whose members do not receive any form of income for serving on the board; and

(3) Whose majority is not composed of the IPVO's officers or staff members.

(f) *Condition No. 6 (Financial Viability).* That it:

(1) Accounts for its funds in accordance with generally accepted accounting principles (GAAP) or generally accepted accounting standards of IPVO's country of domicile.

(2) Has a sound financial position;

(3) Provides its financial statements to the public upon request; and

(4) Has been incorporated for not less than 18 months.

(g) *Condition No. 7 (Program Activities vs. Supporting Services).* That it:

(1) Expends and distributes its funds in accordance with the annual report of program activities;

(2) Does not expend more than 40 percent of total expenses on supporting services; and

(3) In order to maintain its registration, conducts international program activities within the last three years. For example, if an IPVO did not have any international activities for 2004, the current year, or 2003, but did have activities in 2002, then it would remain registered. However, if it did not have any international activities in 2005, USAID would remove it from the Registry in 2006 because for the previous three years (2003, 2004, 2005), it did not conduct any international activities.

(h) *Condition No. 8 (General Eligibility).* It is not:

(1) Suspended or debarred by an agency of the U.S. Government;

(2) Designated as a foreign terrorist organization by the Secretary of State, pursuant to Section 219 of the Immigration and Nationality Act, as amended; or

(3) The subject of a decision by the Department of State to the effect that registration or a financial relationship between USAID and the organization is contrary to the national defense, national security, or foreign policy interests of the United States.

§ 203.7 IPVO initial documentation requirements.

(a) So that USAID can determine whether an applicant meets the Conditions of Registration, an application must be submitted in duplicate and in English. The application instructions and forms packet are available at USAID Web site *http://www.usaid.gov* Keyword: PVO Registration. The completed application must include:

(1) A cover letter with

(i) The reason for applying for registration; and

(ii) A description of current or intended program activities abroad;

(2) Articles of incorporation or charter establishing the IPVO's legal status under the laws of the country in which it is domiciled;

(3) Bylaws or other documents establishing the applicant's corporate structure;

(4) Statement of tax exemption or a comparable document from the country of its origin;

(5) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with generally accepted accounting principles (GAAP) or generally accepted accounting standards for IPVO's country of domicile by an independent certified public accountant (CPA) and in *U.S. dollars*;

(6) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(7) International Executive Contact Data Sheet; and

(8) AID Form 200–1, PVO Classification Form.

(b) In addition, each applicant must submit such other information as USAID may reasonably require to determine whether the organization meets the Conditions of Registration.

(c) USAID may revise this list of documents from time to time.

(d) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine an organization's eligibility for a particular grant or cooperative agreement.

(e) The completed application must be sent in duplicate to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.8 IPVO annual documentation requirements.

(a) To maintain its registration, each registered IPVO must submit documents and forms, in English, annually. The submission instructions and forms packet are available at USAID Web site *www.usaid.gov* Keyword: PVO Registration. The completed submission must include:

(1) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with GAAP or generally accepted accounting standards for IPVO's country of domicile by an independent CPA; or unaudited financial statements if total support and revenue is less than $50,000 in *U.S. dollars*;

(2) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(3) International Executive Contact Data Sheet; and

(4) AID Form 200–1, PVO Classification Form.

(b) IPVOs also must submit any amendments, if applicable, to its articles of incorporation, charter, or bylaws and any changes in the tax-exempt status.

(c) Submission is due within six months after the close of the IPVO's fiscal year.

(d) In addition, each registrant must submit such other information as USAID may reasonably require to determine that the organization continues to meet the Conditions of Registration.

(e) USAID may revise this list of documents from time to time.

(f) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine the IPVO's eligibility for a particular grant or cooperative agreement.

(g) The completed submission must be sent annually in English to the

USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.9 Denial of registration.

(a) *Notification of denial of registration.* Denial of registration by USAID will include written notice to the applicant stating the grounds for the denial.

(b) *Reconsideration.* Within 30 days after receipt of a denial notification an organization may request that its application be reconsidered. USAID will consider the request and inform the applicant in writing of USAID's subsequent decision.

(c) *Resubmission.* An organization may at any time submit a new application for registration.

§ 203.10 Termination of registration.

(a) *Reasons.* USAID may terminate registration for any of the following reasons if the registrant:

(1) Relinquishes its registration status voluntarily upon written notice to USAID;

(2) Fails to comply with the documentation requirements or the Conditions of Registration;

(3) Uses promotional material or advertisements suggesting that its USAID registration is an endorsement; or

(4) Refuses to transfer to USAID any records, documents, copies of such records or documents, or information referred to in this regulation and within the registrant's control within a reasonable time after USAID request them.

(b) *Notification of termination of registration.* Termination by USAID will include written notice to the registrant stating the grounds for the termination.

(c) *Reconsideration.* Within 30 days after receipt of a termination notification an organization may request that its termination be reconsidered. USAID will consider the request and inform the registrant in writing of USAID's subsequent decision. In addition, USAID may, at its own discretion, reconsider a termination of registration at any time.

(d) *Resubmission.* An organization may at any time submit a new application for registration.

§ 203.11 Access to records and communications.

(a) All records, reports, and other documents that are made available to USAID pursuant to this regulation must be made available for public inspection and copying, pursuant to the Freedom of Information Act and other applicable laws.

(b) Communications from USAID will only be sent to the applicant's or registrant's headquarters.

§ 203.12 Cooperative Development Organizations (CDOs).

CDOs are not PVOs for purposes of registration under this part. CDOs as part of the larger PVO community will continue to be listed in the U.S. PVO Registry at *www.usaid.gov* Keyword: Registry and will continue to be eligible for assistance that is otherwise available to registered U.S. PVOs. In order to be listed in the Registry as a CDO, the CDO must comply with the annual documentation requirements of § 203.5. A CDO applying for registration or registered under this part as a U.S. PVO must comply with the requirements of this part.

§ 203.13 Delegation of authority.

The Administrator of USAID or his/her designee may delegate authority to the Assistant Administrator of the Bureau for Democracy, Conflict and Humanitarian Assistance to administer the registration process and, in particular, the authority to waive, withdraw, or amend any or all of the provisions within this part.

PART 204—HOUSING GUARANTY STANDARD TERMS AND CONDITIONS

Subpart A—Definitions

Sec.
204.1 Definitions.

Subpart B—The Guaranty

204.11 The Guaranty.
204.12 Guaranty eligibility.
204.13 Non-impairment of the guaranty.

204.14 Transferability of guaranty; Note Register.
204.15 Paying agent obligation.

Subpart C—Procedure for Obtaining Compensation

204.21 Event of default; Application for compensation; Payment.
204.22 Right of A.I.D. to cure default.
204.23 Payment to A.I.D. of excess amounts received by the lender of any assignee.

Subpart D—Covenants

204.31 Prosecution of claims.
204.32 Change in agreements.
204.33 A.I.D. approval of acceleration of notes.

Subpart E—Administration

204.41 Arbitration.
204.42 Notice.
204.43 Governing law.
EXHIBIT A TO PART 204—APPLICATION FOR COMPENSATION
EXHIBIT B TO PART 204—ASSIGNMENT

AUTHORITY: 22 U.S.C. 2381.

SOURCE: 53 FR 33805, Sept. 1, 1988, unless otherwise noted.

Subpart A—Definitions

§ 204.1 Definitions.

Wherever used in these standard terms and conditions:

(a) *A.I.D.* means the United States Agency for International Development or its successor with respect to the housing guaranty authorities contained in title III, chapter 2 of part I of the Foreign Assistance Act of 1961, as amended (the ''Act'').

(b) *Eligible Note(s)* means (a) Note(s) meeting the eligiblity criteria set out in § 204.12 hereof.

(c) *Eligible Investor* means an ''eligible investor'' as defined in section 238(c) of the Act.

(d) *Lender* means an Eligible Investor who initially provides loan funds to the Borrower in exchange for Eligible Note(s).

(e) *Investment* respecting any Eligible Note means the principal amount of such Eligible Note.

(f) *Assignee* means the owner of an Eligible Note who is registered as an Assignee on the Note Register of Eligible Notes required to be maintained by the Paying Agent and who is an ''Eligible Investor.''

(g) *Outstanding Investment* respecting any Eligible Note means the Investment less the net amount of any repayments of principal of the Investment made by or on behalf of the Borrower or A.I.D.

(h) *Further Guaranteed Payments* means the amount of any loss suffered by the Lender or by any Assignee by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless the Lender and Assignee from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Note in the country of the Borrower.

(i) *Loss of Investment* respecting any Eligible Note means an amount in Dollars equal to the total of the (1) Outstanding Investment determined as of the Date of Application, (2) Further Guaranteed Payments unpaid as of the Date of Application, and (3) interest accrued at the rate(s) specified in the Note(s) and unpaid on the Outstanding Investment and Further Guaranteed Payments to and including the date on which full payment thereof is made to the Lender or any Assignee.

(j) *Application for Compensation* means an executed application in the form of Exhibit A hereto which the Lender or any Assignee files with A.I.D. pursuant to § 204.21 of this part.

(k) *Applicant* means a Lender or Assignee who files an Application for Compensation with A.I.D.

(l) *Date of Application* means the effective date of an Application for Compensation filed with A.I.D. pursuant to § 204.21 of this part.

(m) *Business Day* means a date on which banks of the District of Columbia of the United States of America are open for business.

(n) *Guaranty Payment Date* means a Business Day not more than sixty (60) calendar days after the related Date of Application; provided that (1) compensation to the party filing the related Application for Compensation is

due and payable on such date, in accordance with the terms of this Guaranty and (2) tender of assignment referred to in subsection 204.21(f) is made as therein provided.

[53 FR 33805, Sept. 1, 1988; 53 FR 39015, Oct. 4, 1988]

Subpart B—The Guaranty

§ 204.11 The Guaranty.

Subject to these standard terms and conditions, the United States of America, acting through A.I.D., agrees to pay to any Lender or Assignee who has been determined to be an Eligible Investor compensation in Dollars equal to its Loss of Investment under the Eligible Note; provided, however, that no such payment shall be made for any such loss arising out of fraud or misrepresentation for which such Lender or Assignee is responsible or of which it had knowledge at the time it became such Lender or Assignee.

This Guaranty shall apply to each Eligible Note registered on the Note Register required to be maintained by the Paying Agent.

§ 204.12 Guaranty eligibility.

(a) Eligible Notes only may be guarantied hereunder, and Eligible Investors only are entitled to the benefits of this Guaranty. Notes in order to achieve Eligible Note status must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower; and they must contain a guaranty legend incorporating these standard terms and conditions signed on behalf of A.I.D. by either a manual signature or a facsimile signature or an authorized representative of A.I.D. together with a certificate of authentication manually executed by a Paying Agent whose appointment by the Borrower is consented to by A.I.D. in a Paying and Transfer Agency Agreement.

(b) A.I.D. shall designate in a certificate delivered to the Lender and to the Paying Agent, the person(s) whose signature shall be binding on A.I.D. The certificate of authentication of the Paying Agent issued pursuant to the Paying and Transfer Agency Agreement shall, when manually executed by the Paying Agent, be conclusive evidence binding on A.I.D. that the Note has been duly executed on behalf of the Borrower and delivered.

§ 204.13 Non-impairment of the guaranty.

The full faith and credit of the United States of America is pledged to the performance of this Guaranty. The Guaranty shall not be affected or impaired by any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by the Lender, A.I.D., the Paying Agent or the Borrower in connection with the transactions contemplated by this Guaranty. This non-impairment of the guaranty provision shall not, however, be operative with respect to any amount arising out of fraud or misrepresentation for which the Lender or Assignee is responsible or of which it had knowledge prior to the time it became such Lender or Assignee.

§ 204.14 Transferability of guaranty; Note Register.

The Lender of any Assignee may assign, transfer or pledge the Eligible Notes to any Eligible Investor. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Assignee is entered on the Note Register required to be maintained by the Paying Agent pursuant to the Paying and Transfer Agency Agreement. A.I.D. shall be entitled to treat the persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guaranty and A.I.D. shall not be affected by notice to the contrary.

§ 204.15 Paying agent obligations.

Failure of the Paying Agent to perform any of its obligations pursuant to the Paying and Transfer Agency Agreement shall not impair the Investor's or any Assignee's rights under this Contract of Guaranty, but may be the subject of action for damages against the Paying Agent by A.I.D. as a result of such failure or neglect; provided, however, that the Paying Agent is not authorized to issue and authenticate and have Notes outstanding at any time in

excess of the principal amount of the Loan.

Subpart C—Procedure for Obtaining Compensation

§ 204.21 Event of default; Application for compensation; Payment.

(a) Within one year after an Event of Default, as this term is defined in an Eligible Note, the Lender or Assignee may file with A.I.D. an Application for Compensation in form as provided in Exhibit A. A.I.D. shall make the required payment not later than sixty (60) days after the Date of Application unless A.I.D. has cured the default under § 204.22.

(b) *Guaranty Payment.* On or before the Guaranty Payment Date, the Applicant shall tender assignment of all Applicant's right, title and interest as of the Date of Application in and to all sums for which Application has been made. A.I.D. shall accept the assignment and pay or cause to be paid to Applicant and compensation due to the Applicant pursuant to the Guaranty.

§ 204.22 Right of A.I.D. to cure default.

Within sixty (60) days after the Date of Application for Compensation, A.I.D. may at any time make payments to the Lender or any Assignee equal to all installments of principal due and unpaid under any Note (other than installments whose maturity has been accelerated), together with interest on the unpaid principal amount of the Note to the date of such payment by A.I.D., and any Further Guaranteed payments due and unpaid, and thereby prevent or cure any default under the Note. Upon such a payment by A.I.D., if the Lender or Assignee shall have accelerated such Note, such acceleration shall be immediately rescinded or, if such Note shall not have been accelerated, such Note shall not thereafter be accelerated as a result of such Event of Default.

§ 204.23 Payment to A.I.D. of excess amounts received by the lender of any assignee.

If the Lender or Assignee shall, as a result of A.I.D. paying compensation under this Guaranty, receive an excess payment, it shall refund the excess to A.I.D.

Subpart D—Covenants

§ 204.31 Prosecution of claims.

After an assignment to A.I.D. by the Lender or any Assignee pursuant to § 204.21(b), A.I.D. shall have exclusive power to prosecute all claims related to the outstanding Eligible Notes so assigned. If the Lender or such Assignee continues to have an interest in the outstanding Eligible Notes, the Lender or such Assignee and A.I.D. shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 204.32 Change in agreements.

Neither the Lender nor any Assignee will consent to any change or waiver of any provision of any document contemplated by this Guaranty without the prior written consent of A.I.D.

§ 204.33 A.I.D. approval of acceleration of notes.

Without the prior approval of A.I.D., the Lender or any Assignee shall not accelerate any Eligible Notes held by it on account of the happening of an Event of Default other than failure to make a payment when due on the note.

Subpart E—Administration

§ 204.41 Arbitration.

Any controversy or claim between A.I.D. and the Lender or any Assignee arising out of this Guaranty shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 204.42 Notice.

Any communication to A.I.D. pursuant to this Guaranty shall be in writing in the English language, shall refer to the A.I.D. Housing Guaranty Project Number inscribed on the Eligible Note and shall be complete on the day it

shall be actually received by A.I.D. at the address specified below:

Mail Address:

Office of Housing and Urban Programs, Agency for International Development, Washington, DC 20523.

Re: A.I.D. Housing Guaranty Project ____–HG–____ [1]

Telex Nos.: ITT 440001 (Answer back is AIDWNDC) RCA 248379 (Answer back is 248379 AID UR) WU 892703 (Answer back is AID WSH) WU 64154 (Answer back is AID 64154)

Fax No.: 202/647–4958

Cable Address: AID WASH DC

Other addresses may be substituted for the above upon the giving of notice of such substitution to each Lender or Assignee by first class mail at the addresses set forth in the Note Register.

§ 204.43 Governing law.

This Guaranty shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

EXHIBIT A TO PART 204—APPLICATION FOR COMPENSATION

Office of Housing and Urban Programs, Agency for International Development, International Development Cooperation Agency, Washington, DC 20523

Ref: Guaranty dated as of _____, 19___: A.I.D. Housing Project HG–_____

Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments as defined in Section 204.01(i) of the Standard Terms and Conditions of the above-mentioned Guaranty [1]) was due on _____, 19___, on $_____ principal amount of Notes held by the undersigned of the _____ (the ''Borrower''), issued pursuant to the Loan Agreement, dated as of _____, _____, between the Borrower and _____. Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guaranty, the undersigned hereby applies, under Section 204.21 of said Guaranty, for payment of a total of $_____, representing $_____, the outstanding principal amount of the presently outstanding Notes of the Borrower held by the undersigned issued pursuant to said Loan Agreement, and $_____ in Further Guaranteed Payments, [2] plus accrued and unpaid interest thereon to and including the date payment in full is made by you pursuant to said Guaranty. Such payment is to be made at your office in Washington, DC.

[Name of Applicant]

By _____

Name _____

Title _____

Dated _____

EXHIBIT B TO PART 204—ASSIGNMENT

The undersigned, being the registered owner of a Note in the principal amount of $_____ issued by the _____ (the ''Borrower''), pursuant _____, and guaranty, dated as of _____, _____ the ''Guaranty''), between the Lender and the United States of America, acting through the Agency for International Development (''A.I.D.''), hereby assigns to A.I.D., without recourse (i) its entire right, title and interest in and to the Note of the Borrower referred to above (which Note is attached hereto), including its rights to unpaid interest on such Note, and (ii) its entire outstanding right, title and interest arising out of said Loan Agreement with respect to such Note, except the undersigned's right to receive payments under the Loan Agreement in respect of which A.I.D. has made no payment to the undersigned as of the date hereof.

[Name of Applicant]

By _____

Name _____

Title _____

Dated _____

Accepted:

UNITED STATES OF AMERICA

By _____

Name _____

Title _____

Dated _____

[1] Enter title and numerical designation of the relevant A.I.D. Housing Guaranty Project as inscribed on each Note guaranty legend.

[1] Strike inapplicable portion.

[2] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

AUTHORITY: 22 U.S.C. 2381(a).

§ 205.1 Grants and cooperative agreements.

(a) Religious organizations are eligible, on the same basis as any other organization to participate in any USAID program for which they are otherwise eligible. In the selection of service providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, the term ''program'' refers to Federally funded USAID grants and cooperative agreements, including sub-grants and sub-agreements. The term also includes grants awarded under contracts that have been awarded by USAID for the purpose of administering grant programs. As used in this section, the term ''grantee'' includes a recipient of a grant or a signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements and contracts.

(b) Organizations that receive direct financial assistance from USAID under any USAID program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded with direct financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. These restrictions on inherently religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in USAID-funded programs or services will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) USAID funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. Where a structure is used for both eligible and inherently religious activities, USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USAID funds in this part. Sanctuaries, chapels, or other rooms that a USAID-funded religious congregation uses as its principal place of worship, however, are ineligible for USAID-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition. (*See* 22 CFR part 226).

(e) An organization that participates in programs funded by financial assistance from USAID shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief.

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in Sec. 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from USAID.

(h) Many USAID grant programs require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. Grantees should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID programs in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(i) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

[69 FR 61723, Oct. 20, 2004]

PART 206—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE A.I.D. IS NOT A PARTY

Sec.

206.1 Purpose and scope.
206.2 Production or disclosure prohibited unless approved by the General Counsel.
206.3 Procedure in the event of a demand for production or disclosure.
206.4 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.
206.5 Procedure in the event of an adverse ruling.
206.6 Considerations in determining whether production or disclosure should be made pursuant to a demand.

AUTHORITY: Sec. 621, Foreign Assistance Act of 1961, as amended, 75 Stat. 424 (22 U.S.C. 2381).

SOURCE: 53 FR 24260, June 28, 1988, unless otherwise noted.

§ 206.1 Purpose and scope.

(a) This part sets forth the procedures to be followed in proceedings in which the U.S. Agency for International Development (the ''Agency'') is not a party, whenever a subpoena, order or other demand (collectively referred to as a ''demand'') of a court or other authority set forth in § 206.1(d) of this part is issued for the production or disclosure of (1) any material contained in the files of the Agency, (2) any information relating to material contained in the files of the Agency, or (3) any information or material acquired by any person while such person was an employee of the Agency as a part of the performance of his official duties or because of his official status.

(b) For purposes of this part, the term ''employee of the Agency'' includes all officers and employees of the Agency appointed by, or subject to the supervision, jurisdiction or control of, the Administrator of the Agency, including personal services contractors.

(c) This part is intended to provide instructions regarding the internal operations of the Agency, and is not intended, and does not and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by a party against the Agency.

(d) This part applies to:

(1) State and local court, administrative and legislative proceedings.

(2) Federal court and administrative proceedings.

(e) This part does not apply to:

(1) Congressional requests or subpoenas for testimony or documents.

(2) Employees or former employees making appearances solely in their private capacity in legal or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents, domestic relations, etc.). Any question whether the appearance relates solely to the employee's or former employee's private capacity should be referred to the General Counsel or his designee.

(f) Nothing in this part affects disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a. the Sunshine Act, 5 U.S.C. 552b, or the Agency's implementing regulations. Nothing in this part otherwise permits disclosure of information by the Agency except as is provided by statute or other applicable law.

§ 206.2 Production or disclosure prohibited unless approved by the General Counsel.

No employee or former employee of the Agency shall, in response to a demand of a court or other authority set forth in § 206.1(d), produce any material or disclose any information described in § 206.1(a) without the approval of the General Counsel or his designee.

§ 206.3 Procedure in the event of a demand for production or disclosure.

(a) Whenever an employee or former employee of the Agency receives a demand for the production of material or the disclosure of information described in § 206.1(a), he shall immediately notify and provide a copy of the demand to the General Counsel or his designee. The General Counsel, or his designee, shall be furnished by the party causing the demand to be issued or served a written summary of the information sought, its relevance to the proceeding in connection with which it was served and why the information sought is unavailable by any other means or from any other sources.

(b) The General Counsel, or his designee, in consultation with appripriate Agency officials, and in light of the considerations listed in § 206.6, will determine whether the person on whom the demand was served should respond to the demand.

(c) To the extent he deems it necessary or appropriate, the General Counsel, or his designee, may also require from the party causing such demand to be issued or served a plan of all reasonably foreseeable demands, including but not limited to names of all employees and former employees from whom discovery will be sought, areas of inquiry, length of time of proceedings requiring oral testimony and identification of documents to be used or whose production is sought.

§ 206.4 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.

If the response to the demand is required before the instructions from the General Counsel, or his designee, are received, an attorney designated by the Department of Justice for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and 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 General Counsel and shall respectfully request the court or other authority to stay the demand pending receipt of the requested instructions.

§ 206.5 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 206.4 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, the employuee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this part and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

§ 206.6 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, the General Counsel, or his designee, may consider, among things:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute or a rule of procedure,

(2) Disclosure would violate a specific regulation,

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal trade secrets or proprietary information without the owner's consent,

(5) Disclosure would otherwise adversely affect the foreign policy interets of the United States or impair the foreign assistance program of the United States, or

(6) Disclosure would impair an ongoing Inspector General or Department of Justice investigation.

PART 207—INDEMNIFICATION OF EMPLOYEES

§ 207.01 Policy.

(a) A.I.D. may indemnify, in whole or in part, its employees (which for the purpose of this regulation includes former employees) for any verdict, judgment or other monetary award which is rendered against any such employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Agency and that such indemnification is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(b) A.I.D. may settle or compromise a personal damage claim against its employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(c) Absent exceptional circumstances, as determined by the Administrator or his or her designee, A.I.D. will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify A.I.D. that such an action is pending.

(e) The employee may, thereafter, request either: (1) Indemnification to satisfy a verdict, judgment or award entered against the employee or (2) payment to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with documentation including copies of the verdict, judgment, award or settlement proposal, as appropriate, to the General Counsel. The General Counsel may also seek the views of the Department of Justice. The General Counsel shall forward the request and the General Counsel's recommendation to the Administrator for decision.

(f) Any payment under this part either to indemnify an employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds.

(5 U.S.C. 301; 22 U.S.C. 2381(a))

[53 FR 29658, Aug. 8, 1988]

PART 209—NON-DISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS OF THE AGENCY FOR INTERNATIONAL DEVELOPMENT—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

209.1 Purpose.
209.2 Application of this part.
209.3 Definitions.
209.4 Discrimination prohibited.
209.5 Assurance required.
209.6 Compliance information.
209.7 Conduct of investigations.
209.8 Procedure for effecting compliance.
209.9 Hearings.
209.10 Decisions and notices.
209.11 Judicial review.
209.12 Effect on other regulations; supervision and coordination.
209.13 Delegation of authority.
APPENDIX A TO PART 209—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS REGULATION APPLIES

AUTHORITY: Sec. 602, 78 Stat. 252, and sec. 621, Foreign Assistance Act of 1961, 75 Stat. 445; 22 U.S.C. 2402.

SOURCE: 30 FR 317, Jan. 9, 1965, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 209 appear at 68 FR 51361, Aug. 26, 2003.

§ 209.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development.

§ 209.2 Application of this part.

This part applies to all programs carried on within the United States by recipients of Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development, including the types of Federal financial assistance listed in appendix A of this part. (appendix A may be revised from time to time by notice in the FEDERAL REGISTER.) It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this regulation, even if the application for such assistance is approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred or other assistance extended before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary, (d) any employment practice under any such program of any employer, employment agency, or labor organization, or (e) any procurement of goods or services, including the procurement of training. This part does not bar selection and treatment reasonably related to the foreign assistance objective or such other authorized purpose as the Federal assistance may have. It does not bar selections which are limited to particular

groups where the purpose of the Federal financial assistance calls for such a limitation nor does not bar special treatment including special courses of training, orientation or counseling consistent with such purpose.

§ 209.3 Definitions.

For purposes of this part—

(a) The term *Act* means the Civil Rights Act of 1964 (78 Stat. 241).

(b) The term *Administrator* means the Administrator of the Agency for International Development or any person specifically designated by him to perform any function provided for under this part.

(c) The term *applicant* means one who submits an application, request or plan required to be approved by the Administrator, or by a primary recipient as a condition to eligibility for Federal financial assistance, and the term ''application'' means such application, request, or plan.

(d) The term *facility* includes all or any portion 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.

(e) The term *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.

(f) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(g) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (g)(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. 7801), 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 (g)(1), (2), or (3) of this section.

(h) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or any other entity, or any individual in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary or a sovereign foreign government.

(i) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa,

Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

[30 FR 317, Jan. 9, 1965, as amended at 68 FR 51361, Aug. 26, 2003]

§ 209.4 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 subjected to discrimination under, any program or activity receiving Federal financial assistance from the Agency for International Development.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this regulation applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual 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 an individual 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 an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual 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 an individual an opportunity to participate in a program as an employee where a primary objective of the Federal financial assistance is to provide employment.

(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 individuals 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 individuals 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 individuals to discrimination because of race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects 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 individuals 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 regulation.

(4) As used in this section the services, financial aid, or other benefit provided under a program receiving Federal financial assistance shall be deemed to 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 regulation 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, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color

or national origin. Where previous 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 Regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973]

§ 209.5 Assurance 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. In the case of an application for Federal financial assistance to provide real property 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 real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The head of the bureau or office administering the Federal financial assistance 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 of real property, structures or improvements thereon, or interests therein, which was acquired withFederal financial assistance, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved, but property is improved withFederal financial assistance, the recipient shall agree to include such a covenant in any subsequent transfer of such property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Agency to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Agency official, 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 proposed 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 Administrator may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(3) Transfers of surplus property are subject to regulations issued by the Administrator of General Services (41 CFR 101–6.2).

(b) *Assurances 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 a special training project, for student assistance, 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 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 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.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973; 68 FR 51361, Aug. 26, 2003]

§ 209.6 Compliance information.

(a) *Cooperation and assistance.* The Administrator 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 Administrator timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Administrator 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.

(c) *Access to sources of information.* Each recipient shall permit access by the Administrator 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 shall fail or refuse 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 Administrator finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 209.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The Administrator 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 himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Administrator a written complaint. A complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the Administrator.

(c) *Investigations.* The Administrator 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 should 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 Administrator 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 § 209.8.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the Administrator 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 complainant 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.

§ 209.8 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 reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 209.4.* If an applicant fails or refuses to furnish an assurance required under § 209.4 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 Agency for International Development shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph, except that the Agency shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating, or refusing to grant or to continue Federal financial assistance shall become effective until (1) the head of the bureau or office administering the Federal financial assistance has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Administrator pursuant to paragraph (e) of § 209.10 and (4) the expiration of 30 days after the Administrator has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Agency official 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 this part and to take such corrective action as may be approprie.

[38 FR 17494, July 5, 1973]

§ 209.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 209.8(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 Administrator 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 section or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 209.8(c) of this part 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 Agency for International Development in Washington, DC, at a time fixed by the Administrator unless he determines that the convenience of the applicant or recipient or of the Agency requires that another place be selected. Hearings shall be held before the Administrator or before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient, and the Agency for International Development shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedure Act), and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Agency for International Development 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 shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more 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 Administrator may, by agreements with such other department or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 209.10.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

§ 209.10 Decisions and notices.

(a) *Decision by a hearing examiner.* If the hearing is held by a hearing examiner such 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 Administrator for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and the complainant. Where the initial decision is made by the hearing examiner the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the Administrator his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the Administrator 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 such notice of review the Administrator shall review the initial decision and issue his own decision thereon including the reasons therefor. The decision of the Administrator shall be mailed promptly to the applicant or recipient and the complainant, if any. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the Administrator.

(b) *Decisions on record or review by the Administrator.* Wherever a record is certified to the Administrator for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the Administrator 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 copy of the final decision of the Administrator shall be given in writing to the applicant or recipient and the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Wherever a hearing is waived pursuant to § 209.9(a) a decision shall be made by the Administrator on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing officer or the Administrator 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) *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 Administrator that it will fully comply with this part.

(f) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (e) 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 regulation and provides reasonable assurance that it will fully comply with this regulation.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (e) of this section may at any time request the responsible Agency official 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 (f)(1) of this section. If the responsible Agency official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Agency official 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 of procedure issued by the responsible Agency official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (f)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (e) of this section shall remain in effect.

[30 FR 317, Jan. 9, 1965 as amended at 38 FR 17949, July 5, 1973]

§ 209.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 209.12 Effect on other regulations; supervision and coordination.

(a) All regulations, orders or like directions heretofore issued by any officer of the Agency for International Development which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or 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 shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendment thereof): (1) Executive Order 11246, and regulations issued thereunder, or (2) any other regulation or instruction insofar as it prohibits discrimination on the grounds of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibits discrimination on any other ground.

(b) *Supervision and coordination.* The Administrator may from time to time assign to officials of other departments or agencies of the government (with the consent of such department or agency) 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 § 209.10), including the achievement of effective coordination and maximum uniformity within the Agency for International Development 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 subsection shall have the same effect as though such action had been taken by the responsible official of this Agency.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

§ 209.13 Delegation of authority.

Responsibility for administration and enforcement of this part, with respect to Federal financial assistance administered by another Federal department or agency pursuant to delegation, transfer interagency service agreement, or other arrangement is vested in the head of such department or agency, or his delegate, and subject to such delegations or redelegations as he may make or authorize.

APPENDIX A TO PART 209—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS REGULATION APPLIES

1. Grants to organizations and institutions to carry on programs of technical cooperation and development in the United States to promote the economic development of less

developed friendly countries. (Section 211, Foreign Assistance Act, 22 U.S.C. 2171.)

2. Grants to organizations and institutions to carry on programs of technical cooperation and development in the United States to promote the economic development of the less developed friendly countries of Latin America. (Section 251, Foreign Assistance Act, 22 U.S.C. 2211.)

3. Grants to organizations and institutions to carry out programs in the United States of research into, and evaluation of, economic development in less developed foreign countries. (Section 241, Foreign Assistance Act, 22 U.S.C. 2193.)

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

PART 211—TRANSFER OF FOOD COMMODITIES FOR FOOD USE IN DISASTER RELIEF, ECONOMIC DEVELOPMENT AND OTHER ASSISTANCE

Sec.

211.1 General purpose and scope; legislation.
211.2 Definitions.
211.3 Cooperating sponsor agreements; program procedure.
211.4 Availability and shipment of commodities.
211.5 Obligations of cooperating sponsor.
211.6 Processing, repackaging, and labeling commodities.
211.7 Arrangements for entry and handling in foreign country.
211.8 Disposition of commodities unfit for authorized use.
211.9 Liability for loss, damage or improper distribution of commodities.
211.10 Records and reporting requirements.
211.11 Suspension, termination, and expiration of program.
211.12 Waiver and amendment authority.
211.13 Participation by religious organizations.
APPENDIX I TO PART 211—OPERATIONAL PLAN

AUTHORITY: 7 U.S.C. 1726a(c).

SOURCE: 57 FR 19766, May 7, 1992, unless otherwise noted.

§ 211.1 General purpose and scope; legislation.

(a) *Legislation.* The Agricultural Trade Development and Assistance Act of 1954, as amended (Pub. L. 480), was further revised by the Agricultural Development and Trade Act of 1990, Public Law 101–624, 104 Stat. 3632–65 (1990). The legislation implemented by the regulation in this part (as of the date of issuance of this part) includes sections of Public Law 480, as follows: Sections 1, 2, 3, 201, 202, 203, 207, 401, 402, 403, 404, 406, 407, 408, 409, 413 and 414. Pursuant to title II of Public Law 480, A.I.D. may transfer agricultural commodities to address famine or other urgent or extraordinary relief requirements; combat malnutrition, especially in children and mothers; carry out activities that attempt to alleviate the causes of hunger, mortality and morbidity; promote economic and community development; promote sound environmental practices; and carry out feeding programs. Agricultural commodities may be provided to meet emergency food needs through foreign governments and private or public organizations, including intergovernmental organizations. Section 202(a) of Public Law 480 authorizes A.I.D., notwithstanding any other provision of law, to provide agricultural commodities for emergency food needs in such manner and on such terms and conditions as A.I.D. determines appropriate to respond to the emergency. Agricultural commodities also may be provided for non-emergency assistance through private voluntary organizations or cooperatives which are, to the extent practicable, registered with A.I.D., and through intergovernmental organizations.

(b) *Terms and conditions.* This part 211, also known as A.I.D. Regulation 11, provides the standard terms and conditions applicable to title II programs, except those conducted by agencies of the United Nations and the World Food Program. The Operational Plan submitted by a cooperating sponsor may propose, and justify, the waiver of any section of this Regulation that is not required by statute. If A.I.D. approves a waiver, the specific section or subsection waived will be identified in the Transfer Authorization signed by the cooperating sponsor and A.I.D. or in an attachment, prepared by A.I.D., that is appended to the Operational Plan.

§ 211.2 Definitions.

(a) *A.I.D.* means the Agency for International Development or any successor agency, including, when applicable, each USAID. *USAID* means an of-

fice of A.I.D. located in a foreign country. *AID/W* means the office of A.I.D. located in Washington, DC.

(b) *Annual Estimate of Requirements* or *AER* (Form A.I.D. 1550–3, Exhibit E, A.I.D. Handbook 9) is a statistical update of the Operational Plan which is signed by the cooperating sponsor requesting commodities under title II estimating the quantities required. When signed by AID/W, the AER together with the Food for Peace Program Agreement between A.I.D. and the cooperating sponsor, the approved Operational Plan, and this Regulation 11 form a donation agreement between A.I.D. and the cooperating sponsor with respect to the commodities included in the AER.

(c) *CCC* means the Commodity Credit Corporation, a corporate agency and instrumentality of the United States within the U.S. Department of Agriculture.

(d)(1) *Cooperating sponsor* means an entity, within or without the United States, governmental or not, such as the foreign government, the American Red Cross, the intergovernmental organization, or the private voluntary organization or cooperative, which enters into an agreement with the U.S. Government for the use of agricultural commodities or funds.

(2) *Governmental cooperating sponsor* means a foreign government which has signed a Transfer Authorization under which agricultural commodities are donated for emergency purposes only. Governmental cooperating sponsors are treated here as a group separate from other cooperating sponsors since they are eligible only for emergency programs and their circumstances are different in such matters as rules governing shipping and in certain other aspects of agreements.

(3) *Nongovernmental cooperating sponsor* means a cooperating sponsor which is a private voluntary organization, a cooperative, the American Red Cross, or other private or public agency. An intergovernmental organization also is treated as a nongovernmental cooperating sponsor in this Regulation 11 unless the text or context indicates otherwise.

(e) *Cooperative* means a private sector organization whose members own and control the organization and share in its services and its profits and that provides business services and outreach in cooperative development for its membership.

(f) *Diplomatic Posts* means the offices of the Department of State located in foreign countries and may include Embassies, Legations, and Consular offices. Since A.I.D. is responsible for title II programs, references in this Regulation to Diplomatic Posts apply only with respect to those countries where there is no USAID.

(g) *Disaster relief organizations* means organizations which are authorized by AID/W, USAID or a Diplomatic Post to assist disaster victims.

(h) *Disaster victims* means persons who, because of flood, drought, fire, earthquake, other natural or man-made disasters, or extraordinary relief requirements, are in need of food, feed, or other assistance.

(i) *Duty free* means exempt from all customs duties, toll charges, taxes or governmental impositions levied on the act of importation.

(j)(1) *Food for Peace Program Agreement* establishes a nongovernmental organization as a cooperating sponsor for which A.I.D. agrees to authorize future transfers of commodities in accordance with title II of Public Law 480 and Regulation 11 and the cooperating sponsor agrees to accept transfer of commodities in accordance with approved programs under title II and A.I.D. Regulation 11 and related procedures.

(2) *Host Country Food for Peace Program Agreement* means an agreement between the cooperating sponsor and the foreign government of each cooperating country which authorizes the cooperating sponsor to conduct activities there in a manner consistent with the terms and conditions set forth within this Regulation 11.

(3) *Recipient Agency Agreement* means a written agreement between the cooperating sponsor and a recipient agency prior to the transfer to the recipient agency of commodities, monetized proceeds, or other program income for distribution or implementation of an approved program.

(k) *Free alongside ship* (f.a.s.) includes all costs of transportation and delivery of the goods to the dock. ''Free on

board'' (f.o.b.) includes costs for delivering the goods and loading them aboard the carrier at a specific location.

(l) *Institutions* means nonpenal, public or nonprofit private establishments that operate for charitable or welfare purposes where needy persons reside and receive meals including, but not limited to, homes for the aged, mentally and physically handicapped, refugee camps, and leprosy asylums.

(m) *Intergovernmental organizations* means agencies sponsored and supported by two or more nations, one of which is the United States.

(n) *Marine salvage* means the compensation made to those by whose assistance a vessel or its cargo has been saved from impending peril or recovered from actual loss.

(o) *Monetized proceeds* means funds generated from the sale of title II commodities in approved monetization programs. Monetized proceeds should be deposited in a special interest-bearing account for control and monitoring.

(p) *Nonprofit* means that the residue of income over operating expenses accruing in any activity, project, or program is used solely for the operation of such activity, project, or program.

(q) *Operational Plan* is a plan submitted by the cooperating sponsor or potential cooperating sponsor describing the proposed use of commodity and/or monetized proceeds and/or program income. All references in this Regulation to the Operational Plan shall include the AER that relates to such Operational Plan.

(r) *Private voluntary organization* means a not-for-profit, nongovernmental organization (in the case of a United States organization, an organization that is exempt from Federal Income Taxes under section 501(c)(3) of the Internal Revenue Code of 1986) that receives funds from private sources, voluntary contributions of money, staff time, or in-kind support from the public, and that is engaged or is planning to engage in voluntary, charitable or development assistance activities (other than religious activities).

(s) *Program income* means gross income earned by the cooperating sponsor or recipient agencies from activities supported under the approved program during the program period, including, but not limited to, interest earned on deposits of monetized proceeds, revenue from income generating activities, funds accruing from the sale of containers and nominal voluntary contributions by recipients made on the basis of ability to pay.

(t) *Recipient agencies* means schools, institutions, welfare agencies, disaster relief organizations, and public or private agencies whose food distribution functions or project activities are sponsored by the cooperating sponsor and which receive for distribution to eligible recipients commodities or monetized proceeds or program income for approved project activities. A cooperating sponsor may be a recipient agency.

(u) *Recipients* means persons who receive food assistance or the benefit of monetized proceeds or program income because of their economic or nutritional condition or who are otherwise eligible to receive commodities for their own use or other assistance in accordance with the terms and conditions of the approved Operational Plan or Transfer Authorization.

(v) *Registered private voluntary organization or cooperative* means a nonprofit private voluntary organization or cooperative registered with, and approved by, A.I.D. The term includes foreign as well as U.S. registered nonprofit voluntary organizations and cooperatives. For discussion of registration, see 22 CFR part 203, A.I.D. Regulation 3, Registration of Agencies for Voluntary Foreign Aid. In reviewing and approving proposals, A.I.D., at its discretion, may give preference to registered private voluntary organizations and cooperatives over those that are not and to U.S. private voluntary organizations and cooperatives over those that are foreign.

(w) *Transfer Authorization* or *TA* means the document signed by the cooperating sponsor and A.I.D. which describes commodities and the program in which they will be used. The TA incorporates A.I.D. Regulation 11 and authorizes CCC to ship the commodities.

(x) *USDA* means the U.S. Department of Agriculture.

(y) *Welfare agencies* means public or private voluntary organizations that

provide care, including food assistance, to needy persons who are not residents of institutions.

§211.3 Cooperating sponsor agreements; program procedure.

(a) *Food for Peace Program Agreement.* A nongovernmental organization is eligible to be a cooperating sponsor for regular programs under paragraph (d)(2)(i) of this section only after it has entered into a Food For Peace Program Agreement with A.I.D. that incorporates the terms and conditions set forth in Regulation 11.

(b) *Host Country Food for Peace Program Agreement.* Nongovernmental and intergovernmental cooperating sponsors shall, in addition to the Food for Peace Program Agreement, enter into a separate written Host Country Food for Peace Agreement with the foreign government of each country for which title II commodities are transferred to the cooperating sponsor. This agreement shall establish the terms and conditions needed by a nongovernmental cooperating sponsor to conduct a title II program in the country in accordance with the applicable requirements of this part. The cooperating sponsor shall provide USAID or the Diplomatic Post a copy of each executed Host Country Food for Peace Agreement.

Where such written agreement is not appropriate or feasible, USAID or the Diplomatic Post shall assure AID/W, in writing, that the program can be effectively implemented in compliance with this Regulation without such an agreement.

(c) *Recipient Agency Agreement.* Prior to the transfer of commodities, monetized proceeds, or program income to a recipient agency for distribution or implementation of an approved program, the cooperating sponsor shall execute with such agency a written agreement which shall:

(1) Describe the approved uses of commodities, monetized proceeds and program income in a manner consistent with the approved Operational Plan or TA;

(2) Require the recipient agency to pay the cooperating sponsor the value of any commodities, monetized proceeds or program income that are used for purposes not permitted under the Recipient Agency Agreement or that are lost, damaged or misused as a result of the recipient agency's failure to exercise reasonable care with respect to such commodities, monetized proceeds or program income; and

(3) Incorporate by reference or otherwise the terms and conditions set forth in this Regulation 11.

The Operational Plan may indicate those transfers of commodities, monetized proceeds or program income for which the cooperating sponsor and A.I.D. agree that a Recipient Agency Agreement would not be appropriate or feasible. In any case, the cooperating sponsor shall remain responsible for such commodities, monetized proceeds and program income in accordance with the terms of this Regulation 11 and the Operational Plan or TA. The cooperating sponsor shall provide USAID or the Diplomatic Post a copy of each executed Recipient Agency Agreement.

(d) *Program procedure*—(1) *Requests for programs.* A program may be requested by any cooperating sponsor, including private voluntary organizations, cooperatives, foreign governments (for emergencies only), and international organizations.

(2) *Approval of programs.* There are two basic patterns of decision typically employed in approving a request for title II assistance:

(i) *Regular programs.* The cooperating sponsor submits to A.I.D. an Operational Plan or multi-year Operational Plan (see appendix I), describing the program proposed. Also, an AER will be submitted to A.I.D. along with the Operational Plan, estimating the quantities of commodities required for each program proposed. AID/W's approval of and signature on the AER completes this decision process.

(ii) *Individual programs.* The other basic pattern of decision making results in a Transfer Authorization. The TA is used for all emergency government-to-government programs, and for nongovernmental cooperating sponsor programs which do not fit within the Program Agreement/AER framework. The TA will include by reference Regulation 11.

(3) *Subject to availability.* A.I.D.'s agreement to transfer commodities is

subject to the availability of appropriations and agricultural commodities during each United States Government fiscal year to which it applies.

(4) *Timing of decision.* Under Public Law 480, section 207(a), within 45 days of its submission to AID/W, a decision must be made on a proposal submitted by a private voluntary organization or cooperative, concurred in by USAID or the Diplomatic Post. The decision shall detail the reasons for approval or denial, and if denied, conditions to be met for approval. In addition, a USAID or Diplomatic Post must decide whether or not to concur in the proposal within 45 days of receiving it or provide a written explanation to the private voluntary organization or cooperative and AID/W of the reasons USAID or the Diplomatic Post needs more time to consider the proposal.

§ 211.4 Availability and shipment of commodities.

(a) *Shipment, distribution and use of commodities.* Commodities shall be available for shipment, distribution and use in accordance with the provisions of the approved Operational Plan and AER, or TA and this Regulation 11.

(b) *Transfer of title and delivery.* (1) Unless the approved Operational Plan or TA provides otherwise, title to the commodity shall pass—

(i) For nongovernmental cooperating sponsors, at the point in the United States at which the ocean carrier or its agents take possession of the cargo (generally f.a.s. or f.o.b. vessel U.S. port); or

(ii) For governmental cooperating sponsors, at the destination port of entry, upon completion of discharge by the ocean carrier (non-landlocked countries), or at the destination point of entry, upon completion of delivery by the inland carrier (landlocked countries).

Except as A.I.D. may otherwise agree in writing, the cooperating sponsor shall retain title to commodities, monetized proceeds, and program income transferred to a recipient agency for distribution or use in accordance with the Operational Plan or TA.

(2) Nongovernmental cooperating sponsors shall make the necessary arrangements to accept commodities at the points of availability designated by CCC.

(c) *Processing, handling, transportation and other costs.* (1) Except as otherwise provided in the Operational Plan or TA, the United States will pay in accordance with this paragraph (c) processing, handling, transportation, and other incidental costs incurred in making commodities available to cooperating sponsors at U.S. ports or U.S. inland destinations, up to the point at which the ocean carrier takes possession of the cargo.

(2) The United States will finance the transfer of commodities at the lowest combination inland and ocean transportation costs as determined by the United States and in sizes and types of packages announced as applicable. If a nongovernmental cooperating sponsor requests changes to these standards which are made by the United States as an accommodation to the cooperating sponsor and these changes result in costs over those the United States otherwise would have incurred, the cooperating sponsor shall reimburse the United States for these increased costs promptly upon request.

(3) All costs and expenses incurred subsequent to the transfer of title to cooperating sponsors shall be borne by them except as otherwise provided herein. Upon the determination that it is in the interests of the program to do so, the United States may pay or reimburse the following additional costs:

(i) Ocean transportation costs from U.S. ports to the designated ports of entry abroad; or

(ii) Ocean transportation costs from U.S. ports to designated points of entry abroad in the case—

(A) Of landlocked countries,

(B) Where ports cannot be used effectively because of natural or other disturbances,

(C) Where carriers to a specific country are unavailable, or

(D) Where a substantial savings in cost or time can be effected by the utilization of points of entry other than ports; or

(iii) In the case of commodities for urgent and extraordinary relief requirements, including prepositioned commodities, transportation costs from designated points of entry or

ports of entry abroad to storage and distribution centers and associated storage and distribution costs.

(d) *Payment or reimbursement of ocean freight costs.* When A.I.D. contracts for ocean carriage, carriers shall be paid by A.I.D., as provided in their contracts of affreightment, upon presentation of Standard Form 1034 and three copies of 1034A (Public Voucher for purchases and services other than personal), together with three copies of the related on-board ocean bill of lading, one copy of which must contain the following certification signed by an authorized representative of the steamship company:

I certify that this document is a true and correct copy of the original on-board ocean bill of lading under which the goods herein described were located on the above-named vessel and that the original and all other copies thereof have been clearly marked as not to be certified for billing.

_____
(Name of steamship co.)

By

(Authorized representative)

Such documents shall be submitted to: Transportation Division, Office of Procurement, (FA/OP/TRANS), Agency for International Development, Washington, DC 20523. Except for duty, taxes and other costs excluded by §211.7 (a) and (b) of this Regulation 11, nongovernmental cooperating sponsors booking their own vessels will be reimbursed as provided in A.I.D. Regulation 2 (part 202 of this chapter) for ocean freight authorized by the United States upon presentation to AID/W of proof of payment to the ocean carrier. However, freight prepaid bills of lading which indicate firm incurrence of freight costs will be accepted by A.I.D. as evidence of payment to the ocean carrier provided that the nongovernmental cooperating sponsor agrees to ensure that such carrier is actually paid no later than 7 calendar days following receipt of U.S. Government funds by the sponsor or its agent. A.I.D. will reimburse nongovernmental cooperating sponsors only up to a maximum of 2½ percent commission paid to their freight forwarders as a result of booking Public Law 480, title II cargo. Similarly, when A.I.D. books cargo, a maximum of 2½ percent commission may be paid by the contracted carrier. Proof of payment of commissions must be submitted with requests for reimbursement.

(e) *Shipping instructions*—(1) *Shipments booked by A.I.D.* Requests for shipment of commodities shall originate with the cooperating sponsor and shall be submitted to USAID or the Diplomatic Post for clearance and transmittal to AID/W. AID/W shall, through cables or letters to USAID or the Diplomatic Post, provide cooperating sponsors (and, where applicable, private voluntary organization or cooperative headquarters) with names of vessels, expected times of arrival (ETAs), and other pertinent information on shipments booked by A.I.D. As soon as possible but not later than 7 days from the time of exportation of commodities, A.I.D.'s freight forwarding contractor shall send applicable ocean bills of lading by airmail, or by the fastest means available, to USDA (Chief, Processed Commodities Division, Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205), to USAID or the Diplomatic Post (and where applicable to the USAID Controller and nongovernmental cooperating sponsor headquarters and field representative), to AID/W, FA/OP/TRANS (see §211.4(d)), and to the consignee in sufficient time to advise of the arrival of the shipment.

(2) *Shipments booked by nongovernmental cooperating sponsor.* Requests for shipment of commodities shall originate with the cooperating sponsor and shall be cleared by USAID or the Diplomatic Post before transmittal to the cooperating sponsor's headquarters for concurrence and issuance. USAID or the Diplomatic Post shall promptly clear such requests for shipment of commodities or, if there is reason for delay or disapproval, advise the cooperating sponsor and AID/W within seven (7) days of receipt of requests for shipment. After the cooperating sponsor headquarters concurs in the request and issues the order, the original will be sent promptly to AID/W which will forward it to CCC for procurement action with a copy to USAID or the Diplomatic Post. Headquarters of cooperating sponsors which book their own

shipments shall provide their representatives and USAID or the Diplomatic Post with the names of vessels, ETAs and other pertinent information on shipments booked. At the time of exportation of commodities, the booking agent representing the cooperating sponsor shall send applicable ocean bills of lading by airmail or by the fastest means available to USDA (Chief, Processed Commodities Division, Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205), to USAID or the Diplomatic Post (and where applicable to the USAID Controller and the nongovernmental cooperating sponsor representative), to AID/W, FA/OP/TRANS (see § 211.4(d)), and to the consignee in the country of destination in sufficient time to advise of the arrival of the shipment. Nongovernmental cooperating sponsors also will forward cable advice of actual exportation to their program directors in countries within the Caribbean area in view of the short transit time from U.S. port to destination.

(3) Cooperating sponsors awarding USAID-financed ocean transportation bookings of food aid under the Public Law 480, title II program shall follow consistent, transparent, fair and effective procedures. In order to promote these objectives, USAID may formulate, and from time-to-time amend, uniform standard booking guidelines relating to such bookings. Guidelines will be finalized only after consultation with affected cooperating sponsors, freight forwarders and carriers as required by the Agricultural Development and Trade Act of 1990 or other applicable legislation. Copies of the guidelines and any proposed amendments may be obtained from the Transportation Division, Office of Procurement, Agency for International Development, Washington, DC 20523.

(f) *Tolerances*. Delivery by the United States to the cooperating sponsor at point of transfer of title within a tolerance of 5 percent (2 percent in the case of quantities over 10,000 metric tons) plus or minus, of the quantity ordered for shipment shall be regarded as completion of delivery. There shall be no tolerance with respect to the ocean carrier's responsibility to deliver the entire cargo shipped and the United States assumes no obligation for failure by an ocean carrier to complete delivery to port of discharge.

(g) *Conflict of interest*. (1) Pursuant to section 407(c)(4) of Public Law 480, a person may not be an agent, broker, consultant, or other representative of the U.S. Government, an importer, or an importing country in connection with agricultural commodities provided under Public Law 480 during a fiscal year in which such person acts as an agent, broker, consultant or other representative of a person engaged in providing ocean transportation or ocean transportation-related services for such commodities.

(i) For purposes of section 407(c)(4), the term ''transportation-related services'' means lightening, stevedoring, bagging or inland transportation to the destination point.

(ii) The prohibition does not preclude payment by ocean carriers of compensation or brokerage fees on a shipment-by-shipment basis as provided in governing tariffs or charter parties to persons performing freight forwarding or charter broking services under contract to the U.S. Government.

(2) Pursuant to section 407(d)(3) of Public Law 480, freight agents employed by A.I.D. under title I, II or III of Public Law 480 shall not represent any other foreign government during the period of their contract with the United States Government. This restriction applies both to charter brokers and freight forwarders whether they are prime contractors or subcontractors of A.I.D.

(3) This paragraph (g) does not apply to shipments booked by nongovernmental cooperating sponsors or their agents.

[57 FR 19766, May 7, 1992, as amended at 60 FR 36991, July 19, 1995]

§ 211.5 Obligations of cooperating sponsor.

(a) *Operational Plans*. Each cooperating sponsor shall submit a description of the programs it is sponsoring or proposes to sponsor to USAID or the Diplomatic Post for its approval. AID/W will prescribe the format and timing for submittals and provide final approval of the Operational Plan. This

Operational Plan will include program purposes and goals; criteria for measuring program effectiveness; a description of the activities for which commodities, monetized proceeds, or program income will be provided or used; and other specific provisions in addition to those set forth in this Regulation. Further, this description will include information from which it may be determined that the distribution of commodities in the recipient country will not result in a substantial disincentive to domestic production and that adequate storage facilities will be available in the recipient country at the time of arrival of the commodity to prevent spoilage or waste of the commodity. For preparation of the Operational Plan, see appendix I to this regulation. If a cooperating sponsor submits a multi-year Operational Plan that is approved by A.I.D., the Operational Plan provided with an AER each subsequent year should cover only those components or features which require updating or the cooperating sponsor proposes to change. A.I.D. will issue guidance each year regarding Operational Plans that must be submitted by cooperating sponsors. Within the limits of the total amount of commodities, monetized proceeds and program income approved by A.I.D. in the Operational Plan, the cooperating sponsor may increase or decrease by not to exceed 10 percent the amount of commodities, monetized proceeds or program income allocated to approved program categories or components of the Operational Plan. Such adjustments must be identified specifically in the annual report submitted by a cooperating sponsor under §211.10(b) of the Regulation. A cooperating sponsor may not otherwise deviate from the Operational Plan without the prior written approval of A.I.D.

(b) *Program supervision*. Cooperating sponsors shall provide adequate supervisory personnel for the efficient operation of the program, including personnel to:

(1) Plan, organize, implement, control, and evaluate programs involving distribution of commodities or use of monetized proceeds and program income,

(2) Make warehouse inspections, physical inventories, and end-use checks of food or funds, and

(3) Review of books and records maintained by recipient agencies that receive monetized proceeds and/or program income.

Cooperating sponsors shall be represented by a person resident in the country of distribution or other nearby country approved by AID/W, who is appointed by and responsible to the cooperating sponsor for distribution of commodities or use of monetized proceeds or program income in accordance with the provisions of this regulation.

(c) *Audits*—(1) *By nongovernmental cooperating sponsors*. A nongovernmental cooperating sponsor shall arrange for periodic audits to be conducted in accordance with OMB Circular A–133, including the OMB Compliance Supplement and the Statement of Position Regarding Circular A–133 developed by the American Institute of Certified Public Accountants. Nongovernmental recipient agencies shall be treated as subrecipients under OMB Circular A–133, and governmental recipient agencies shall furnish the cooperating sponsor audits in accordance with the standard in paragraph (c)(2) of this section. The cooperating sponsor may satisfy these audit responsibilities with respect to recipient agencies by relying on independent audits performed of recipient agencies or on appropriate procedures performed by the cooperating sponsor's internal audit or program staff, by expanding the scope of the independent financial and compliance audit of the cooperating sponsor to encompass testing of recipient agency charges, or by a combination of these procedures. The Generally Accepted Commodity Accounting Principles issued by Food Aid Management, an association of cooperating sponsors, may be used for commodity accounting.

(2) *By governmental cooperating sponsors*. A governmental cooperating sponsor shall ensure that an audit satisfactory to A.I.D. is conducted annually with respect to donated commodities and monetized proceeds, if commodity sales are authorized under the agreement with A.I.D., including commodities and monetized proceeds transferred to or used by recipient agencies.

The audit shall be a financial audit performed by the country's principal government audit agency or another audit agency or firm acceptable to A.I.D. This audit should be conducted in accordance with generally accepted government auditing standards issued by the United States General Accounting Office, or auditing standards that have been prescribed by the laws of the country or adopted by public accountants or an association of public accountants in the country, or Auditing Standards promulgated by the International Organization of Supreme Audit Institutions or International Auditing Practices Committee of the International Federation of Accountants. Both the auditor and the auditing standards to be used by the cooperating sponsor must be acceptable to A.I.D. The cooperating sponsor may satisfy its audit responsibility with respect to recipient agencies by relying on independent audits of the recipient agency or on appropriate procedures performed by internal audit or program staff of the cooperating sponsor, by expanding the scope of the independent financial audit of the cooperating sponsor to encompass testing of recipient agency charges or actions, or by a combination of these procedures. Recipient agencies that receive less than $25,000 of donated commodities and/or monetized proceeds are excluded from the cooperating sponsor's audit responsibility.

(d) *Commodity requirements; AER.* Each cooperating sponsor shall submit to USAID or the Diplomatic Post, within such times and on the AER form prescribed by AID/W, estimates of requirements showing the quantities of commodities required for each program proposed.

(e) *No military distribution.* Except as A.I.D. may otherwise agree in writing, agricultural commodities donated by A.I.D. shall not be distributed, handled or allocated by any military forces.

(f) *Determination of eligibility of recipients.* Cooperating sponsors shall be responsible for determining that the recipients and recipient agencies to whom they distribute commodities are eligible in accordance with the Operational Plan or TA and this Regulation. Cooperating sponsors shall impose upon recipient agencies responsibility for determining that the recipients to whom they distribute commodities or provide assistance with monetized proceeds or program income are eligible. Commodities shall be distributed free of charge except as provided in paragraphs (j) and (k) of this section or as otherwise authorized by AID/W, but in no case will recipients be excluded from receiving commodities because of inability to make a contribution to the cooperating sponsor for any purpose.

(g) *No discrimination.* Cooperating sponsors shall distribute commodities to and conduct operations (with food, monetized proceeds, or program income) only with eligible recipient agencies and eligible recipients without regard to political affiliation, geographic location, ethnic, tribal or religious identity or other factors extraneous to need and the eligibility criteria set forth in the approved Operational Plan or TA, and shall impose similar conditions upon recipient agencies.

(h) *Public recognition.* To the maximum extent practicable, and with the cooperation of the host government, adequate public recognition shall be given in the press, by radio, and other media that the commodities or assistance financed by monetized proceeds or program income have been provided through the friendship of the American people as food for peace. At distribution and feeding centers or other project sites the cooperating sponsor shall, to the extent feasible, display banners, posters, or similar media which shall contain information similar to that prescribed for containers in paragraph (i) of this section. Recipients' individual identification cards shall, insofar as practicable, be imprinted to contain such information.

(i) *Containers*—(1) *Markings.* Unless otherwise specified in the Operational Plan or TA, when commodities are packaged for shipment from the United States, bags and other containers shall be marked with the CCC contract number or other identification, the A.I.D. emblem and the following information stated in English:

(i) Name of commodity;

(ii) Provided through the friendship of the American people as food for peace;

(iii) Not to be sold or exchanged (where applicable).

(2) *Disposal of containers.* Cooperating sponsors may dispose of containers, other than containers provided by carriers, in which commodities are received in countries having approved title II programs, by sale or exchange, or may distribute the containers free of charge to eligible food or fiber recipients for their personal use. If the containers are to be used commercially, the cooperating sponsor must arrange for the removal, obliteration, or cross out of the U.S. Government markings from the containers prior to such use.

(j) *Monetization programs.* Provisions of this Regulation that prohibit or restrict the sale of commodities or require marking or labeling of containers do not apply to the extent the sale of commodities is approved by A.I.D. Cooperating sponsors are not required to monitor, manage, report on or account for the distribution or use of commodities after title to the commodities has passed to buyers or other third parties pursuant to a sale under a monetization program and all sales proceeds have been fully deposited in the special interest-bearing account established by the cooperating sponsor for monetized proceeds. However, the receipt and use of sales proceeds must be monitored, managed, reported and accounted for as provided in this Regulation, with special reference to paragraphs (k) and (l) of this section, and §211.10. It is not mandatory that commodities approved for monetization be imported and sold free from all duties and taxes, but nongovernmental cooperating sponsors may negotiate agreements with the host government permitting the tax-free import and sale of such commodities. Even where the cooperating sponsor negotiates tax-exempt status, the prices at which the cooperating sponsor sells the commodities to the purchaser should reflect prices that would be obtained in a commercial transaction, *i.e.*, the prices would include the cost of duties and taxes, except as A.I.D. may otherwise agree in writing. Thus, the amounts normally paid for duties and taxes would accrue for the benefit of the cooperating sponsor's approved program. Cooperating sponsors should refer to the ''Monetization Field Manual'' for more comprehensive guidance on setting the sales price. A copy of the Monetization Manual may be obtained from AID/W-FHA/PPE, Washington, DC 20523.

(k) *Use of funds.* (1) Nongovernmental cooperating sponsors and recipient agencies may use monetized proceeds and program income to:

(i) Transport, store, distribute and otherwise enhance the effectiveness of the use of donated commodities and products thereof, including construction or improvement of storage facilities or warehouses, handling, insect and rodent control, payment of personnel employed or used by the cooperating sponsor or recipient agencies in support of approved programs;

(ii) Implement income generating, community development, health, nutrition, cooperative development, agricultural and other developmental activities agreed upon by A.I.D. and the cooperating sponsor;

(iii) Make investments, with the approval of A.I.D., and any interest earned on such investments may be used for purposes described in paragraphs (k)(l) (i) and (ii) of this section;

(iv) Improve their financial and other management systems; and

(v) Pay indirect costs of the cooperating sponsor that are allocable to the monetization program at the indirect cost rate approved by A.I.D. for the cooperating sponsor, the direct and indirect costs of an office maintained by the cooperating sponsor in the country where the monetization program is conducted that are allocable to the title II program there, and the costs of a regional office maintained by a cooperating sponsor that are allocable to the cooperating sponsor's effort to enhance the effectiveness of the use of commodities provided by A.I.D. under title II.

(2) Monetized proceeds and program income may be used by the cooperating sponsor and recipient agencies only for the purposes described in the Operational Plan or TA, or otherwise approved by A.I.D., in writing, and only for such costs as would be allowable under OMB Circular A–122, as amended,

''Cost Principles for Nonprofit Organizations''. A recipient agency may use not to exceed $500 per year of voluntary contributions for institutional, community or social development or other humanitarian purposes without regard to the Operational Plan or TA or OMB Circular A–122.

(3) Governmental cooperating sponsors shall use monetized proceeds and program income only for emergency purposes as described in the TA with respect to such programs.

(4) Monetized proceeds and program income may not be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.

(5) Except as A.I.D. may otherwise agree in writing, monetized proceeds may not be used to finance the production for export of agricultural commodities, or products thereof, that would compete in the world market with similar agricultural commodities, or products thereof, produced in the United States, if such competition would cause substantial injury to the United States producers, as determined by A.I.D.

(6)(i) The cooperating sponsor shall use commercially reasonable practices in construction activities and in purchasing goods and services with monetized proceeds or program income; maintain a code of standards of conduct regarding conflicts of interest; carry out procurement transactions in a manner to provide open and free competition to the maximum extent practicable; and maintain and make available to A.I.D. in accordance with § 211.10 records and documents regarding the procurement of goods and services with monetized proceeds and program income. Cooperating sponsors shall follow their own requirements relating to bid guarantees, performance bonds and payment bonds when program income or monetized proceeds are used to finance construction or the improvement of facilities, but shall consult with USAID or the Diplomatic Post regarding such requirements when the estimated cost of such construction or improvements exceeds $100,000. Title to real and personal property shall be vested in the cooperating sponsor, except as provided in the Operational Plan or TA or as A.I.D. may otherwise agree in writing, subject to the requirements of § 211.11 upon termination of the program.

(ii) Monetized proceeds and program income may not be used to acquire, construct, alter or upgrade land, buildings or other real property improvements that are used in whole or in part for sectarian purposes or which are owned or managed by a church or other organization engaged exclusively in religious activity. Notwithstanding the preceding sentence, monetized proceeds or program income may be used to finance repair or rehabilitation of an existing structure owned or managed by a church or organization engaged exclusively in religious activity to the extent necessary to avoid spoilage or loss of donated commodities, provided that the structure is not used in whole or in part for any sectarian purpose while donated commodities are stored in it. The use of monetized proceeds or program income to finance construction of such a structure may be approved in the Operational Plan or TA or by USAID or the Diplomatic Post if the structure is needed and will be used for the storage of donated commodities for a sufficient period of time to warrant the expenditure of monetized proceeds or program income and the structure will not be used for any sectarian purpose during this period.

(l) *Report on funds.* The cooperating sponsor (headquarters, if there is more than one office) shall annually provide AID/W a report on the receipt and disbursement of all monetized proceeds and program income by cooperating sponsors and recipient agencies. This report should include the source of the funds, by country, and how the funds were used. This annual report should be submitted to AID/W by December 31 of each calendar year for the fiscal year ending September 30 of that calendar year.

(m) *No displacement of sales.* Except in the case of emergency or disaster situations, the donation of commodities furnished for these programs shall not result in increased availability for export by the recipient country of the same or like commodities and shall not interfere with or displace sales in the

recipient country which might otherwise take place. A country may be exempt from this proviso if circumstances warrant. USAIDs should seek AID/W guidance on this matter.

(n) *Commodities borrowed or exchanged for programs.* After the date of the program approval by AID/W, but before arrival at the distribution point of the commodities authorized, the cooperating sponsor may, with prior approval of USAID or the Diplomatic Post, borrow the same or similar commodities from available sources to meet program requirements provided that:

(1) Borrowed commodities which are used in accordance with the terms of the Operational Plan or TA will be replaced with commodities transferred by A.I.D. The amount of commodities transferred to replace borrowed commodities shall be established by mutual agreement between the cooperating sponsor and USAID or the Diplomatic Post and will be determined on the basis of equivalent value at the time and place of transfer or on some other justifiable basis proposed by the cooperating sponsor and acceptable to USAID or the Diplomatic Post;

(2) Packaged commodities which are borrowed shall be appropriately identified insofar as practicable in the language of the country of distribution as having been provided through the friendship of the American people as food for peace; and

(3) Suitable publicity shall be given to the exchange of commodities as provided in paragraph (h) of this section and containers for borrowed commodities shall be marked to the extent practicable in accordance with §211.6(c).

(o) *Commodity transfer between programs.* After the date of program approval by AID/W, but before distribution of the commodities, USAID or the Diplomatic Post (or the cooperating sponsor with prior approval of USAID or the Diplomatic Post) may transfer commodities between approved title II programs to meet emergency disaster requirements or to improve efficiency of operation, such as to meet temporary shortages due to delays in ocean transportation or provide for rapid distribution of stocks in danger of deterioration. Transfers also may be made to disaster organizations for use in meeting exceptional circumstances. Commodity transfers shall be made at no cost to the U.S. Government and with the concurrence of the cooperating sponsor and disaster relief organization concerned. A USAID or Diplomatic Post with funds available, however, may pay the costs of transfers to meet extraordinary relief requirements, and AID/W shall be advised promptly of the details of the transfer. Commodities transferred between programs shall not be replaced by the U.S. Government unless AID/W authorizes such replacement.

(p) *Disposal of excessive stock of commodities.* If commodities are on hand which cannot be utilized in accordance with the approved Operational Plan or the TA, the cooperating sponsor shall promptly advise USAID or the Diplomatic Post of the quantities, location and condition of such commodities, and where possible, shall propose an alternate use of the excess stocks; USAID or the Diplomatic Post shall determine the most appropriate use of the excess stocks, and with prior AID/W concurrence, shall issue instructions for disposition. Transportation costs and other charges attributable to transferring commodities from one program to another within the country shall be the responsibility of the cooperating sponsor, except that in case of disaster or emergency, AID/W may authorize the use of disaster or emergency funds to pay for the costs of such transfers. (For discussion of unfit commodity disposal, see §211.8.)

(q) *Trilateral exchange programs.* The restrictions in this Regulation regarding the distribution, use or labeling of commodities shall not apply to commodities furnished by CCC in exchange for other commodities obtained from third parties (''exchanged commodities'') to be distributed in a recipient country under a trilateral exchange program. Except as A.I.D. and the cooperating sponsor may otherwise agree in writing, title to the exchanged commodities will pass to the cooperating sponsor upon delivery to and acceptance by the cooperating sponsor at the point of delivery specified in the Operational Plan or TA. After title passes

to the cooperating sponsor the exchanged commodities shall be deemed ''commodities'' covered by this Regulation with respect to all post-delivery obligations of the cooperating sponsor contained in this Regulation, including obligations regarding labeling to the extent practicable, distribution, monitoring, reporting, accounting and use of commodities or monetized proceeds resulting from their sale. In the event of difficulty in satisfying the labeling requirement, the cooperating sponsor will consult with USAID or the Diplomatic Post for guidance.

(r) *Landing*. Governmental cooperating sponsors shall permit donated commodities to be discharged notwithstanding any dispute or question concerning quality, quantity, or other matters relating to the commodity itself. Any such dispute or question shall be resolved in accordance with procedures stated in this Regulation or in the relevant shipping or other contracts, as applicable.

§ 211.6 Processing, repackaging, and labeling commodities.

(a) *Commercial processing and repackaging*. Cooperating sponsors or their designees may arrange for processing commodities into different end products and for packaging or repackaging commodities prior to distribution. Commodities may be bartered, or monetized proceeds or program income may be used, to offset such costs if provided for in the Operational Plan or TA or approved by USAID or the Diplomatic Post. When commercial facilities are used for processing, packaging or repackaging, cooperating sponsors or their designees shall enter into written agreements for such services and copies of the agreements must be provided to USAID or the Diplomatic Post. Except as AID/W otherwise agrees, the executed agreements shall provide as a minimum that the party providing such services shall:

(1) Fully account to the cooperating sponsor for all commodities delivered to the processor's possession and shall maintain adequate records and submit periodic reports pertaining to the performance of the agreement;

(2) Be liable for the value of all commodities not accounted for as provided in § 211.9(e);

(3) Return or dispose of the containers in which the commodity is received from the cooperating sponsor according to instructions from the cooperating sponsor; and

(4) Plainly label carton, sacks, or other containers containing the end product in accordance with paragraph (c) of this section.

(b) *Use of cooperating sponsor facilities*. When cooperating sponsors utilize their own facilities to process, package, or repackage commodities into different end products, and when such products are distributed for consumption off the premises of the cooperating sponsor, the cooperating sponsor shall plainly label the containers as provided in paragraph (c) of this section, and banners, posters, or similar media which shall contain information similar to that prescribed in paragraph (c) of this section, shall be displayed at the distribution center. Recipients' individual identification cards shall to the maximum extent practicable be imprinted to contain such information.

(c) *Labeling*. If, prior to distribution, the cooperating sponsor arranges for packaging or repackaging donated commodities, the cartons, sacks, or other containers in which the commodities are packed shall be plainly labeled with the A.I.D. emblem, and insofar as practicable, with the following information in the language of the country in which the commodities are to be distributed:

(1) Name of commodity;

(2) Provided through the friendship of the American people as food for peace; and

(3) Not to be sold or exchanged (where applicable).

Emblems or other identification of nongovernmental cooperating sponsors also may be added.

(d) *Where commodity containers are not used*. When the usual practice in a country is not to enclose the end product in a container, wrapper, sack, etc., the cooperating sponsor shall, to the extent practicable, display banners, posters, or other media, and imprint on individual recipient identification

cards information similar to that prescribed in paragraph (c) of this section.

§211.7 Arrangements for entry and handling in foreign country.

(a) *Costs at discharge ports.* Except as otherwise agreed upon by AID/W and provided in the applicable shipping contract or in paragraph (d) and (e) of this section, the cooperating sponsor shall be responsible for all costs, other than those assessed by the delivering carrier either in accordance with its applicable tariff for delivery to the discharge port or the applicable charter or booking contract. The cooperating sponsor shall be responsible for all costs related to

(1) Distributing the commodity to end users, as provided in the approved Operational Plan or TA;

(2) Demurrage, detention, and overtime;

(3) Obtaining independent discharge survey reports as provided in §211.9 under which the cooperating sponsor will be reimbursed for the costs of obtaining independent survey reports as provided in §211.9(c)(1)(iv); and

(4) Wharfage, taxes, dues, and port charges assessed and collected by local authorities from the consignee, lighterage (when not a custom of the port), and lightening costs when assessed as a charge separate from the freight rate.

(b) *Duty, taxes, and consular invoices.* Except for commodities which are to be monetized (sold) under an approved Operational Plan or TA, commodities shall be admitted duty free and exempt from all taxes. Consular or legalization invoices shall not be required unless specific provision is made in the Operational Plan or TA. If required, they shall be issued without cost to the cooperating sponsor or to the Government of the United States. The cooperating sponsor shall be responsible for ensuring prompt entry and transit in the foreign country(ies) and for obtaining all necessary import permits, licenses or other appropriate approvals for entry and transit, including phytosanitary, health and inspection certificates.

(c) *Storage facilities and transportation in foreign countries.* The cooperating sponsors shall provide assurance to USAID or the Diplomatic Post that all necessary arrangements for receiving the commodities have been made, and shall assume full responsibility for storage and maintenance of the commodities from time of delivery at port of entry abroad or, when authorized, at other designated points of entry abroad agreed upon between the cooperating sponsor and A.I.D. Before recommending approval of a program to AID/W, USAID or the Diplomatic Post shall obtain, from the cooperating sponsor, assurance that provision has been made for internal transportation, and for storage and handling which are adequate by local commercial standards. The cooperating sponsor shall be responsible for the maintenance of the commodities in such manner as to assure distribution of the commodities in good condition to recipient agencies or eligible recipients.

(d) *Inland transportation in intermediate countries.* In the case of landlocked countries, transportation in the intermediate country to a designated inland point of entry in the recipient country shall be arranged by the cooperating sponsor unless otherwise provided in the Operational Plan or TA. Nongovernmental cooperating sponsors shall handle claims arising from loss or damage in the intermediate country, in accordance with §211.9(e). Governmental cooperating sponsors shall assign any rights that they may have to any claims that arise in the intermediate country to USAID or the Diplomatic Post which shall pursue and retain the proceeds of such claims.

(e) *Authorization for reimbursement of costs.* If, because of packaging damage, a cooperating sponsor determines that commodities must be repackaged to ensure that the commodities arrive at the distribution point in a wholesome condition, the cooperating sponsor may incur expenses for such repackaging up to $500 and such costs will be reimbursed by CCC. If costs will exceed $500, the authority to repackage and incur the costs must be approved by USAID or the Diplomatic Post in advance of repackaging unless such prior approval is specifically waived, in writing, by USAID or the Diplomatic Post. For losses in transit, the $500 limitation shall apply to all commodities which are shipped on the same voyage of the

same vessel to the same port of destination, irrespective of the kinds of commodities shipped or the number of different bills of lading issued by the carrier. For other losses, the $500 limitation shall apply to each loss situation, e.g., if 700 bags are damaged in a warehouse due to an earthquake, the $500 limitation applies to the total cost of repackaging the 700 bags. Shipments may not be artificially divided in order to avoid the limitation of $500 or for obtaining prior approval to incur repackaging costs.

(f) *Method of reimbursement.* (1) Costs of repackaging required because of damage occurring prior to or during discharge from the ocean carrier should be included, as a separate item, in claims filed against the ocean carrier. (See § 211.9(c).) Full reimbursement of such costs up to $500 will be made by CCC upon receipt of invoices or other documents to support such costs. For amounts expended in excess of $500, reimbursement will be made upon receipt of supporting invoices or other documents establishing the costs of repackaging and showing the prior approval of USAID or the Diplomatic Post to incur the costs, unless approval is waived under § 211.7(e).

(2) Costs of repackaging required because of damage caused after discharge of the cargo from the ocean carrier will be reimbursed to the cooperating sponsor by CCC (USDA-ASCS Fiscal Division, 14th & Independence Avenue, Washington, DC 20250) upon receipt of supporting invoices or other documentation.

§ 211.8 Disposition of commodities unfit for authorized use.

(a) *Prior to delivery to cooperating sponsor at discharge port or point of entry.* If the commodity is damaged prior to delivery to a governmental cooperating sponsor at discharge port or point of entry overseas, USAID or the Diplomatic Post shall immediately arrange for inspection by a public health official or other competent authority. A nongovernmental cooperating sponsor shall arrange for such an inspection under these circumstances. Commodity that is determined to be unfit for authorized use shall be disposed of in accordance with the priority set forth in paragraph (b). Expenses incidental to the handling and disposition of the damaged commodity shall be paid by USAID or the Diplomatic Post from the sales proceeds, from CCC Account No. 20FT401 or from the special title II, Public Law 480 Agricultural Commodity Account. The net proceeds of sales shall be deposited with the U.S. Disbursing Officer American Embassy, for the credit of CCC Account No. 20FT401.

(b) *After delivery to cooperating sponsor.* (1) If after arrival in a foreign country it appears that all or part of the commodities, may be unfit for the use authorized in the Operational Plan or TA, the cooperating sponsor shall immediately arrange for inspection of the commodity by a public health official or other competent authority approved by USAID or the Diplomatic Post. If no competent local authority is available, USAID or the Diplomatic Post may determine whether the commodities are unfit, and if so, may direct disposal in accordance with paragraphs (b) (1) through (4) of this section. The cooperating sponsor shall arrange for the recovery for authorized use of that part designated during the inspection as suitable for program use. If, after inspection, the commodity (or any part thereof) is determined to be unfit for authorized use the cooperating sponsor shall notify USAID or the Diplomatic Post of the circumstances pertaining to the loss or damage as prescribed in § 211.9(f).

(2) A cooperating sponsor shall dispose of commodities determined to be unfit for authorized use in the order of priority described in paragraphs (b)(2)(i) through (iv) of this section. The concurrence of USAID or the Diplomatic Post should be requested for disposition of commodities valued at $500 or more. If the USAID or Diplomatic Post does not respond to the cooperating sponsor's request for concurrence within 15 days, the cooperating sponsor may dispose of the commodities in the manner described in its request and inform the USAID or Diplomatic Post of its action taken in accordance with this section.

(i) Sale for the most appropriate use, *i.e.*, animal feed, fertilizer, or industrial use, at the highest obtainable

price. When the commodity is sold, all U.S. Government markings shall be obliterated, removed or crossed out.

(ii) Transfer to an approved Food for Peace program for use as livestock feed. AID/W shall be advised promptly of any such transfer so that shipments from the United States to the livestock feeding program can be reduced by an equivalent amount.

(iii) Donation to a governmental or charitable organization for use as animal feed or for other nonfood use.

(iv) If the commodity is unfit for any use or if disposal in accordance with paragraphs (b)(2) (i), (ii) or (iii) of this section is not possible, the commodity shall be destroyed in such manner as to prevent its use for any purpose. Commodities valued at $500 or more shall be destroyed under the observation of a representative of the USAID or Diplomatic Post if practicable. When the cooperating sponsor informs the USAID or Diplomatic Post of its intention to destroy commodities, the cooperating sponsor shall indicate the kind and amount of commodities that will be destroyed, the manner of destruction, the representative(s) of local authorities who will witness the destruction, and the date when the commodities will be destroyed. The date shall be established on the basis of programmatic need, but an effort should be made to provide a reasonable opportunity for a representative of the USAID or Diplomatic Post to attend. The commodities may be destroyed on the date indicated even if there is no representative of the USAID or Diplomatic Post to observe this action.

(3) Expenses incidental to the handling and disposition of the damaged commodity shall be paid by the cooperating sponsor unless it is determined by USAID or the Diplomatic Post that the damage could not have been prevented by the proper exercise of the cooperating sponsor's responsibility under the terms of the Operational Plan or TA. Actual expenses incurred, including third party costs, in selling the commodities may be deducted from the sales proceeds and, except for monetization programs, the net proceeds shall be deposited with the U.S. Disbursing Officer, American Embassy, with instructions to credit the deposit to CCC Account No. 20FT401. In monetization programs, net proceeds shall be deposited in the special account used for the approved program.

(4) The cooperating sponsor shall furnish USAID or the Diplomatic Post a written report in accordance with §211.9(f), and the report shall enclose a certification by a public health official or other competent authority of

(i) The exact quantity of the damaged commodity disposed of because it was determined to be unfit for any use and

(ii) The manner in which the commodities were destroyed.

§211.9 Liability for loss damage or improper distribution of commodities.

(Where the instructions in this §211.9 state that the cooperating sponsor should contact USDA or CCC, the contact office is: Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205. For Section 211.9 (a) and (b) contact: KCCO, Chief, Processed Commodities Division. For §211.9(c) contact: KCCO, Chief, Claims and Collections Division, Kansas City, Missouri 64141–6105.)

(a) *Fault of cooperating sponsor prior to loading on ocean vessel.* A cooperating sponsor and A.I.D. shall agree on a schedule for shipping commodities. A nongovernmental cooperating sponsor that books cargo for ocean transportation must notify USDA immediately if the vessel does not arrive at the U.S. port of export in accordance with the agreed shipping schedule. USDA will determine whether the commodity shall be

(1) Moved to another available outlet;

(2) Stored at the port for delivery to the nongovernmental cooperating sponsor when a vessel is available for loading; or

(3) Disposed of as USDA may deem proper.

When CCC incurs additional expenses because the nongovernmental cooperating sponsor, or its agent, fails to meet the agreed shipping schedule or to make necessary arrangements to accept commodities at the points of delivery designated by CCC, and CCC determines that the expenses were in-

curred because of the fault or negligence of the nongovernmental cooperating sponsor, the cooperating sponsor shall reimburse CCC for such expenses or take such action as directed by CCC.

(b) *Fault of others prior to loading on ocean vessel.* A nongovernmental cooperating sponsor shall immediately notify CCC if there is a loss of or damage to commodities, between the time title is transferred to the cooperating sponsor and the time the commodities are loaded on board the vessel, that is caused by the act or omission of a third party, such as a warehouseman or carrier, who is or may be legally liable for the loss or damage. The cooperating sponsor also shall promptly assign to CCC any claim it has against the third party and forward to CCC all documents relating to the loss or damage and the claim. CCC shall have the right to initiate, prosecute, and retain the proceeds all claims for such loss or damage.

(c) *Ocean carrier loss and damage*—(1) *Survey and outturn reports.* (i) Nongovernmental cooperating sponsors shall arrange for an independent cargo surveyor to attend the discharge of the cargo and to count or weigh the cargo and examine its condition, unless USAID or the Diplomatic Post determines that such examination is not feasible, or if CCC has made other provision for such examinations and reports. The surveyor shall prepare a report of its findings showing the quantity and condition of the commodities discharged. The report also shall show the probable cause of any damage noted, and set forth the time and place when the examination was made. If practicable, the examination of the cargo shall be conducted jointly by the surveyor, the consignee, and the ocean carrier, and the survey report shall be signed by all parties. Customs receipts, port authority reports, shortlanding certificates, cargo boat notes, stevedore's tallies, etc., where applicable, shall be obtained and furnished with the report of the surveyor. Whenever a damaged commodity appears unfit for its intended use, the cooperating sponsor shall obtain

(A) A certification by a public health official or similar competent authority regarding the condition of the commodity; and

(B) A certificate of disposition if the commodity is determined to be unfit for its intended use. These certificates shall be obtained as soon as possible after discharge of the cargo. If the cooperating sponsor can provide a narrative chronology or other commentary to assist in the adjudication of ocean transportation claims, this information should be forwarded as follows: cooperating sponsors shall prepare such a statement in any case where the loss is estimated to be in excess of $5,000; all documentation shall be in English or supported by an English translation and shall be forwarded as set forth in paragraphs (c)(1)(iii) and (iv) of this section; and the cost of an English translation shall be incorporated into the survey fee. The cooperating sponsor may, at its option, also engage the independent surveyor to supervise clearance and delivery of the cargo from customs or port areas to the cooperating sponsor or its agent and to issue delivery survey reports thereon.

(ii) In the event of cargo loss or damage, a nongovernmental cooperating sponsor shall provide the names and addresses of individuals who were present at the time of discharge and during survey and who can verify the quantity lost or damaged. In the case of bulk grain shipments, the cooperating sponsor shall obtain the services of an independent surveyor to:

(A) Observe discharge of the cargo;

(B) Report on discharging method (including whether a scale was used, its type and calibration and other factors affecting its accuracy, or an explanation of why a scale was not used and how weight was determined);

(C) Furnish information as to whether cargo was discharged in accordance with port customs;

(D) Provide actual or estimated (if scales not used) quantity of cargo lost during discharge and specify how such losses occurred;

(E) Obtain copies of port and/or ship records including scale weights, where applicable, to show quantity discharged;

(F) Verify that upon conclusion of discharge, cargo holds are empty;

(G) Provide to USDA information as to quantity, type and cause of lost or damaged cargo;

(H) Furnish daily tally totals and any other pertinent information about the bagging of the bulk cargo when cargo is bagged or stacked by vessel interests; and

(I) Notify the cooperating sponsor immediately if additional services are necessary to protect cargo interests or if the surveyor has reason to believe that the correct quantity was not discharged.

The cooperating sponsor, in the case of damage to bulk grain shipments, shall obtain and provide the same documentation regarding quality of cargo as set forth in §211.8(a) and paragraph (c)(1)(i) of this section. In the case of shipments arriving in container vans, cooperating sponsors shall require the independent surveyor to list the container van numbers and seal numbers shown on the container vans, and indicate whether the seals were intact at the time the container vans were opened, and whether the container vans were in any way damaged. To the extent possible, the independent surveyor should observe discharge of container vans from the vessel to ascertain whether any damage to the container van occurred and arrange for surveying the contents of any damaged container vans as they are opened.

(iii) Cooperating sponsors shall send to USDA copies of all reports and documents pertaining to the discharge of commodities. For those surveys arranged by CCC, the cooperating sponsors may obtain a copy of the report from the local USAID Food for Peace Officer.

(iv) CCC will reimburse a nongovernmental cooperating sponsor for the costs incurred by it in obtaining the services of an independent surveyor to conduct examinations of the cargo and render the report set forth above. Reimbursement by CCC will be made upon receipt by CCC of the survey report and the surveyor's invoice or other documents that establish the survey cost. However, CCC will not reimburse a nongovernmental cooperating sponsor for the costs of only a delivery survey, in the absence of a discharge survey, or for any other survey not taken contemporaneously with the discharge of the vessel, unless such deviation from the documentation requirements of paragraph (c)(1) of this section is justified to the satisfaction of CCC.

(v) CCC normally will contract for the survey of cargo on shipments furnished under Transfer Authorizations, including shipments for which A.I.D. contracts for the ocean transportation services. Survey contracts normally will be let on a competitive bid basis. However, if a USAID or Diplomatic Post desires that CCC limit its consideration to only certain selected surveyors, USAID or the Diplomatic Post shall furnish AID/W a list of eligible surveyors for forwarding to CCC. Surveyors may be omitted from the list, for instance, based on foreign relations considerations, conflicts of interest, and/or lack of demonstrated capability to carry out surveying responsibilities properly as set forth in the requirements of CCC. Upon receipt of written justification for removal of a particular survey firm, CCC will consider removal of such firm and advise the USAID via AID/W of the final determination. AID/W will furnish CCC's surveying requirements to a USAID or Diplomatic Post upon request. If CCC is unable to find a surveyor at a port to which a shipment has been consigned, CCC may request AID/W to contact USAID or the Diplomatic Post to arrange for a survey. The surveyor's bill for such services shall be submitted to USAID or the Diplomatic Post for review. After the billing has been approved, USAID or the Diplomatic Post either may pay the bill using funds in CCC account 20FT401, if available, or forward the bill to AID/W for transmittal to CCC for payment. If USAID or the Diplomatic Post pays the bill, AID/W shall be advised of the amount paid, and CCC will reimburse USAID or the Diplomatic Post.

(2) *Claims against ocean carriers.* (i) Whether or not title to commodities has transferred from CCC to the cooperating sponsor, if A.I.D. contracted for the ocean transportation, CCC shall have the right to initiate, prosecute, and retain the proceeds of all claims against ocean carriers for cargo loss and/or damage arising out of shipments

of commodities transferred or delivered by CCC hereunder.

(ii)(A) Unless otherwise provided in the Operational Plan or TA, nongovernmental cooperating sponsors shall file notice of any cargo loss and/or damage with the ocean carrier immediately upon discovery of any such loss and/or damage, promptly initiate claims against the ocean carrier for cargo loss and/or damage, take all necessary action to obtain restitution for losses within any applicable periods of limitations, and transmit to CCC copies of all such claims. However, the nongovernmental cooperating sponsor need not file a claim when the cargo loss and/or damage is not in excess of $100, or in any case when the loss and/or damage is between $100 and $300 and it is determined by the nongovernmental cooperating sponsor that the cost of filing and collecting the claim will exceed the amount of the claim. The nongovernmental cooperating sponsor shall transmit to CCC copies of all claims filed with the ocean carriers for cargo loss and/or damage, as well as information and/or documentation on shipments when no claim is to be filed. When General Average has been declared, no action will be taken by the nongovernmental cooperating sponsor to file or collect claims for loss or damage to commodities. (See paragraph (c)(2)(iii) of this section.)

(B) The value of commodities misused, lost or damaged shall be determined on the basis of the domestic market price at the time and place the misuse, loss or damage occurred, or, in case it is not feasible to obtain or determine such market price, the f.o.b. or f.a.s. commercial export price of the commodity at the time and place of export, plus ocean freight charges and other costs incurred by the U.S. Government in making delivery to the cooperating sponsor. When value is determined on a cost basis, nongovernmental cooperating sponsors may add to the value any provable costs they have incurred prior to delivery by the ocean carrier. In preparing the claim statement, these costs shall be clearly segregated from costs incurred by the U.S. Government. With respect to claims other than ocean carrier loss or damage claims, at the request of the cooperating sponsor or upon the recommendation of USAID or the Diplomatic Post, AID/W may determine that such value may be established on some other justifiable basis. When replacement is made, the value of commodities misused, lost or damaged shall be their value at the time and place the misuse, loss, or damage occurred and the value of the replacement commodities shall be their value at the time and place replacement is made.

(C) Amounts collected by nongovernmental cooperating sponsors on claims against ocean carriers not in excess of $200 may be retained by the nongovernmental cooperating sponsor. On claims involving loss and/or damage having a value in excess of $200, nongovernmental cooperating sponsors may retain from collections received by them, the larger of:

(*1*) The amount of $200 plus 10 percent of the difference between $200 and the total amount collected on the claim, up to a maximum of $500, or

(*2*) Actual administrative expenses incurred in collection of the claim if approved by CCC.

Collection costs shall not be deemed to include attorneys fees, fees of collection agencies, and the like. In no event will collection costs in excess of the amount collected on the claim be paid by CCC. The nongovernmental cooperating sponsors may also retain from claim recoveries remaining after allowable deductions for administrative expenses of collection, the amount of any special charges, such as handling, packing, and insurance costs, which the nongovernmental cooperating sponsor has incurred on the lost and/or damaged commodity and which are included in the claims and paid by the liable party.

(D) A nongovernmental cooperating sponsor may redetermine claims on the basis of additional documentation or information, not considered when the claims were originally filed when such documentation or information clearly changes the ocean carrier's liability. Approval of such changes by CCC is not required regardless of amount. However, copies of redetermined claims and supporting documentation or information shall be furnished to CCC.

(E) A nongovernmental cooperating sponsor may negotiate compromise settlements of claims regardless of the amount thereof, except that proposed compromise settlements of claims having a value in excess of $5,000 shall not be accepted until such action has been approved in writing by CCC. When a claim is compromised, the nongovernmental cooperating sponsor may retain from the amount collected, the amounts authorized in paragraph (c)(2)(ii)(C) and in addition, an amount representing such percentage of the special charges described in paragraph (c)(2)(ii)(C) as the compromised amount is to the full amount of the claim. When a claim is not in excess of $600, the nongovernmental cooperating sponsor may terminate collection activity on the claim according to the standards set forth in the Federal Claims Collection Standards, 4 CFR 104.3. Approval of such termination by CCC is not required, but the nongovernmental cooperating sponsor shall notify CCC when collection activity on a claim is terminated.

(F) All amounts collected in excess of the amounts authorized herein to be retained shall be remitted to CCC. For the purpose of determining the amount to be retained by the nongovernmental cooperating sponsor from the proceeds of claims filed against ocean carriers, the word ''claim'' shall refer to the loss and/or damage to commodities which are shipped on the same voyage of the same vessel to the same port destination, irrespective of the kinds of commodities shipped or the number of different bills of lading issued by the carrier. If a nongovernmental cooperating sponsor is unable to collect a claim or negotiate an acceptable compromise settlement within the applicable period of limitation or any extension thereof granted in writing by the liable party or parties, the rights of the nongovernmental cooperating sponsor to the claim shall be assigned to CCC in sufficient time to permit the filing of legal action prior to the expiration of the period of limitation or any extension thereof. Nongovernmental cooperating sponsors shall promptly assign their claim rights to CCC upon request. In the event CCC collects or settles the claim after the rights of the nongovernmental cooperating sponsor to the claim have been assigned CCC, CCC shall, except as shown below, pay to the nongovernmental cooperating sponsor the amount the agency or organization would have been entitled to retain had they collected the same amount. However, the additional 10 percent on amounts collected in excess of $200 will be payable only if CCC determines that reasonable efforts were made to collect the claim prior to the assignment, or if payment is deemed to be commensurate with the extra efforts exerted in further documenting claims. In addition, if CCC determines that the documentation requirements of paragraph (c)(1) have not been fulfilled and the lack of such documentation has not been justified to the satisfaction of CCC, CCC reserves the right to deny payment of all allowances to the nongovernmental cooperating sponsor.

(G) When nongovernmental cooperating sponsors fail to file claims, or permit claims to become time-barred, or fail to provide for the right of CCC to assert such claims, as provided in this §211.9, and it is determined by CCC that such failure was due to the fault or negligence of the nongovernmental cooperating sponsor, the agency or organization shall be liable to the United States for the cost and freight (C&F) value of the commodities lost to the program.

(iii) If a cargo loss has been incurred on a nongovernmental cooperating sponsor shipment, and general average has been declared, the nongovernmental cooperating sponsor shall furnish to CCC with a duplicate copy to AID/W—

(A) Copies of booking confirmations and the applicable on-board bill(s) of lading,

(B) The related outturn or survey report(s),

(C) Evidence showing the amount of ocean transportation charges paid to the carrier(s), and

(D) An assignment to CCC of the cooperating sponsor's right to the claim(s) for such loss.

CCC assumes responsibility for general average and marine salvage.

(iv) A.I.D. will initiate and prosecute claims against ocean carriers and defend claims by such carriers, arising

from or relating to affreightment contracts booked by A.I.D. where the claims involve entitlement to freight and related costs from the U.S. Government. Proceeds of such claims received by A.I.D. shall be returned to CCC pursuant to agreed procedures.

(d) *Fault of cooperating sponsor in country of distribution.* If a commodity, monetized proceeds or program income is used for a purpose not permitted under the Operational Plan or TA or this Regulation, or if a cooperating sponsor causes loss or damage to a commodity, monetized proceeds or program income through any act or omission or failure to provide proper storage, care and handling, the cooperating sponsor shall pay to the United States the value of the commodities, monetized proceeds or program income, lost, damaged, or misused, unless A.I.D. determines that such improper distribution or use, or such loss or damage, could not have been prevented by proper exercise of the cooperating sponsor's responsibility under the Operational Plan or TA and this Regulation. In determining whether there was a proper exercise of the cooperating sponsor's responsibility, A.I.D. shall consider normal commercial practices in the country of distribution and the problems associated with carrying out programs in developing countries. Payment by the cooperating sponsor shall be made in accordance with paragraph (g) of this section, except that the USAID or Diplomatic Post may agree to permit a cooperating sponsor to replace commodities lost, damaged, or misused with similar commodities of equal value.

(e) *Fault of others in country of distribution and in intermediate country.* (1) In addition to survey and/or outturn reports to determine ocean carrier loss and damage, the cooperating sponsor shall, in the case of landlocked countries, arrange for an independent survey at the point of entry into the recipient country and to make a report as set forth in paragraph (c)(1) of this section. CCC will reimburse the cooperating sponsor for the costs of a survey as set forth in paragraph (c)(1)(iv).

(2) If a cooperating sponsor acquires any right against a person or governmental or nongovernmental organization based on an event for which the person or organization is responsible that resulted in the damage, loss or misuse of any commodity, monetized proceeds or program income, the cooperating sponsor shall file a claim against the liable party or parties for the value of the commodities, monetized proceeds or program income lost damaged or misused and shall make every reasonable effort to collect the claim. A copy of the claim and related documents shall be provided to USAID or the Diplomatic Post. Cooperating sponsors who fail to file or pursue such claims shall be liable to A.I.D. for the value of the commodities or monetized proceeds or program income lost, damaged, or misused: Provided, however, that the cooperating sponsor may elect not to file a claim if the loss is less than $500 and such action is not detrimental to the program. Cooperating sponsors may retain $150 of any amount collected on an individual claim. In addition, cooperating sponsors may, with the written approval of USAID or the Diplomatic Post, retain either special costs such as reasonable legal fees that they have incurred in the collection of a claim, or pay such legal fees with monetized proceeds or program income. Any proposed settlement for less than the full amount of the claim must be approved by USAID or the Diplomatic Post prior to acceptance. When the cooperating sponsor has exhausted all reasonable attempts to collect a claim, it shall request USAID or the Diplomatic Post to provide further instructions in accordance with paragraph (e)(4).

(3) *Calculation of the amount of a claim against others.* A claim is the right a cooperating sponsor has against a third party as a result of an event for which the third party is responsible that caused the loss, damage or misuse of commodities, monetized proceeds or program income. The amount of the claim is based on the value of the commodities, monetized proceeds or program income lost, damaged or misused as a result of the event. An individual claim may not be broken down artificially to enlarge the amount the cooperating sponsor may retain as an administrative allowance on collection of

the claim. For example, if a cooperating sponsor has a contract with a carrier to transport commodities, and losses occur during a single shipment of commodities from points A to B, the cooperating sponsor has one claim against the carrier, and the amount of the claim will be based on the total value of the commodities lost during the shipment from A to B even though some of the loss might have occurred on each of several trucks or by subcontractors used by the carrier to satisfy its contract responsibility to transport the commodities.

(4) Reasonable attempts to collect the claim shall not be less than the follow-up of initial billings with three progressively stronger demands at not more than 30-day intervals. If these efforts fail to elicit a satisfactory response, legal action in the judicial system of the cooperating country should be pursued unless:

(i) Liability of the third party is not provable,

(ii) The cost of pursuing the claim would exceed the amount of the claim,

(iii) The third party would not have enough assets to satisfy the claim after a judicial decision favorable to the cooperating sponsor,

(iv) Maintaining legal action in the country's judicial system would seriously impair the cooperating sponsor's ability to conduct an effective program in the country, or

(v) It is inappropriate for reasons relating to the judiciary or judicial system of the country.

A cooperating sponsor's decision not to take legal action, and reasons therefore, must be submitted in writing to USAID or the Diplomatic Post for review and approval, and USAID or the Diplomatic Post may require the cooperating sponsor to obtain and submit the opinion of competent legal counsel to support its decision. A cooperating sponsor also may request approval to terminate legal action after it has commenced if it is apparent that any of the exceptions described above becomes applicable or if it is otherwise appropriate to terminate legal action prior to judgment. In each instance, USAID or the Diplomatic Post must provide the cooperating sponsor a written explanation of its decision within 45 days from the date the request is received or inform the cooperating sponsor in writing regarding the reason(s) the USAID or Diplomatic Post needs more time to make a decision. If USAID or the Diplomatic Post approves a cooperating sponsor's decision not to take further action on the claim for reasons described in paragraphs (e)(4)(iv) or (v) of this section, the cooperating sponsor shall assign the claim to A.I.D. and shall provide to A.I.D. all documentation relating to the claim. When USAID or the Diplomatic Post takes an assignment of a claim or claims from a cooperating sponsor, the USAID or Diplomatic Post shall consult AID/W regarding the appropriate action to take on the assigned claim(s), unless standing guidance is in effect.

(5) As an alternative to legal action in the judicial system of the country with regard to claims against a public entity of the government of the cooperating country, the cooperating sponsor and the cooperating country may agree to settle disputed claims by an appropriate administrative procedure and/or arbitration. This alternative may be established in the Host Country Food for Peace Program Agreement required under §211.3(b), or by a separate formal understanding, and must be submitted to USAID or the Diplomatic Post for review and approval. Resolution of disputed claims by any administrative procedure or arbitration agreed to by the cooperating sponsor and the cooperating country should be final and binding on the parties.

(f) *Reporting losses to USAID or the Diplomatic Post.* (1) The cooperating sponsor shall provide the USAID or Diplomatic Post a quarterly report regarding any loss, damage or misuse of commodities, monetized proceeds or program income. The report must be provided within 30 days after the close of the calendar quarter and shall contain the following information except for commodity losses less than $500: who had possession of the commodities, monetized proceeds or program income; who, if anyone, might be responsible for the loss, damage or misuse; the kind and quantity of commodities; the size and type of containers; the

time and place of loss, damage or misuse; the current location of the commodities; the program number; CCC contract number, if known, and if not known, other identifying numbers printed on the commodity containers; the action taken by the cooperating sponsor with respect to recovery or disposal; and the estimated value of the loss, damage or misuse. If any of this information is not available, the cooperating sponsor shall explain why it is not. The report simply may identify separately commodity losses valued at less than $500 and indicate the estimated value of the commodities lost damaged or misused and the action taken by the cooperating sponsor with respect to recovery or disposal, except that the cooperating sponsor shall inform the USAID or Diplomatic Post if it has reason to believe there is a pattern or trend in the loss, damage or misuse of such commodities and provide the information described above for losses of $500 or more together with such other information available to it. USAID or the Diplomatic Post may require additional information about any commodities lost, damaged or misused. Information in the quarterly report may be provided in tabular form to the extent possible, and the report shall enclose a copy of any claim made by the cooperating sponsor during the reporting period.

(2) If any commodity, monetized proceeds or program income is lost or misused under circumstances which give a cooperating sponsor reason to believe that the loss or misuse has occurred as a result of criminal activity, the cooperating sponsor shall promptly report these circumstances to the A.I.D. Inspector General through AID/W, USAID or the Diplomatic Post, and subsequently to the appropriate authorities of the cooperating country unless instructed not to do so by A.I.D. The cooperating sponsor also shall cooperate fully with any subsequent investigation by the Inspector General and/or authorities of the cooperating country.

(g) *Handling claims proceeds.* Claims against ocean carriers shall be collected in U.S. dollars (or in the currency in which freight is paid, or a pro rata share of each) and shall be remitted (less amounts authorized to be retained) by nongovernmental cooperating sponsors to CCC. With respect to commodities, claims against nongovernmental cooperating sponsors shall be paid to CCC or AID/W in U.S. dollars; amounts paid by other cooperating sponsors and third parties in the country of distribution shall be deposited with the U.S. Disbursing Officer, American Embassy, preferably in U.S. dollars with instructions to credit the deposit to CCC Account No. 12X4336, or in local currency with instructions to credit the deposit to Treasury sales account 20FT401. Any conversion required for these deposits shall be at the highest rate of exchange legally obtainable on the date of deposit unless A.I.D. agrees otherwise in writing. With respect to monetized proceeds and program income, amounts recovered should be deposited into the special interest-bearing account established for the monetized proceeds and may be used for purposes of the approved program.

(h) *General average.* CCC shall—

(1) Be responsible for settling general average and marine salvage claims;

(2) Retain the authority to make or authorize any disposition of commodities which have not commenced ocean transit or of which the ocean transit is interrupted, and receive and retain any monetary proceeds resulting from such disposition;

(3) In the event of a declaration of general average, initiate, prosecute, and retain all proceeds of cargo loss and damage claims against ocean carriers; and

(4) Receive and retain any allowance in general average. CCC will pay any general average or marine salvage claims determined to be due.

§ 211.10 Records and reporting requirements.

(a) *Records.* Cooperating sponsors and recipient agencies shall maintain records and documents in a manner which accurately reflects the operation of the program and all transactions pertaining to the receipt, storage, distribution, sale, inspection and use of commodities and to receipt and disbursement of any monetized proceeds and program income. Such records

shall be retained for a period of 3 years from the close of the U.S. fiscal year to which they pertain, or longer, upon request by A.I.D. for cause, such as in the case of litigation of a claim or an audit concerning such records. The cooperating sponsor shall transfer to A.I.D. any records, or copies thereof, requested by A.I.D.

(b) *Reports.* Cooperating sponsors shall submit two copies of audits performed in accordance to §211.5(c). In addition, cooperating sponsors shall submit to USAID or the Diplomatic Post, and to AID/W such reports as A.I.D. may reasonably request. The following is a list of the principal types of reports that are to be submitted at least annually:

(1) Periodic summary reports showing receipt, distribution, and inventory of commodities and proposed schedules of shipments or calls forward.

(2) Reports relating to the generation of monetized proceeds and program income and the use of such funds for purposes specified in the Operational Plan or TA. See §211.5(l).

(3) Reports relating to progress and problems in the implementation of the program.

(4) Reports shall be submitted in sufficient detail to enable USAID or the Diplomatic Post to assess and to make recommendations as to the ability of the cooperating sponsors to effectively plan, manage, control and evaluate the Food for Peace programs under their administration.

(5) At the time that an emergency program under Public Law 480, title II is initiated, whether by a governmental or nongovernmental cooperating sponsor, USAID or the Diplomatic Post should

(i) Make a determination regarding the ability of the cooperating sponsor to perform the record-keeping required by this §211.10, and

(ii) In those instances in which those specific record-keeping requirements cannot be followed, due to emergency circumstances, specify exactly which essential information will be recorded in order to account fully for title II commodities and monetized proceeds.

(c) *Inspection and audit.* Cooperating sponsors and recipient agencies shall cooperate with and assist U.S. Government representatives to enable them at any reasonable time to:

(1) Examine activities and records of the cooperating sponsor, recipient agencies, processors, or others, pertaining to the receipt, storage, distribution, processing, repackaging, sale and use of commodities by recipients;

(2) Inspect commodities in storage, or the facilities used in the handling or storage of commodities;

(3) Examine and audit books and records, including financial books and records and reports pertaining to storage, transportation, processing, repackaging, distribution, sale and use of commodities and pertaining to the deposit and use of any monetized proceeds and program income;

(4) Review the overall effectiveness of the program as it relates to the objectives set forth in the Operational Plan or TA; and

(5) Examine or audit the procedure and methods used in carrying out the requirements of this Regulation.

Inspections and audits of title II emergency programs will take into account the circumstances under which such programs are carried out.

§211.11 Suspension, termination, and expiration of program.

(a) *Termination or suspension by A.I.D.* All or any part of the assistance provided under the program, including commodities in transit, may be terminated or suspended by A.I.D. at its discretion if AID/W determines that a cooperating sponsor has failed to comply with the provisions of the approved Operational Plan or TA, or of this Regulation, or that the continuation of such assistance is no longer necessary or desirable. If AID/W believes that circumstances permit, AID/W will provide a nongovernmental cooperating sponsor written notice of A.I.D.'s intention to terminate or suspend the cooperating sponsor's program, together with an explanation of the reason(s) for A.I.D.'s action, at least 30 days prior to the date indicated in the notice that the program will be terminated or suspended. Comments provided by the nongovernmental cooperating sponsor prior to the effective date of the termination or suspension shall be considered by AID/W in determining whether

to rescind the notice. When a program is terminated or suspended, title to commodities which have been transferred to the cooperating sponsor, or monetized proceeds, program income and real or personal property procured with monetized proceeds or program income shall, at the written request of USAID, the Diplomatic Post or AID/W, be transferred to the U.S. Government by the cooperating sponsor or shall otherwise be transferred by the cooperating sponsor as directed by A.I.D. Any then excess commodities on hand at the time the program is terminated shall be disposed of in accordance with § 211.5 (o) and (p) or as otherwise instructed by USAID or the Diplomatic Post. If it is determined that any commodity authorized to be supplied under the Operational Plan or TA is no longer available for Food for Peace programs, such authorization shall terminate with respect to any commodities which, as of the date of such determination have not been delivered f.o.b. or f.a.s. vessel, provided that every effort will be made to give adequate advance notice to protect cooperating sponsors against unnecessarily booking vessels.

(b) *Expiration of program.* Upon expiration of the approved program under circumstances other than those described in paragraph (a), the cooperating sponsor shall deposit with the U.S. Disbursing Officer, American Embassy, with instructions to credit the deposit to CCC Account No. 20FT401, any remaining monetized proceeds or program income, or the cooperating sponsor shall obtain approval from AID/W for the use of such monetized proceeds or program income, or real or personal property procured with such proceeds or income, for purposes consistent with those authorized for support from A.I.D.

§ 211.12 Waiver and amendment authority.

The Assistant Administrator for Food and Humanitarian Assistance, A.I.D., may waive, withdraw, or amend, at any time, any or all of the provisions of this Regulation 11 if such provision is not statutory and it is determined to be in the best interest of the U.S. Government to do so. Any cooperating sponsor which has failed to comply with the provisions of this Regulation or any instructions or procedures issued in connection herewith, or any agreements entered into pursuant hereto may at the discretion of A.I.D. be suspended or disqualified from further participation in any distribution program. Reinstatement may be made at the option of A.I.D. Disqualification shall not prevent A.I.D. from taking other action through other available means when considered necessary.

§ 211.13 Participation by religious organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[69 FR 61724, Oct. 20, 2004]

APPENDIX I TO PART 211—OPERATIONAL PLAN

A. General Outline of Operational Plans for Title II Activities

In addition to any other requirement of law or regulation, the Operational Plan will include information outlined below to the extent it is applicable to the specific activity.

1. Program Goals.

Describe program goals and criteria for measuring progress toward reaching the goals. Each program should be designed to achieve measurable objectives within a specified period of time.

2. Program Description.

a. Describe the characteristics, extent and severity of problems that the program will address.

b. Provide a clear concise statement of specific objectives for each program and of criteria for measuring progress towards reaching the objectives. If there are several objectives, indicate priorities.

c. Describe the target population by program, including economic/nutrition-related characteristics, sufficiently to permit a determination of recipient eligibility for title II commodities. Describe the educational and employment characteristics of the target group, if relevant to program objectives; the rationale for selection of the target group, the rationale for the selection of the geographical areas where programs will be carried out; the calculation of coverage and the percent of total target population reached.

d. Describe the intervention including:

(1) *Ration composition*. A description of rations, rationale for size and composition, assessment of effectiveness (dilution, sharing, acceptance).

(2) *Complementary program components and inputs*. Identify existing or potential complementary program components, *i.e.*, education, growth monitoring, training, etc., that are necessary to achieve program impact, including determination of financial costs and sources of funding.

(3) *Monetization*. Describe to whom the commodities will be sold; the sales price (which shall not be less than the value of the food commodities f.a.s. or f.o.b.); arrangements for deposit of the monetization proceeds in a special (segregated), interest bearing account, pending use of the proceeds plus interest for the program; and the capability of the cooperating sponsor and recipient agencies to use and account for monetized proceeds properly as well as technical assistance the cooperating sponsor intends to obtain or provide if necessary in order to ensure that there are adequate financial and other management systems for the program proposed.

(4) *Intervention strategy*. Describe how the commodities, monetization proceeds, program income and other program components will address the problems. Indicate the recipient agencies to which commodities, monetized proceeds or program income will be transferred, and identify those recipient agencies which will not be required to execute Recipient Agency Agreements, and provide a brief explanation of the reasons.

(5) *Linkages with other development activities, such as health or agricultural extension services*. Describe specific areas of collaboration relative to program purposes.

(6) *Monitoring and evaluation*. Include a description of the evaluation plan, including information to be collected for purposes of assessing program operations and impact. Describe the monitoring system for collection, analysis and utilization of information. Include a schedule for carrying out the evaluation as well as a plan for conducting audits (Regulation 11, section 211.5(c)).

(7) *Program period*. The Operational Plan should cover enough time for a program to become fully operational and to permit evaluation of its effectiveness, including specific measurement of progress in achieving the stated program goals. Normally this will be a multi-year time frame, such as three to five years. Plans for and considerations involved in phasing-out U.S.G. support, and any phasing-over to non-U.S.G. support, should be discussed.

3. *Program funding*. Provide details of host government, cooperating sponsor and other non-USG support for the proposed program, with specific budgetary information on how these funds are to be used (e.g. complementary inputs, transport, administration). Where relevant, discussion of arrangements which will be made covering voluntary contributions.

4. *Publicity*. Describe how the requirements for public recognition, container marking, and use of funds set forth in Regulation 11, §§211.5i(h), (i) and (k) and in 211.6 (a) and (b), will be met.

5. *Logistics*. Provide a logistics plan that demonstrates the adequacy and availability in recipient country of port facilities, transportation and storage facilities to handle the flow of commodities to recipients to prevent spoilage or waste. A further affirmation must be made at the time of exportation of the commodity from the United States.

6. *Disincentives*. Furnish sufficient information concerning the plan of distribution and the target group of recipients so that a determination can be made as to whether the proposed food distribution would result in substantial disincentive to domestic food production. It is not necessary to provide a disincentive analysis if A.I.D. or USDA has completed such an analysis for another program that is relevant to the program proposed by the cooperating sponsor.

7. *Accountability*. Describe the method to be used to supervise, monitor, and account for the distribution or sale of commodities and the use of monetized proceeds and program income.

8. *Import duty*. Provide information to show approval of foreign government to import the donated commodities duty free.

9. *Voluntary agency regular programs*. An Operational Plan is required for all regular, *i.e.*, non-emergency, title II nongovernmental cooperating sponsor programs as part of their program submission, along with the Annual Estimate of Requirements (AER), to USAID or the Diplomatic Post and AID/W. When new multi-year Operational Plans are required, they should be prepared and submitted in advance of the year in which they are to begin, in order to permit adequate time for substantive review and approval. In any event, nongovernmental cooperating sponsor Operational Plans should be submitted to AID/W no later than the Mission Action Plan covering the following fiscal year's program. Once an Operational Plan has been approved, only an updating will be required on an annual basis, unless there has been a significant change from the approved plan's program directives, methodology, design or magnitudes. Updates should be submitted each year for review with the AERs.

B. Operational Plans for Emergency Programs

The response to emergency situations using title II resources does not usually permit the same degree of detail and certainty of analysis that is expected in planning title II non-emergency programs. However, Operational Plans are required for all nongovernmental cooperating sponsors' emergency

programs, along with the AER. An Operational Plan for an emergency program must cover the same basic elements, set forth above, as for a nonemergency program. Thus, all of the above basic issues set forth in the Operational Plan format must be addressed when proposing title II emergency programs as well as regular nonemergency programs.

C. USAID/Diplomatic Post Responsibilities

A USAID or Diplomatic Post is expected to comment on the substance and adequacy of a nongovernmental cooperating sponsor's Operational Plan when submitted to AID/W along with a program request, and to address the plan's relationship to and consistency with the Mission's Country Development Strategy Statement.

D. Required Approval for Program Change

Cooperating sponsors agree not to deviate from the program as described in the Operational Plan and other program documents approved by A.I.D., without the prior written approval of A.I.D.

E. Emergency Assistance Program Requests

Any cooperating sponsor (governmental or nongovernmental) may initiate an emergency assistance proposal under Public Law 480, title II. Requests are received by a USAID or Diplomatic Post and reviewed and approved before forwarding to AID/W with appropriate recommendations.

a. Nongovernmental emergency program requests can be cabled by USAID or the Diplomatic Post for AID/W review based on information provided and using procedures established for regular programs as described in Regulation 11, §211.5(a): AER and Operational Plan.

b. A foreign government or international organization (other than World Food Program) emergency request normally requires more Mission involvement in program design and management. However, as in the case of nongovernmental programs, the approval will be based on a cabled program summary based on the program plan outlined in (2) above. On approval, AID/W will prepare a Transfer Authorization (TA) to be signed by the recipient government specifying terms of the program and reporting requirements. Additional guidance in preparing government-to-government or international organizations emergency requests is in chapter 9 and Exhibit A of A.I.D. Handbook 9. The TA serves as (1) the Food for Peace Agreement between the U.S. Government and the cooperating sponsor, (2) the project authorization document, and (3) the authority for the CCC to ship commodities. (Under Pub. L. 480, section 207(a), not later than 15 days after receipt of a call forward from a field mission for commodities, the order shall be transmitted to the CCC.)

F. Local Currency Programs (Public Law 480, Title II Section 203)

Detailed guidance for preparing, approving, implementing and administering these programs is provided in chapters 6, 7, and 11 of A.I.D. Handbook 9.

G. Problems Conducting Programs In Developing Countries

Describe the problems that can be anticipated in implementing the program in the recipient country as a result of its being a developing country.

H. Waivers

A cooperating sponsor should provide a justification for the waiver of any specific section or sections of Regulation 11 that it believes necessary for the program.

PART 212—PUBLIC INFORMATION

Subpart A—General

Sec.
212.1 Statement of policy.

Subpart B—Publication in the Federal Register

212.11 Materials to be published.
212.12 Effect of nonpublication.
212.13 Incorporation by reference.

Subpart C—Availability of Information for Public Inspection and Copying

212.21 Public records.
212.22 Protection of personal privacy.
212.23 Current index.
212.24 Effect of noncompliance.
212.25 Procedures for obtaining materials under this subpart.

Subpart D—Access to Agency Records

212.31 Availability of agency records.
212.32 Identification of records.
212.33 Procedure for making requests.
212.34 Procedures for responding to requests for records.
212.35 Schedule of fees and methods of payment for services rendered.
212.36 Denial of request for access to records.
212.37 Procedures for agency consideration of appeals.
212.38 Predisclosure notification procedures for confidential commercial information.

Subpart E—Exemptions From Disclosure

212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.
212.42 Exemption from 5 U.S.C. 552.

Subpart F—Opening of Records for Nonofficial Research Purposes.

212.51 General Policy.

AUTHORITY: 22 U.S.C. 2381(a).

SOURCE: 61 FR 43002, Aug. 20, 1996, unless otherwise noted.

Subpart A—General

§212.1 Statement of policy.

(a) It is the policy of the United States Agency for International Development (hereinafter ''USAID'' or ''the Agency'') that information about its objectives and operations be freely available to the public in accordance with the provisions of the Freedom of Information Act (''FOIA''), 5 U.S.C. 552, as amended; the President's Memorandum for Heads of Departments and Agencies regarding the FOIA, 29 Weekly Comp. Pres. Doc. 1999 (October 4, 1993); and the Attorney General's Memorandum of the same title and date. The Director, Office of Administrative Services, Bureau for Management, or his/her designee, is responsible on behalf of the Agency for administration of the provisions of the regulations set forth in this part.

(b) In addition, concerning the International Cooperation and Development Agency (''IDCA''), pursuant to executive order and delegations of authority USAID is responsible not only for management of its own affairs but also for those of IDCA. The policy of IDCA in the FOIA area has been determined by USAID to be identical to that of USAID, as stated in this section. Therefore, all policies and procedures set forth in this part apply equally to IDCA as to USAID; and it is intended that references in this part to ''USAID'' or ''the Agency'' shall, wherever appropriate, include or mean a reference to IDCA. Accordingly, all IDCA FOIA-related matters shall be referred to and processed by USAID staff under this part as though they were USAID matters.

(c) All records of USAID shall be made available to the public upon compliance with the procedures established in §212.33, except to the extent a determination is made to withhold a record exemptible under 5 U.S.C. 552(b). Such a determination shall be made pursuant to procedures set forth in §212.36, 212.37 and 212.38.

(d) The term ''record'' as used in this part includes all books, papers, maps, photographs, or other documentary material or copies thereof, regardless of physical form or characteristics, made in or received by USAID (including its missions or offices abroad), and preserved as evidence of its organization, functions, policies, decisions, procedures, operations, or other activities. The term does not include copies of the records of other U.S. Government agencies, foreign governments, international organizations, or non-governmental entities which do not evidence organization, functions, policies, decisions, procedures, operations, or activities of USAID.

Subpart B—Publication in the Federal Register

§212.11 Materials to be published.

(a) USAID separately states and currently publishes in the FEDERAL REGISTER for the information and guidance of the public:

(1) Descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

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

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

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

(5) Every amendment, revision or repeal of the material listed in this section.

(b) USAID Public Notice No. 1 and the USAID Regulations published in chapter II of Title 22 and in subtitle A,

Chapter 7 of Title 41 of the Code of Federal Regulations implement the provisions of this section.

§ 212.12 Effect of nonpublication.

The materials referenced in § 212.11 shall not be binding upon or otherwise adversely affect a person unless either

(a) The materials were in fact published in the FEDERAL REGISTER or

(b) The person otherwise had actual and timely notice of the content of such materials.

§ 212.13 Incorporation by reference.

For purposes of this subpart B, USAID matters which are reasonably available to the class of persons affected thereby are deemed to be published in the FEDERAL REGISTER when they have been incorporated by reference therein with the approval of the Director of the Federal Register.

Subpart C—Availability of Information for Public Inspection and Copying

§ 212.21 Public records.

In accordance with this subpart, USAID makes the following information and materials available for public inspection and copying:

(a) All final opinions (including concurring and dissenting options), and all orders made in the adjudication of the cases:

(b) those statements of policy and interpretations which have been adopted by the Agency and are not published in the FEDERAL REGISTER; and

(c) Administrative staff manuals and instructions to staff that affect any member of the public.

§ 212.22 Protection of personal privacy.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, USAID may delete identifying details when USAID makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. USAID will, in each such case, explain in writing the justification for the deletion.

§ 212.23 Current index.

USAID maintains and makes available for public inspection and copying a current index providing identifying information for the public as to any matter which has been issued, adopted, or promulgated after July 4, 1967, and which is required by § 212.21 to be made available or published. Publication of an index is deemed both unnecessary and impractical. However, copies of the index are available, upon request, for a fee based on the direct cost of duplication.

§ 212.24 Effect of noncompliance.

No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited as precedent by USAID against any private party unless it has been indexed and either made available or published as provided by this subpart, or unless that private party shall have actual and timely notice of the terms thereof.

§ 212.25 Procedures for obtaining materials under this subpart.

(a) The materials required to be made available for public inspection and copying in accordance with this subpart are available to members of the public at USAID's Public Reading Room, Room 1113, 1621 North Kent Street, Rosslyn, Virginia 22209, which is open from 9 a.m. to 5 p.m., Monday through Friday, except on holidays. All such materials are available in electronic form (disks) only; to a reasonable degree, assistance will be provided in use of necessary equipment.

(b) Requests for materials which are available under this subpart should follow the procedures under § 212.33(a) of this part.

(c) The direct costs of any necessary duplication will be charged in accordance with the fee schedule set forth in § 212.35.

(d) USAID Missions and offices in countries abroad are not responsible for the maintenance of the index and materials available under this subpart. However, insofar as they do have these materials, they will make them available to citizens of the United States who are present in their respective

countries upon application made either or in person in writing to the USAID Director, or other principal USAID officer, c/o American Embassy in the applicable country.

Subpart D—Access to Agency Records

§ 212.31 Availability of agency records.

Upon receiving a request which reasonably describes a USAID record, and which is made in accordance with the provisions of this subpart, USAID will make such records, except the following, promptly available to the requesting party:

(a) Matters published in the FEDERAL REGISTER pursuant to subpart B;

(b) Matters made available to the public pursuant to subpart C; and

(c) Matters exempt from disclosure pursuant to § 212.41 or § 241.42 of this part.

§ 212.32 Identification of records.

The request for a record by a member of the public must contain a reasonably specific description of the particular record sought so that a USAID officer who is familiar with the subject matter of the request may be able to locate the record with a reasonable amount of effort. A description that includes as much information as possible, such as the subject matter, format, approximate date and, where pertinent, the name of the country or person involved, will facilitate the search for the requested record.

§ 212.33 Procedure for making requests.

(a) Requests for records, other than records available at the Public Reading Room identified in § 212.24(a), may be made by a member of the public in writing only to the Chief, Customer Outreach and Oversight Staff, Room 1113, SA–16, Agency for International Development, Department of State, 320 21st Street, N.W., Washington, D.C. 20523–1608. The request and the envelope must be plainly marked ''FOIA Request.'' Requests may be made orally, that is, in person, only for records and materials available at the Public Reading Room.

(b) Requests for records may be made directly to a USAID mission or office abroad only by a citizen of the United States who is present in that country and must be by written application to the USAID Director (or other principal USAID officer), care of the American Embassy in that country. Any such written request and its envelope must be plainly marked ''FOIA Request.''

(c) Only signed original (as opposed to electronically transmitted) requests are acceptable for procedures pursuant to paragraphs (a) and (b) of this section. Telephoned requests, or in-person requests other than to the Public Reading Room, cannot be accepted. If a written request not properly marked ''FOIA Request'' on both the letter and envelope is thereby delayed in reaching the Chief, Office of Customer Outreach and Oversight Staff, such request will not be deemed received by USAID until actually received by that official. In the event of such a delay, the person making the request will be furnished a notice of the effective date of receipt.

§ 212.34 Procedures for responding to requests for records.

(a) Upon receipt by the Chief, Office of Customer Outreach and Oversight Staff, of a reasonably specific request made pursuant to § 212.33 of this part, a maximum of ten working days will normally be taken to determine to what extent the Agency can provide the information requested. Upon the making of that determination, the person making the request will be promptly so informed. Copies of the releasable documents will be made available promptly thereafter upon receipt of applicable fees and charges as set forth in § 212.35.

(b)(1) In unusual circumstances, USAID may not be able to determine the availability of the requested documents within ten working days, in which event the person making the request will be informed by written notice of the delay, the reasons for the delay and the date on which a determination may be expected. In this context, the term ''unusual circumstances'' refers to the following situations:

(i) When there is a need to search for and collect the requested records from field facilities or other establishments

that are separate from the office processing the request;

(ii) When there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request; or

(iii) When there is a need for consultation (which will be conducted with all practicable speed) with another agency having a substantial interest in the determination of the request or among two or more components of the Agency, each having substantial subject-matter interest therein.

(2) The maximum time in making a determination of availability, in the event of such unusual circumstances, will be twenty working days from receipt of the request. In the event that only part of the permissible ten working days extension is used, then USAID reserves the right, if necessary, to use any remainder of such time for the determination of an appeal, if one is made.

(c) If a request is made to USAID for material that is controlled or held by another agency, the person making the request will be immediately notified that USAID does not have or control the requested material and he/she will be advised of the name of the controlling agency and of the address from which the material may be requested, unless the other agency has, by public regulation, delegated the release authority to USAID. If release authority has been delegated, USAID will follow the procedures authorized by the delegation in determining whether to release the information. If a request for material is referred to USAID from another agency, the time period for determination of release of the information will not start until the request is received by the Chief, Office of Customer Outreach and Oversight Staff; and the person making the request will be immediately notified of the referral and of the date the request was received in USAID. USAID will not accept referral of requests unless and until the Chief, Customer Outreach and Oversight Staff, or his/her designee, determines that the material requested is actually within the scope and control of the release authority of USAID.

(d) If only a part of a record is exempt from disclosure, then any reasonably segregable portion of such record will be furnished after deletion of the portions which are exempt, provided that the segregable portion constitutes an intelligible record which is not distorted out of context or contradictory to the substance of the entire record before segregation.

§ 212.35 Schedule of fees and method of payment for services rendered.

(a) *Definitions*. (1) *Direct costs* means those expenditures which the Agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents in order to respond to a FOIA request.

(2) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Line-by-line search will not be done when duplicating an entire document would prove the less expensive and quicker method of complying with a request. (''Search'' for this purpose is distinguished from ''review'' (see paragraph (a)(4) of this section).

(3) *Duplication* refers to the process of making a copy of a document available to the FOIA requester. Copies can take the form of paper copy, microfilm or audiovisual materials (among others) and will be in a form that is reasonably usable by requesters.

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

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that is related to commerce, trade, or the profit interest of the requester or

of the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Agency will determine the use to which a requester will put the documents requested. Where the Agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Agency may seek additional clarification before assigning the request to a specific category.

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

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

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

(b) *Fees to be charged.* The following specific fees shall be applicable with respect to services rendered to members of the public under this part:

(1) *Commercial use requesters.* Fees are intended to cover the full estimated direct costs of researching for, reviewing for release, and duplicating the records requested. *Search costs* are computed based on the following formula: hours spent by Agency personnel, whatever their grade and location, and rounded up to the nearest full hour, and including locality pay for Washington-based personnel only, at the basic annual rate then payable to U.S. Government employees at the GS–9/Step 4 level, times 1.17 (to factor in related benefits) and divided by 2080 (hours per work year). *Review costs* are computed based on the same formula but, instead, using the rate then payable to employees at the GS–13/Step 4 level. *Duplicating costs* are $0.20 per page. Search costs will be assessed even though no records may be found or even if, after review, there is no disclosure of records.

(2) *Educational and non-commercial scientific institution requester.* The Agency will provide documents to requesters in this category for the cost of duplication alone ($0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that a request is being made under the auspices of a qualifying institution and that the records are sought in furtherance of scholarly research, if the request is from an educational institution or scientific research, if the request is from a non-commercial scientific institution. Requesters eligible for free search must (as with all FOIA requesters) reasonably describe the records sought.

(3) *Requesters who are representatives of the news media.* The Agency will provide documents to requesters in this category for the cost of reproduction alone ($0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category a

requester must meet the criteria in paragraph (a)(8) of this section, and his/her request must not be made for commercial use. In reference to this class of requesters, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters eligible for free search must also reasonably describe the records sought.

(4) *All other requesters.* The Agency will charge requesters who do not fit into any of the categories in paragraphs (b) (1), (2), and (3) of this section fees which recover the full direct cost of search, and for reproducing records that are responsive to the request, except that the first 100 pages and the first two hours of search time shall be furnished without charge. The hourly rates outlined in paragraph (b)(1) of this section will prevail. Requesters must reasonably describe the records sought. Moreover, requests from subjects for records filed in the Agency's Privacy Act System of Records will continue to be treated under the fee provisions of the Privacy Act of 1975 except that the first 100 pages of reproduction will be furnished without charge.

(c) *Non-payment of fees.* (1) The Agency will begin assessing interest charges on the thirty-first day following the day on which the requester is advised of the fee charge. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(2) Where a requester has previously failed to copy a fee charged in a timely fashion (*i.e.*, within thirty days of the billing date), the Agency will require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (c)(1) of this section, and to make an advance payment of the full amount of the remaining estimated fee before the Agency begins to process a new request or continues processing a then-pending request from the requester.

(3) When the Agency acts under paragraph (c) (1) or (2) of this section the administrative time limits prescribed in subsection (a)(6) of the FOIA (*i.e.*, ten working days from receipt of initial request and twenty working days from receipt of appeals from initial denial plus permissible extensions of these time limits) will begin only after the Agency has received fee payments described in this section.

(d) *Advance payments or confirmation.* Where USAID estimates or determines that allowable charges to a requester are likely to exceed $250, USAID will require a requester to make an advance payment of the entire estimated charges before continuing to process the request. Where the estimated charges are in the $25–$250 range, then USAID in its discretion, before processing the request, may require either—

(1) An advance deposit of the entire estimated charges or (2) Written confirmation of the requester's willingness, when billed, to pay such charges.

(e) *Waiving or reducing fee.* In accordance with section (4)(A)(ii) of the FOIA, the Agency will furnish documents without charge or at reduced charges if disclosure of the information is ''in the public interest'' in that such disclosure is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. A requester may at any time, up to a period not to exceed thirty days from the final USAID decision concerning his/her request, request such waiver or reduction of fee by letter addressed to the Chief, Customer Outreach and Oversight Staff; such request shall address the above criteria for waiver. Such request will initially be decided by the Chief, Customer Outreach and Oversight Staff, or his/her designee; such decision will normally be made, and the requester so advised, within ten working days of its receipt. The requester, if dissatisfied with that decision, may appeal pursuant to the same procedures as apply under § 212.36 and § 212.37 of this part.

(f) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the FOIA, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than

the fee itself. These provisions work together so that, except for commercial use requesters, the Agency will not begin to assess fees until it has provided such free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, the Agency will determine the cost of only ten minutes of search time and only five pages of reproduction. If this cost is equal to or less than the cost of processing the payment instrument—a figure which the Agency will from time to time review and determine—then there will be no charge to the requester.

(g) *Other provisions*—(1) *Charges for unsuccessful search*. The Agency will assess charges for time spent searching even if the Agency fails to locate the records or if records located are determined to be exempt from disclosure.

(2) *Aggregating requesters*. When the Agency reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Agency will aggregate any such requesters and charge accordingly.

(3) *Effect of the Debt Collection Act of 1982* (Public Law 97–365). The Agency will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

(4) *Remittances*. (i) Remittances will be in U.S. Dollars in the form of either a personal check or bank draft drawn on a bank in the United States or a money order.

(ii) Remittances shall be made payable to the order of the U.S. Treasury and mailed to the Chief, Customer Outreach and Oversight Staff, at the address set forth in § 212.33(a) of this part.

§ 212.36 Denial of request for access to records.

(a) If it is determined that the Agency cannot comply with all or part of a request for records, the person making the request shall be immediately notified of the determination, the reasons for the determination, the name and title of each officer responsible for the denial, and the right of the person to appeal the adverse determination.

(b) The denial of a request for records may be made, initially, only by the Chief, Customer Outreach and Oversight Staff, or his/her designee.

(c)(1) Any person who has been denied access to records pursuant to this section may appeal the relevant decision not later than thirty days after the date of the notification of denial or, in the case of a partial denial, not later than thirty days after the date the releasable documents are actually furnished to the person making the request, whichever is later. The appeal shall be in writing addressed to the Agency's FOIA Appeals Officer, who is:

The Director, Office of Administrative Services, Bureau for Management, Room 803, SA–2, Agency for International Development, 21st and Virginia Ave., N.W., Washington, D.C., 20523–0217.

(2) In order for the Agency to make a timely response to the appeal, both the text of the appeal and its envelope must be plainly marked ''FOIA Appeal''. The appeal must contain a reasonable description of the record sought and withheld, a copy of the initial decision to deny access and any other information that will enable the Appeals Officer to make the final decision.

§ 212.37 Procedures for agency consideration of appeals.

(a) Upon receipt of the appeal by the Appeals Officer, a maximum of twenty working days will normally be taken to decide the appeal. In unusual circumstances, as defined in § 212.34, the twenty working days may be extended by ten working days or by the number of days not used in the original denial of the request.

(b) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 212.35. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decisions and of the provisions for judicial review of the Agency's denial of the request.

(c) In the event a determination is not issued within the applicable time limit and the person making the request therefore chooses to sue the Agency, the Agency-level determination process shall nonetheless continue.

(d) If an appeal not properly marked ''FOIA Appeal'' on the text of the appeal and/or envelope is thereby delayed in reaching the Appeals Officer, it will not be deemed received by the Appeals Officer until actually received by him/her. In such event, the person making the appeal will be furnished notice of the effective date of receipt.

§ 212.38 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Agency shall not be disclosed pursuant to a FOIA request except in accordance with this section. For purposes of this section, the following definitions apply:

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

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

(b) *Notice to submitters.* Whenever the Agency receives a FOIA request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter of such information is entitled to receive notice of that request, then the Agency shall promptly notify the submitter that it has received the request, unless such a notice is not required pursuant to paragraph (g) of this section. The notice shall be in writing and shall either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known address. Where notice is required to be given to a voluminous number of submitters, in lieu of such a mailing the notice may be posted or published in a manner and place reasonably calculated to provide notice to the submitters.

(c) *When notice is required; related matters.* (1) For confidential commercial information submitted prior to January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

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

(ii) The Agency has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm to the submitter thereof.

(2) For confidential commercial information submitted to the Agency on or after January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

(i) The submitter has designated the information as confidential commercial information pursuant to the requirements of this section; or

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

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than ten years after the date of submission unless the submitter provides reasonable justification for a designation period of greater duration.

(4) A submitter shall use good-faith efforts to designate by appropriate markings, either at the time a record is submitted to the Agency or within a reasonable period of time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the submitter, its agent or

designee that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public.

(5) Whenever the Agency provides notice to the submitter in accordance with paragraph (c) of this section, the Agency shall at the same time provide written notice to the requester that it is affording the submitter a reasonable period of time within which to object to the disclosure, and that, therefore, the Agency may be required to enlarge the time within which it otherwise would respond to the request.

(d) *Opportunity to object to disclosure.* To the extent permitted by law, the notice required by paragraph (c) of this section shall afford a submitter a reasonable period of time within which the submitter or its authorized representative may provide the Agency with a written objection to the disclosure of the confidential commercial information and demonstrate why the submitter believes that the records contain confidential commercial information whose disclosure would, probably, cause substantial competitive injury to the submitter. Except where a certification already has been made in conformance with the requirements of paragraph (c)(4) of this section, the objection shall be accompanied by certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Agency shall give careful consideration to objections made by a submitter pursuant to paragraph (d) of this section prior to making any administrative determination of the issue. Whenever the Agency decides to disclose information despite the objection of a submitter, the Agency shall forward to the submitter a written notice which shall include:

(i) A statement of the reasons for which a submitter's disclosure objections were not sustained; and

(ii) A description of the information to be disclosed.

(2) To the extent permitted by law, the notice required to be given by paragraph (e)(1) of this section shall be provided to the submitter a reasonable number of days prior to the specific disclosure date.

(3) Whenever the Agency provides notice to the submitter in accordance with paragraphs (e) (1) and (2) of this section, the Agency shall at the same time notify the requester

(i) That such a notice has been given and

(ii) Of the proposed date for disclosure.

(f) *Notice of lawsuit.* When a requester brings suit seeking to compel the disclosure of information for which notice is required pursuant to paragraph (c) of this section, the Agency shall promptly notify the submitter that such suit has been filed.

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

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

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

(3) Disclosure of the information is required by an Agency rule that;

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the Agency that are to be released under the FOIA; and

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

(4) For purposes of paragraph (c) of this section, the information requested was not designated by the submitter as exempt from disclosure when the submitter had an opportunity to make such designation at the time of submission of the information or within a reasonable time thereafter, unless;

(i) The Agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(ii) The designation made by the submitter appears obviously frivolous; except that, in such case, the Agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Subpart E—Exemptions From Disclosure

§ 212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.

None of the provisions of subparts B, C, and D which provide for publication and disclosure of certain information and records shall be applicable to matters that are:

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

(b) Related solely to the internal personnel rules and practices of the Agency;

(c) Specifically exempted from disclosure by statute;

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

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

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

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

(1) Would reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

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

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

(5) Would disclose techniques and procedure for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

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

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

§ 212.42 Exemption from 5 U.S.C. 552.

Whenever a request is made which involves access to records described in paragraph (g) of § 212.41 and the investigation or proceedings involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Agency may, during only such time as that circumstances continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

Subpart F—Opening of Records for Nonofficial Research Purposes

§ 212.51 General policy.

(a) The Agency will open its records on an equitable basis to all individuals engaged in private research as soon as

such action may be taken without adversely affecting the national security, the maintenance of friendly relations with other nations, the efficient operation of the Agency, or the administrative feasibility of servicing requests for access to such records.

(b) Access for research purposes to the classified foreign policy records in the Agency's custody will be governed by the regulations of the Department of State with respect thereto, as set forth in part 6, chapter II of title II of the Code of Federal Regulations. Application for such access may be made to the Chief, Customer Outreach and Oversight Staff, at the address listed in §212.33(a) of this part. That officer, or his/her designee, in consultation with the Director, Historical Office, Department of State, or his/her designee, will determine the action to be taken and will so advise the researcher.

PART 213—CLAIMS COLLECTION

Subpart A—General

Sec.
213.1 Purpose and scope.
213.2 Definitions.
213.3 Loans, guarantees, sovereign and interagency claims.
213.4 Other remedies.
213.5 Fraud claims.
213.6 Subdivision of claims not authorized.
213.7 Omission not a defense.

Subpart B—Collection

213.8 Collection—general.
213.9 Written notice.
213.10 Review requirements.
213.11 Aggressive collection actions; documentation.
213.12 Interest, penalty and administrative costs.
213.13 Interest and charges pending waiver or review.
213.14 Contracting for collection services.
213.15 Use of credit reporting bureaus.
213.16 Use and disclosure of mailing addresses.
213.17 Liquidation of collateral.
213.18 Suspension or revocation of eligibility for loans and loan guarantees, licenses or privileges.
213.19 Installment payments.

Subpart C—Administrative Offset

213.20 Administrative offset of non-employee debts.
213.21 Employee salary offset—general.
213.22 Salary offset when USAID is the creditor agency.
213.23 Salary offset when USAID is not the creditor agency.

Subpart D—Compromise of Debts

213.24 General.
213.25 Standards for compromise.
213.26 Payment of compromised claims.
213.27 Joint and several liability.
213.28 Execution of releases.

Subpart E—Suspension or Termination of Collection Action

213.29 Suspension—general.
213.30 Standards for suspension.
213.31 Termination—general.
213.32 Standards for termination.
213.33 Permitted actions after termination of collection activity.
213.34 Debts that have been discharged in bankruptcy.

Subpart F—Discharge of Indebtedness and Reporting Requirements

213.35 Discharging indebtedness—general.
213.36 Reporting to IRS.

Subpart G—Referrals to the Department of Justice

213.37 Referrals to the Department of Justice.

Subpart H—Mandatory Transfer of Delinquent Debt to Financial Management Service (FMS) of the Department of Treasury

213.38 Mandatory transfer of debts to FMS—general.
213.39 Exceptions to mandatory transfer.

AUTHORITY: Section 621(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2381(a).

SOURCE: 67 FR 47258, July 18, 2002, unless otherwise noted.

Subpart A—General

§213.1 Purpose and scope.

This part prescribes standards and procedures for the United States Agency for International Development's (USAID) collection and disposal of claims. These standards and procedures are applicable to all claims and debts for which a statute, regulation or contract does not prescribe different standards or procedures. This part covers USAID's collection, compromise,

suspension, termination, and referral of claims to the Department of Justice.

§ 213.2 Definitions.

(a) *Administrative offset* means the withholding of money payable by the United States to, or held by the United States for, a person to satisfy a debt the person owes the Government.

(b) *Administrative wage garnishment* means the process by which federal agencies require a private sector employer to withhold up to 15% of an employee's disposable pay to satisfy a delinquent debt owed to the federal government. A court order is not required.

(c) *Agency* means the United States Agency for International Development (USAID).

(d) *Claim* means an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency. As used in this part, the terms debt and claim are synonymous.

(e) *CFO* means the Chief Financial Officer of USAID or a USAID employee or official designated to act on the CFO's behalf.

(f) *Creditor agency* means the Federal agency to which the debt is owed, including a debt collection center when acting on behalf of a creditor agency in matters pertaining to the collection of a debt.

(g) *Debtor* means an individual, organization, association, corporation, or a State or local government indebted to the United States or a person or entity with legal responsibility for assuming the debtor's obligation.

(h) *Delinquent claim* means any claim that has not been paid by the date specified in the agency's bill for collection or demand letter for payment or which has not been satisfied in accordance with a repayment agreement.

(i) *Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld (other than deductions to execute garnishment orders) in accordance with 5 CFR parts 581 and 582. Among the legally required deductions that must be applied first to determine disposable pay are levies pursuant to the Internal Revenue Code (Title 26, United States Code) and deductions described in 5 CFR 581.105 (b) through (f). These deductions include, but are not limited to: Social security withholdings; Federal, State and local tax withholdings; health insurance premiums; retirement contributions; and life insurance premiums.

(j) *Employee* means a current employee of the Federal Government including a current member of the Armed Forces or a Reserve of the Armed Forces.

(k) *Employee salary offset* means the administrative collection of a debt by deductions at one or more officially established pay intervals from the current pay account of an employee without the employee's consent.

(l) *Person* means an individual, firm, partnership, corporation, association and, except for purposes of administrative offsets under subpart C and interest, penalty and administrative costs under subpart B of this part, includes State and local governments and Indian tribes and components of tribal governments.

(m) *Recoupment* is a special method for adjusting debts arising under the same transaction or occurrence. For example, obligations arising under the same contract generally are subject to recoupment.

(n) *Waiver* means the cancellation, remission, forgiveness or non-recovery of a debt or debt-related charge as permitted or required by law.

(o) *Withholding order* means any order for withholding or garnishment of pay issued by USAID or a judicial or administrative body. For the purposes of this part, wage garnishment order and garnishment order have the same meaning as withholding order.

§ 213.3 Loans, guarantees, sovereign and interagency claims.

This part does not apply to:

(a) Claims arising out of loans for which compromise and collection authority is conferred by section 635(g)(2) of the Foreign Assistance Act of 1961, as amended;

(b) Claims arising from investment guaranty operations for which settlement and arbitration authority is conferred by section 635(I) of the Foreign Assistance Act of 1961, as amended;

(c) Claims against any foreign country or any political subdivision thereof, or any public international organization;

(d) Claims where the CFO determines that the achievement of the purposes of the Foreign Assistance Act of 1961, as amended, or any other provision of law administered by USAID require a different course of action; and

(e) Claims owed USAID by other Federal agencies. Such debts will be resolved by negotiation between the agencies.

§213.4 Other remedies.

(a) This part does not supersede or require omission or duplication of administrative proceedings required by contract, statute, regulation or other Agency procedures, e.g., resolution of audit findings under grants or contracts, informal grant appeals, formal appeals, or review under a procurement contract.

(b) The remedies and sanctions available to the Agency under this part for collecting debts are not intended to be exclusive. The Agency may impose, where authorized, other appropriate sanctions upon a debtor for inexcusable, prolonged or repeated failure to pay a debt. For example, the Agency may stop doing business with a grantee, contractor, borrower or lender; convert the method of payment under a grant or contract from an advance payment to a reimbursement method; or revoke a grantee's or contractor's letter-of-credit.

§213.5 Fraud claims.

(a) The CFO will refer claims involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim to the USAID Office of Inspector General (OIG). The OIG has the responsibility for investigating or referring the matter, where appropriate, to the Department of Justice (DOJ), and/or returning it to the CFO for further action.

(b) The CFO will not administratively compromise, terminate, suspend or otherwise dispose of debts involving fraud, the presentation of a false claim or misrepresentation on the part of the debtor or any party having an interest in the claim without the approval of DOJ.

§213.6 Subdivision of claims not authorized.

A claim will not be subdivided to avoid the $100,000 limit on the Agency's authority to compromise, suspend, or terminate a debt. A debtor's liability arising from a particular transaction or contract is a single claim.

§213.7 Omission not a defense.

Failure by USAID to comply with any provision of this part is not available to a debtor as a defense against payment of a debt.

Subpart B—Collection

§213.8 Collection—general.

(a) The CFO takes action to collect all debts owed the United States arising out of USAID activities and to reduce debt delinquencies. Collection actions may include sending written demands to the debtor's last known address. Written demand may be preceded by other appropriate action, including immediate referral to DOJ for litigation, when such action is necessary to protect the Government's interest. The CFO may contact the debtor by telephone, in person and/or in writing to demand prompt payment, to discuss the debtor's position regarding the existence, amount or repayment of the debt, to inform the debtor of its rights (e.g., to apply for waiver of the indebtedness or to have an administrative review) and of the basis for the debt and the consequences of nonpayment or delay in payment.

(b) The CFO maintains an administrative file for each debt and/or debtor which documents the basis for the debt, all administrative collection actions regarding the debt (including communications to and from the debtor) and its final disposition. Information on an individual may be disclosed only for purposes that are consistent

with this part, the Privacy Act of 1974 and other applicable law.

§ 213.9 Written notice.

(a) When the billing official determines that a debt is owed USAID, he or she provides a written notice in the form of a Bill for Collection or demand letter to the debtor. Unless otherwise provided by agreement, contract or order, the written notice informs the debtor of:

(1) The amount, nature and basis of the debt;

(2) The right of the debtor to inspect and copy records related to the debt;

(3) The right of the debtor to discuss and propose a repayment agreement;

(4) Any rights available to the debtor to dispute the validity of the debt or to have recovery of the debt waived (citing the available review or waiver authority, the conditions for review or waiver, and the effects of the review or waiver request on the collection of the debt);

(5) The date on which payment is due which will be not more than 30 days from the date of the bill for collection or demand letter;

(6) The instructions for making electronic payment;

(7) The debt is considered delinquent if it is not paid on the due date;

(8) The imposition of interest charges and, except for State and local governments and Indian tribes, penalty charges and administrative costs that may be assessed against a delinquent debt;

(9) The intention of USAID to use non-centralized administrative offset to collect the debt if appropriate and, if not, the referral of the debt 90 days after the Bill for Collection or demand letter to the Financial Management Service in the Department of Treasury who will collect their administrative costs from the debtor in addition to the amount owed USAID and use all means available to the Federal Government for debt collection including administrative wage garnishment, use of collection agencies and reporting the indebtedness to a credit reporting bureau (see § 213.14);

(10) The address, telephone number, and name of the person available to discuss the debt;

(11) The possibility of referral to the Department of Justice for litigation if the debt cannot be collected administratively.

(b) USAID will respond promptly to communications from the debtor. Response generally will be within 30 days of receipt of communication from the debtor.

§ 213.10 Review requirements.

(a) For purposes of this section, whenever USAID is required to afford a debtor a review within the agency, USAID shall provide the debtor with a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity.

(b) Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although USAID will carefully document all significant matters discussed at the hearing.

(c) This section does not require an oral hearing with respect to debt collection systems in which a determination of indebtedness rarely involves issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes.

(d) In those cases when an oral hearing is not required by this section, USAID shall accord the debtor a ''paper hearing,'' that is, a determination of the request for reconsideration based upon a review of the written record.

§ 213.11 Aggressive collection actions; documentation.

(a) USAID takes actions and effective follow-up on a timely basis to collect all claims of the United States for money and property arising out of USAID's activities. USAID cooperates with other Federal agencies in their debt collection activities.

(b) All administrative collection actions are documented in the claim file, and the basis for any compromise, termination or suspension of collection

actions is set out in detail. This documentation, including the Claims Collection Litigation Report required in § 213.34, is retained in the appropriate debt file.

§ 213.12 Interest, penalty and administrative costs.

(a) *Interest.* USAID will assess interest on all delinquent debts unless prohibited by statute, regulation or contract.

(1) Interest begins to accrue on all debts from the payment due date established in the initial notice to the debtor. USAID will assess an annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.*, the Treasury tax and loan account rate) unless a different rate is necessary to protect the interest of the Government. USAID will notify the debtor of the basis for its finding that a different rate is necessary to protect the interest of the Government.

(2) The rate of interest, as initially assessed, remains fixed for the duration of the indebtedness. If a debtor defaults on a repayment agreement, interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(3) Interest will not be assessed on interest charges, administrative costs or late payment penalties. However, where a debtor defaults on a previous repayment agreement and interest, administrative costs and penalties charges have been waived under the defaulted agreement, these charges can be reinstated and added to the debt principal under any new agreement and interest charged on the entire amount of the debt.

(b) *Administrative costs of collecting overdue debts.* The costs of the Agency's administrative handling of overdue debts including charges assessed by Treasury in cross-servicing USAID debts, based on either actual or average cost incurred, will be charged on all debts except those owed by State and local governments and Indian tribes. These costs include both direct and indirect costs.

(c) *Penalties.* As provided by 31 U.S.C. 3717(e)(2), a penalty charge will be assessed on all debts, except those owned by State and local governments and Indian tribes, more than 90 days delinquent. The penalty charge will be at a rate not to exceed 6% per annum and will be assessed monthly.

(d) *Allocation of payments.* A partial payment by a debtor will be applied first to outstanding administrative costs, second to penalty assessments, third to accrued interest and then to the outstanding debt principal.

(e) *Waivers.* (1) USAID will waive the collection of interest and administrative charges on the portion of the debt that is paid within 30 days after the date on which interest begins to accrue. The CFO may extend this 30-day period on a case-by-case basis where he determines that such action is in the best interest of the Government. A decision to extend or not to extend the payment period is final and is not subject to further review.

(2) The CFO may (without regard to the amount of the debt) waive collection of all or part of accrued interest, penalty or administrative costs, where he determines that—

(i) Waiver is justified under the criteria of § 213.24;

(ii) The debt or the charges resulted from the Agency's error, action or inaction, and without fault by the debtor; or

(iii) Collection of these charges would be against equity and good conscience or not in the best interest of the United States.

(3) A decision to waive interest, penalty charges or administrative costs may be made at any time.

§ 213.13 Interest and charges pending waiver or review.

Interest, penalty charges and administrative costs will continue to accrue on a debt during administrative appeal, either formal or informal, and during waiver consideration by the Agency; except, that interest, penalty charges and administrative costs will not be assessed where a statute or a regulation specifically prohibits collection of the debt during the period of the administrative appeal or the Agency review.

§ 213.14 Contracting for collection services.

USAID has entered into a cross-servicing agreement with the Financial Management Service (FMS) of the Department of Treasury. FMS is authorized to take all appropriate action to enforce collection of accounts referred to FMS in accordance with applicable statutory and regulatory requirements. The FMS fee ranges from 3% to 18% of the funds collected and will be collected from the debtor along with the original amount of the indebtedness. After referral, FMS will be solely responsible for the maintenance of the delinquent debtor records in its possessions and for ensuring that accounts are updated as necessary. In the event that a referred debtor disputes the validity of the debt or any terms and conditions related to any debt not reduced to judgment, FMS may return the disputed debt to USAID for its determination of debt validity. FMS may take any of the following collection actions on USAID's behalf:

(a) Send demand letters on U. S. Treasury letterhead and telephone debtors;

(b) Refer accounts to credit bureaus;

(c) Skiptracing;

(d) Purchase credit reports to assist in the collection effort;

(e) Refer accounts for offset, including tax refund, Federal employee salary, administrative wage garnishment, and general administrative offset under the Treasury Offset Program.

(f) Refer accounts to private collection agencies;

(g) Refer accounts to DOJ for litigation;

(h) Report written off/discharged debts to IRS on the appropriate Form 1099;

(i) Take any additional steps necessary to enforce recovery; and

(j) Terminate collection action, as appropriate.

§ 213.15 Use of credit reporting bureaus.

Delinquent debts owed to USAID are reported to appropriate credit reporting bureaus through the cross-servicing agreement with FMS.

(a) The following information is provided to the credit reporting bureaus:

(1) A statement that the claim is valid and is overdue;

(2) The name, address, taxpayer identification number and any other information necessary to establish the identity of the debtor;

(3) The amount, status and history of the debt; and

(4) The program or pertinent activity under which the debt arose.

(b) Before referring claims to FMS and disclosing debt information to credit reporting bureaus, USAID will have:

(1) Taken reasonable action to locate the debtor if a current address is not available; and

(2) If a current address is available, notified the debtor in writing that:

(i) The designated USAID official has reviewed the claim and has determined that it is valid and overdue;

(ii) That 90 days after the initial billing or demand letter if the debt is not paid, USAID intends to refer the debt to FMS and disclose to a credit reporting agency the information authorized for disclosure by this subpart; and

(iii) The debtor can request a complete explanation of the claim, can dispute the information in USAID's records concerning the claim, and can file for an administrative review, waiver or reconsideration of the claim, where applicable.

(c) Before information is submitted to a credit reporting bureau, USAID will provide a written statement to FMS that all required actions have been taken. Additionally, FMS will, thereafter, ensure that accounts are updated as necessary during the period that FMS holds the account information.

(d) If a debtor disputes the validity of the debt, the credit reporting bureau will refer the matter to the appropriate USAID official. The credit reporting bureau will exclude the debt from its reports until USAID certifies in writing that the debt is valid.

§ 213.16 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a debt, the CFO may obtain a debtor's current mailing address from the Internal Revenue Service.

(b) Addresses obtained from the Internal Revenue Service will be used by the Agency, its officers, employees, agents or contractors and other Federal agencies only to collect or dispose of debts, and may be disclosed to other agencies and to collection agencies only for collection purposes.

§ 213.17 Liquidation of collateral.

Where the CFO holds a security instrument with a power of sale or has physical possession of collateral, he may liquidate the security or collateral and apply the proceeds to the overdue debt. USAID will exercise this right where the debtor fails to pay within a reasonable time after demand, unless the cost of disposing of the collateral is disproportionate to its value or special circumstances require judicial foreclosure. However, collection from other businesses, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance company unless expressly required by contract or statute. The CFO will give the debtor reasonable notice of the sale and an accounting of any surplus proceeds and will comply with any other requirements of law or contract.

§ 213.18 Suspension or revocation of eligibility for loans and loan guarantees, licenses or privileges.

Unless waived by the CFO, USAID will not extend financial assistance in the form of a loan or loan guarantee to any person delinquent on a nontax debt owed to a Federal agency. USAID may also suspend or revoke licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay a claim. Additionally, the CFO may suspend or disqualify any contractor, lender, broker, borrower, grantee or other debtor from doing business with USAID or engaging in programs USAID sponsors or funds if a debtor fails to pay its debts to the Government within a reasonable time. Debtors will be notified before such action is taken and applicable suspension or debarment procedures will be used. The CFO will report the failure of any surety to honor its obligations to the Treasury Department for action under 31 CFR 332.18.

§ 213.19 Installment payments.

(a) Whenever feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalty and administrative costs, as required by § 213.11, will be collected in a single payment. However, where the CFO determines that a debtor is financially unable to pay the indebtedness in a single payment or that an alternative payment mechanism is in the best interest of the United States, the CFO may approve repayment of the debt in installments. The debtor has the burden of establishing that it is financially unable to pay the debt in a single payment or that an alternative payment mechanism is warranted. If the CFO agrees to accept payment by installments, the CFO may require a debtor to execute a written agreement which specifies all the terms of the repayment arrangement and which contains a provision accelerating the debt in the event of default. The size and frequency of installment payments will bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment payments will be sufficient in size and frequency to liquidate the debt in not more than 3 years, unless the CFO determines that a longer period is required. Installment payments of less than $50 per month generally will not be accepted, but may be accepted where the debtor's financial or other circumstances justify.

(b) If a debtor owes more than one debt and designates how a voluntary installment payment is to be applied among the debts, that designation will be approved if the CFO determines that the designation is in the best interest of the United States. If the debtor does not designate how the payment is to be applied, the CFO will apply the payment to the various debts in accordance with the best interest of the United States, paying special attention to applicable statutes of limitations.

Subpart C—Administrative Offset

§ 213.20 Administrative offset of nonemployee debts.

This subpart provides for USAID's collection of debts by administrative

offset under the Federal Claims Collection Standards, other statutory authorities and offsets or recoupments under common law. It does not apply to offsets against employee salaries covered by §§ 213.21, 213.22 and 213.23 of this subpart. USAID will collect debts by administrative offsets where it determines that such collections are feasible and are not otherwise prohibited by statute or contract. USAID will decide, on a case-by-case basis, whether collection by administrative offset is feasible and that its use furthers and protects the interest of the United States.

(a) *Standards*. (1) The CFO collects debts by administrative offset only after the debtor has been sent written notice in the form of a Bill for Collection or demand letter outlining the type and amount of the debt, the intention of the agency to use administrative offset to collect the debt, and explaining the debtor's rights under 31 U.S.C. 3716.

(2) Offsets may be initiated only after the debtor has been given:

(i) The opportunity to inspect and copy agency records related to the debt;

(ii) The opportunity for a review within the agency of the determination of indebtedness;

(iii) The opportunity to make a written agreement to repay the debt.

(3) The provisions of paragraphs (a)(1) and (2) of this section may be omitted when:

(i) The offset is in the nature of a recoupement;

(ii) The debt arises under a contract as set forth in Cecile Industries, Inc. v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993) (notice and other procedural protections set forth in 31 U.S.C. 3716(a) do not supplant or restrict established procedures for contractual offsets accommodated by the Contracts Disputes Act); or

(iii) In the case of non-centralized administrative offsets conducted under paragraph (g) of this section, USAID first learns of the existence of the amount owed by the debtor when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity for review. When prior notice and an opportunity for review are omitted, USAID shall give the debtor such notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the USAID.

(4) When USAID previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, USAID need not duplicate such notice and review opportunities before administrative offset may be initiated.

(b) *Interagency offset*. The CFO may offset a debt owed to another Federal agency from amounts due or payable by USAID to the debtor, or may request another Federal agency to offset a debt owed to USAID. The CFO through the FMS cross-servicing arrangement may request the Internal Revenue Service to offset an overdue debt from a Federal income tax refund due. The FMS may also garnishment the salary of a private sector employee where reasonable attempts to obtain payment have failed. Interagency offsets from employee's salaries will be made in accordance with the procedures contained in §§ 213.22 and 213.23.

(c) *Statutory bar to offset*. Administrative offset will not be made more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not have been known through the exercise of reasonable care by the officer responsible for discovering or collecting the debt. For purposes of offset, the right to collect a debt accrues when the appropriate USAID official determines that a debt exists (e.g., contracting officer, grant award official, etc.), when it is affirmed by an administrative appeal or a court having jurisdiction, or when a debtor defaults on a payment agreement, whichever is latest. An offset occurs when money payable to the debtor is first withheld or when USAID requests offset from money held by another agency.

(d) *Alternative repayment*. The CFO may, at the CFO's discretion, enter into a repayment agreement with the debtor in lieu of offset. In deciding whether to accept payment of the debt

by an alternative repayment agreement, the CFO may consider such factors as the amount of the debt, the length of the proposed repayment period, past Agency dealings with the debtor, documentation submitted by the debtor indicating that an offset will cause undue financial hardship, and the debtor's financial ability to adhere to the terms of a repayment agreement. The CFO may require financial documentation from the debtor before considering the repayment arrangement.

(e) *Review of administrative determination of debt's validity*. (1) A debt will not be offset while a debtor is seeking either formal or informal review of the validity of the debt under this section or under another statute, regulation or contract. However, interest, penalty and administrative costs will continue to accrue during this period, unless otherwise waived by the CFO. The CFO may initiate offset as soon as practical after completion of review or after a debtor waives the opportunity to request review.

(2) The debtor must provide a written request for review of the decision to offset the debt no later than 15 days after the date of the notice of the offset unless a different time is specifically prescribed. The debtor's request must state the basis for the request for review.

(3) The CFO may grant an extension of time for filing a request for review if the debtor shows good cause for the late filing. A debtor who fails timely to file or to request an extension waives the right to review.

(4) The CFO will issue, no later than 60 days after the filing of the request, a written final decision based on the evidence, record and applicable law.

(f) *Multiple debts*. Where moneys are available for offset against multiple debts of a debtor, it will be applied in accordance with the best interest of the Government as determined by the CFO on a case-by-case basis.

(g) *Non-centralized administrative offset*. (1) Generally, non-centralized administrative offsets are ad hoc case-by-case offsets that creditor agencies conduct, at the agency's discretion, internally or in cooperation with the agency certifying or authorizing payments to the debtor. Unless otherwise prohibited by law, when centralized administrative offset is not available or appropriate, past due, legally enforceable nontax delinquent debts may be collected through non-centralized administrative offset. In these cases, a creditor agency may make a request directly to a payment authorizing agency to offset a payment due a debtor to collect a delinquent debt.

(2) Before requesting a payment authorizing agency to conduct a non-centralized administrative offset, USAID's regulations provides that such offsets may occur only after:

(i) The debtor has been provided due process as set forth in paragraph (a) of this section; and

(ii) The payment authorizing agency has received written certification from the creditor agency that the debtor owes the past due, legally enforceable delinquent debt in the amount stated, and that the creditor agency has fully complied with its regulations concerning administrative offset.

(3) USAID as a payment authorizing agency will comply with offset requests by creditor agencies to collect debts owed to the United States, unless the offset would not be in the best interests of the United States with respect to USAID's program, or would otherwise be contrary to law.

(4) When collecting multiple debts by non-centralized administrative offset, USAID will apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, particularly the applicable statute of limitations.

(h) *Requests to OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund*. Upon providing OPM written certification that a debtor has been afforded the procedures provided in paragraph (a) of this section, USAID may request OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) in accordance with regulations codified at 5 CFR 831.1801 through 831.1808. Upon receipt of such a request, OPM will identify

and ''flag'' a debtor's account in anticipation of the time when the debtor requests, or becomes eligible to receive, payments from the Fund. This will satisfy any requirement that offset be initiated prior to the expiration of the time limitations referenced in paragraph (a)(4) of this section.

§ 213.21 Employee salary offset—general.

(a) *Purpose.* This section establishes USAID's policies and procedures for recovery of debts owed to the United States by installment collection from the current pay account of an employee.

(b) *Scope.* The provisions of this section apply to collection by salary offset under 5 U.S.C. 5514 of debts owed USAID and debts owed to other Federal agencies by USAID employees. USAID will make every effort reasonably and lawfully possible to administratively collect amounts owed by employees prior to initiating collection by salary offset. An amount advanced to an employee for per diem or mileage allowances in accordance with 5 U.S.C. 5705, but not used for allowable travel expenses, is recoverable from the employee by salary offset without regard to the due process provisions in § 213.22. This section does not apply to debts where collection by salary offset is explicitly provided for or prohibited by another statute.

(c) *References.* The following statutes and regulations apply to USAID's recovery of debts due the United States by salary offset:

(1) 5 U.S.C. 5514, as amended, governing the installment collection of debts;

(2) 31 U.S.C. 3716, governing the liquidation of debts by administrative offset;

(3) 5 CFR part 550, subpart K, setting forth the minimum requirements for executive agency regulations on salary offset; and

(4) 31 CFR parts 900 through 904, the Federal Claims Collection Standards.

§ 213.22 Salary offset when USAID is the creditor agency.

(a) *Due process requirements—Entitlement to notice, hearing, written response and decision.* (1) Prior to initiating collection action through salary offset, USAID will first provide the employee with the opportunity to pay in full the amount owed, unless such notification will compromise the Government's ultimate ability to collect the debt.

(2) Except as provided in paragraph (b) of this section, each employee from whom the Agency proposes to collect a debt by salary offset under this section is entitled to receive a written notice as described in paragraph (c) of this section.

(3) Each employee owing a debt to the United States that will be collected by salary offset is entitled to request a hearing on the debt. This request must be filed as prescribed in paragraph (d) of this section. The Agency will make appropriate hearing arrangements that are consistent with law and regulations. Where a hearing is held, the employee is entitled to a written decision on the following issues:

(i) The determination of the Agency concerning the existence or amount of the debt; and

(ii) The repayment schedule, if it was not established by written agreement between the employee and the Agency.

(b) *Exceptions to due process requirements—pay and allowances.* The procedural requirements of paragraph (a) of this section are not applicable to overpayments of pay or allowances caused by the following:

(1) Any adjustment of pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program (such as health insurance) requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, if the amount to be recovered was accumulated over more than four pay periods the full procedures prescribed under paragraph (d) of this section will be extended to the employee;

(2) Routine intra-agency adjustment in pay or allowances that is made to correct an overpayment of pay attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred with the 4 pay periods preceding the adjustment and, at the time of such adjustment, or as soon thereafter as practical, the employee is provided written

notice of the nature and amount of the adjustment; or

(3) Any adjustment to collect a debt amounting to $50 or less, if at the time of such adjustment, or as soon thereafter as practical, the employee is provided written notice of the nature and amount of the adjustment.

(c) *Notification before deductions begin.* Except as provided in paragraph (b) of this section, deductions will not be made unless the employee is first provided with a minimum of 30 calendar days written notice. Notice will be sent by mail and must include the following:

(1) The Agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The Agency's intention to collect the debt by means of deductions from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date and duration of the intended deductions. (The proposed beginning date for salary offset cannot be earlier than 30 days after the date of notice, unless this would compromise the Government's ultimate ability to resolve the debt);

(4) An explanation of the requirements concerning interest, penalty and administrative costs;

(5) The employee's right to inspect and copy all records relating to the debt or to request and receive a copy of such records;

(6) If not previously provided, the employee's right to enter into a written agreement for a repayment schedule differing from that proposed by the Agency where the terms of the proposed repayment schedule are acceptable to the Agency. (Such an agreement must be in writing and signed by both the employee and the appropriate USAID official and will be included in the debt file);

(7) The right to a hearing conducted by a hearing official not under the control of USAID, if a request is filed;

(8) The method and time for requesting a hearing;

(9) That the filing of a request for hearing within 15 days of receipt of the original notification will stay the assessment of interest, penalty and administrative costs and the commencement of collection proceedings;

(10) That a final decision on the hearing (if requested) will be issued at the earliest practical date, but no later than 60 days after the filing of the request, unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That any knowingly false or frivolous statements, representations or evidence may subject the employee to—

(i) Disciplinary procedures under 5 U.S.C. chapter 75 or any other applicable statutes or regulations;

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

(iii) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority;

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

(13) Unless there are applicable contractual or statutory provisions to the contrary, amounts paid or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(d) *Request for hearing.* An employee may request a hearing by filing a written, signed request directly with the Deputy Chief Financial Office, M/FM, United States Agency for International Development, Ronald Reagan Building, 1300 Pennsylvania Avenue NW., Washington, DC 20523–4601. The request must state the basis upon which the employee disputes the proposed collection of the debt. The request must be signed by the employee and be received by USAID within 15 days of the employee's receipt of the notification of proposed deductions. The employee should submit in writing all facts, evidence and witnesses that support his/her position to the Deputy Chief Financial Officer within 15 days of the date of the request for a hearing. The Deputy Chief Financial Officer will arrange for the services of a hearing official not under the control of USAID and will provide the hearing official with all documents relating to the claim.

(e) *Requests for hearing made after time expires.* Late requests for a hearing may be accepted if the employee can show that the delay in filing the request for a hearing was due to circumstances beyond the employee's control.

(f) *Form of hearing, written response and final decision.* (1) Normally, a hearing will consist of the hearing official making a decision based upon a review of the claims file and any materials submitted by the debtor. However, in instances where the hearing official determines that the validity of the debt turns on an issue of veracity or credibility which cannot be resolved through review of documentary evidence, the hearing official at his discretion may afford the debtor an opportunity for an oral hearing. Such oral hearings will consist of an informal conference before a hearing official in which the employee and the Agency will be given the opportunity to present evidence, witnesses and argument. If desired, the employee may be represented by an individual of his/her choice. The Agency shall maintain a summary record of oral hearings provided under the procedures in this section.

(2) Written decisions provided after a request for hearing will, at a minimum, state the facts evidencing the nature and origin of the alleged debt; and the hearing official's analysis, findings and conclusions.

(3) The decision of the hearing official is final and binding on the parties.

(g) *Request for waiver.* In certain instances, an employee may have a statutory right to request a waiver of overpayment of pay or allowances, e.g., 5 U.S.C. 5584 or 5 U.S.C. 5724(i). When an employee requests waiver consideration under a right authorized by statute, further collection on the debt will be suspended until a final administrative decision is made on the waiver request. However, where it appears that the Government's ability to recover the debt may be adversely affected because of the employee's resignation, termination or other action, suspension of recovery is not required. During the period of the suspension, interest, penalty charges and administrative costs will not be assessed against the debt. The Agency will not duplicate, for purposes of salary offset, any of the procedures already provided the debtor under a request for waiver.

(h) *Method and source of collection.* A debt will be collected in a lump sum or by installment deductions at established pay intervals from an employee's current pay account, unless the employee and the Agency agree to alternative arrangements for payment. The alternative payment schedule must be in writing, signed by both the employee and the CFO and will be documented in the Agency's files.

(i) *Limitation on amount of deduction.* The size and frequency of installment deductions generally will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period may not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payments will be in amounts sufficient to liquidate the debt in three years or less. Installment payments of less than $50 normally will be accepted only in the most unusual circumstances.

(j) *Duration of deduction.* If the employee is financially unable to pay a debt in a lump sum or the amount of the debt exceeds 15 percent of disposable pay, collection will be made in installments. Installment deductions will be made over the period of active duty or employment except as provided in paragraph (a)(1) of this section.

(k) *When deductions may begin.* (1) Deductions to liquidate an employee's debt will begin on the date stated in the Agency's Bill for Collection or demand letter notice of intention to collect from the employee's current pay unless the debt has been repaid or the employee has filed a timely request for hearing on issues for which a hearing is appropriate.

(2) If the employee has filed a timely request for hearing with the Agency, deductions will begin after the hearing official has provided the employee with a final written decision indicating the amount owed the Government. Following the decision by the hearing official, the employee will be given 30 days

to repay the amount owed prior to collection through salary offset, unless otherwise provided by the hearing official.

(l) *Liquidation from final check.* If the employee retires, resigns, or the period of employment ends before collection of the debt is completed, the remainder of the debt will be offset from subsequent payments of any nature due the employee (e.g., final salary payment, lump-sum leave, etc.).

(m) *Recovery from other payments due a separated employee.* If the debt cannot be liquidated by offset from any final payment due the employee on the date of separation, USAID will liquidate the debt, where appropriate, by administrative offset from later payments of any kind due the former employee (e.g., retirement pay). Such administrative offset will be taken in accordance with the procedures set forth in § 213.20.

(n) *Interest, penalty and administrative cost.* USAID will assess interest, penalties and administrative costs on debts collected under the procedures in this section. Interest, penalty and administrative costs will continue to accrue during the period that the debtor is seeking either formal or informal review of the debt or requesting a waiver. The following guidelines apply to the assessment of these costs on debts collected by salary offset:

(1) Interest will be assessed on all debts not collected by the payment due date specified in the bill for collection or demand letter. USAID will waive the collection of interest and administrative charges on the portion of the debt that is paid within 30 days after the date on which interest begins to accrue.

(2) Administrative costs will be assessed if the debt is referred to Treasury for cross-servicing.

(3) Deductions by administrative offset normally begin prior to the time for assessment of a penalty. Therefore, a penalty charge will not be assessed unless deductions occur more than 90 days from the due date in the bill for collection or demand letter.

(o) *Non-waiver of right by payment.* An employee's payment under protest of all or any portion of a debt does not waive any rights that the employee may have under either the procedures in this section or any other provision of law.

(p) *Refunds.* USAID will promptly refund to the employee amounts paid or deducted pursuant to this section, the recovery of which is subsequently waived or otherwise found not owing to the United States. Refunds do not bear interest unless specifically authorized by law.

(q) *Time limit for commencing recovery by salary setoff.* USAID will not initiate salary offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the right to collect the debt were not known and could not have been known through the exercise of reasonable care by the Government official responsible for discovering and collecting such debts.

§ 213.23 Salary offset when USAID is not the creditor agency.

(a) USAID will use salary offset against one of its employees that is indebted to another agency if requested to do so by that agency. Such a request must be accompanied by a certification by the requesting agency that the person owes the debt (including the amount) and that the procedural requirements of 5 U.S.C. 5514 and 5 CFR part 550, subpart K, have been met. The creditor agency must also advise USAID of the number of installments to be collected, the amount of each installment, and the commencement date of the first installment, if a date other than the next established pay period.

(b) Requests for salary offset must be sent to the Chief Financial Officer, Office of Financial Management (M/FM), United States Agency for International Development, Ronald Reagan Building , 1300 Pennsylvania Avenue NW., Washington, DC 20523–4601.

(c) *Processing of the claim by USAID*—(1) *Incomplete claims.* If USAID receives an improperly completed request, the requesting (creditor) agency will be requested to supply the required information before any salary offset can be taken.

(2) *Complete claims.* If the claim procedures in paragraph (a) of this section

have been properly completed, deduction will begin on the next established pay period. USAID will not review the merits of the creditor agency's determinations with respect to the amount or validity of the debt as stated in the debt claim form. USAID will not assess a handling or any other related charge to cover the cost of its processing the claim.

(d) *Employees separating from USAID before a debt to another agency is collected*—(1) *Employees separating from Government service*. If an employee begins separation action before USAID collects the total debt due the creditor agency, the following actions will be taken:

(i) To the extent possible, the balance owed the creditor agency will be liquidated from subsequent payments of any nature due the employee from USAID in accordance with § 213.22;

(ii) If the total amount of the debt cannot be recovered, USAID will certify to the creditor agency and the employee the total amount of USAID's collection; and

(iii) If USAID is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, the Foreign Service Retirement Fund, or other similar payments, it will provide such information to the creditor agency so that it can file a certified claim against the payments.

(2) *Employees who transfer to another Federal agency*. If an USAID employee transfers to another Federal agency before USAID collects the total amount due the creditor agency, USAID will certify the total amount of the collection made on the debt. It is the responsibility of the creditor agency to ensure that the collection is resumed by the new employing agency.

Subpart D—Compromise of Debts

§ 213.24 General.

USAID may compromise claims for money or property where the principal balance of a claim, exclusive of interest, penalty and administrative costs, does not exceed $100,000. Where the claim exceeds $100,000, the authority to accept the compromise rests solely with DOJ. The CFO may reject an offer of compromise in any amount. Where the claim exceeds $100,000 and USAID recommends acceptance of a compromise offer, it will refer the claim with its recommendation to DOJ for approval. The referral will be in the form of the Claims Collection Litigation Report (CCLR) and will outline the basis for USAID's recommendation. USAID refers compromise offers for claims in excess of $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530, unless otherwise provided by Department of Justice delegations or procedures

§ 213.25 Standards for compromise.

(a) USAID may compromise a claim pursuant to this section if USAID cannot collect the full amount because the debtor does not have the financial ability to pay the full amount of the debt within a reasonable time, or the debtor refuses to pay the claim in full and the Government does not have the ability to enforce collection in full within a reasonable time by enforced collection proceedings. In evaluating the acceptability of the offer, the CFO may consider, among other factors, the following:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor;

(5) The availability of assets or income which may be realized by enforced collection proceedings; or

(6) The applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection.

(b) USAID may compromise a claim, or recommend acceptance of a compromise to DOJ, where there is significant doubt concerning the Government's ability to prove its case in court for the full amount of the claim, either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases will fairly reflect the probability of prevailing on the legal issues involved, considering fully the availability of witnesses and other evidentiary data required to support

the Government's claim. In determining the litigative risks involved, USAID will give proportionate weight to the likely amount of court costs and attorney fees the Government may incur if it is unsuccessful in litigation.

(c) USAID may compromise a claim, or recommend acceptance of a compromise to DOJ, if the cost of collection does not justify the enforced collection of the full amount of the debt. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, taking into consideration the time it will take to effect collection. Costs of collection may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collection justifies enforced collection of the full amount, USAID may consider the positive effect that enforced collection of the claim may have on the collection of other similar claims.

(d) To assess the merits of a compromise offer, USAID may obtain a current financial statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income and expense.

(e) Statutory penalties, forfeitures or debts established as an aid to enforcement and to compel compliance may be compromised where the CFO determines that the Agency's enforcement policy, in terms of deterrence and securing compliance (both present and future), will be adequately served by accepting the offer.

§ 213.26 Payment of compromised claims.

The CFO normally will not approve a debtor's request to pay a compromised claim in installments. However, where the CFO determines that payment of a compromise by installments is necessary to effect collection, a debtor's request to pay in installments may be approved.

§ 213.27 Joint and several liability.

When two or more debtors are jointly and severally liable, collection action will not be withheld against one debtor until the other or others pay their proportionate share. The amount of a compromise with one debtor is not precedent in determining compromises from other debtors who have been determined to be jointly and severally liable on the claim.

§ 213.28 Execution of releases.

Upon receipt of full payment of a claim or the amount compromised, USAID will prepare and execute a release on behalf of the United States. In the event a mutual release is not executed when a debt is compromised, unless prohibited by law, the debtor is still deemed to have waived any and all claims and causes of action against USAID and its officials related to the transaction giving rise to the compromised debt.

Subpart E—Suspension or Termination of Collection Action

§ 213.29 Suspension—general.

The CFO may suspend or terminate the Agency's collection actions on a debt where the outstanding debt principal does not exceed $100,000. Unless otherwise provided by DOJ delegations or procedures, the CFO refers requests for suspension of debts exceeding $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval. If prior to referral to DOJ, USAID determines that a debt is plainly erroneous or clearly without legal merit, the agency may terminate collection activity regardless of the amount involved without obtaining DOJ concurrence. The CFO may waive the assessment of interest, penalty charges and administrative costs during the period of the suspension. Suspension will be for an established time period and generally will be reviewed at least every six months to ensure the continued propriety of the suspension.

§ 213.30 Standards for suspension.

(a) The CFO may suspend collection action on a debt when:

(1) The debtor cannot be located;

(2) The debtor's financial condition is expected to improve; or

(3) The debtor has requested a waiver or review of the debt.

(b) Based on the current financial condition of the debtor, the CFO may suspend collection activity on a debt when the debtor's future prospects justify retention of the claim for periodic review, and:

(1) The applicable statute of limitations has not expired; or

(2) Future collection can be effected by offset, notwithstanding the 10-year statute of limitations for administrative offsets; or

(3) The debtor agrees to pay interest on the debt and suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date.

(c) The CFO will suspend collection activity during the time required for waiver consideration or administrative review prior to agency collection of a debt if the statute under which the request is sought prohibits USAID from collecting the debt during that time. The CFO will ordinarily suspend collection action during the pendency of his consideration of a waiver request or administrative review where statute and regulation preclude refund of amounts collected by the Agency should the debtor prevail.

(d) The CFO may suspend collection activities on debts of $100,000 or less during the pendency of a permissive waiver or administrative review when there is no statutory requirement where he determines that:

(1) There is a reasonable possibility that waiver will be granted and the debtor may be found not owing the debt (in whole or in part);

(2) The Government's interest is protected, if suspension is granted, by the reasonable assurance that the debt can be recovered if the debtor does not prevail; or

(3) Collection of the debt will cause undue hardship to the debtor.

(e) The CFO will decline to suspend collection where he determines that the request for waiver or administrative review is frivolous or was made primarily to delay collection.

§ 213.31 Termination—general.

The CFO may terminate collection actions including accrued interest, penalty and administrative costs, where the debt principal does not exceed $100,000. If the debt exceeds $100,000, USAID obtains the approval of DOJ in order to terminate further collection actions. Unless otherwise provided for by DOJ regulations or procedures, requests to terminate collection on debts in excess of $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval.

§ 213.32 Standards for termination.

A debt may be terminated where the CFO determines that:

(a) The Government cannot collect or enforce collection of any significant sum from the debtor, having due regard for available judicial remedies, the debtor's ability to pay, and the exemptions available to the debtor under State and Federal law;

(b) The debtor cannot be located, there is no security remaining to be liquidated, and the prospects of collecting by offset are too remote to justify retention of the claim;

(c) The cost of further collection action is likely to exceed the amount recoverable;

(d) The claim is determined to be legally without merit or enforcement of the debt is barred by any applicable statute of limitations;

(e) The evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment have failed; or

(f) The debt against the debtor has been discharged in bankruptcy.

§ 213.33 Permitted actions after termination of collection activity.

Termination of collection activity ceases active collection of the debt. Termination does not preclude the agency from retaining a record of the account for purposes of:

(a) Selling the debt if the CFO determines that such sale is in the best interests of USAID;

(b) Pursuing collection at a subsequent date in the event there is a change in the debtor's status or a new collection tool becomes available;

(c) Offsetting against future income or assets not available at the time of termination of collection activity; or

(d) Screening future applicants for prior indebtedness.

§ 213.34 Debts that have been discharged in bankruptcy.

USAID generally terminates collection activity on a debt that has been discharged in bankruptcy regardless of the amount. USAID may continue collection activity, however, subject to the provisions of the Bankruptcy Code for any payments provided under a plan of reorganization. The CFO will seek legal advice by the General Counsel's office if he believes that any claims or offsets may have survived the discharge of a debtor.

Subpart F—Discharge of Indebtedness and Reporting Requirements

§ 213.35 Discharging indebtedness—general.

Before discharging a delinquent debt (also referred to as a close out of the debt), USAID will make a determination that collection action is no longer warranted and request that litigation counsel release any liens of record securing the debt. Discharge of indebtedness is distinct from termination or suspension of collection activity and is governed by the Internal Revenue Code. When collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date in accordance with the standards set forth in this part. When a debt is discharged in full or in part, further collection action is prohibited and USAID must terminate debt collection action.

§ 213.36 Reporting to IRS.

Upon discharge of an indebtedness, USAID will report the discharge to the IRS in accordance with the requirements of 26 U.S.C. 6050P and 26 CFR 1.6050P–1. USAID may request FMS to file such a discharge report to the IRS on the agency's behalf.

Subpart G—Referrals to the Department of Justice

§ 213.37 Referrals to the Department of Justice.

(a) The CFO, through the FMS cross-servicing agreement and by direct action, refers to DOJ for litigation all claims on which aggressive collection actions have been taken but which could not be collected, compromised, suspended or terminated. Referrals are made as early as possible, consistent with aggressive agency collection action, and within the period for bringing a timely suit against the debtor. Unless otherwise provided by DOJ regulations or procedures, USAID refers for litigation debts of more than $2,500 but less than $1,000,000 to the Department of Justice's Nationwide Central Intake Facility as required by the Claims Collection Litigation Report (CCLR) instructions. Debts of over $1,000,000 shall be referred to the Civil Division at the Department of Justice.

(b) The CFO will clearly indicate on the CCLR the actions the DOJ should take on the referred claim.

Subpart H—Mandatory Transfer of Delinquent Debt to Financial Management Service (FMS) of the Department of Treasury

§ 213.38 Mandatory transfer of debts to FMS—general.

(a) USAID's procedures call for transfer of legally enforceable debt to FMS 90 days after the Bill for Collection or demand letter is issued. A debt is legally enforceable if there has been a final agency determination that the debt, in the amount stated, is due and there are no legal bars to collection action. A debt is not considered legally enforceable for purposes of mandatory transfer to FMS if a debt is the subject of a pending administrative review process required by statute or regulation and collection action during the review process is prohibited.

(b) Except as set forth in paragraph (a) of this section, USAID will transfer any debt covered by this part that is more than 180 days delinquent to FMS for debt collection services. A debt is

considered 180 days delinquent for purposes of this section if it is 180 days past due and is legally enforceable.

§ 213.39 Exceptions to mandatory transfer.

USAID is not required to transfer a debt to FMS pursuant to § 213.37(b) during such period of time that the debt:

(a) Is in litigation or foreclosure;

(b) Is scheduled for sale;

(c) Is at a private collection contractor;

(d) Is at a debt collection center if the debt has been referred to a Treasury-designated debt collection center;

(e) Is being collected by internal offset; or

(f) Is covered by an exemption granted by Treasury

PART 214—ADVISORY COMMITTEE MANAGEMENT

Subpart A—General

Sec.
214.1 Purpose.
214.2 Definition of advisory committee.
214.3 A.I.D. Advisory Committee Management Officer.

Subpart B—Establishment of Advisory Committees

214.11 Establishment and chartering requirements.
214.12 Considerations in membership selection.
214.13 Responsibilities within A.I.D.
214.14 Charter revision.
214.15 Changes in membership.

Subpart C—Termination and Renewal of Advisory Committees

214.21 Termination and renewal provisions.
214.22 Responsibilities within A.I.D.

Subpart D—Operation of Advisory Committees

214.31 A.I.D. Advisory Committee Representative.
214.32 Calling of advisory committee meetings.
214.33 Notice of meetings.
214.34 Public participation.
214.35 Minutes of meetings.
214.36 Records of advisory committees.
214.37 Public access to committee records.
214.38 Submission of reports to the Library of Congress.

Subpart E—Administration of Advisory Committees

214.41 Support services.
214.42 Uniform pay guidelines.
214.43 Agency records.
214.44 Annual review and reports.

Subpart F—Administrative Remedies

214.51 Administrative review of denial for public access to records.
214.52 Administrative review of other alleged non-compliance.

AUTHORITY: Section 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381); sec. 8(a), Federal Advisory Committee Act, Pub. L. 92–463; and Executive Order 11769.

SOURCE: 40 FR 33205, Aug. 7, 1975, unless otherwise noted.

Subpart A—General

§ 214.1 Purpose.

The regulations in this part prescribe administrative guidelines and management controls for A.I.D. advisory committees. Federal Advisory Committees are governed by the provisions of the Federal Advisory Committee Act, Pub. L. 92–463 (effective January 5, 1973, hereinafter referred to as the Act); Executive Order No. 11769 (February 21, 1974) entitled ''Committee Management;'' OMB Circular A–63 (March 27, 1974, as amended).

§ 214.2 Definition of advisory committee.

(a) The term *advisory committee* is defined in section 3(2) of the Act.

(b) In general, this definition includes any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or sub-group thereof, which is formed or utilized by the Agency for obtaining advice or recommendations, and which is not composed wholly of full-time Federal employees.

§ 214.3 A.I.D. Advisory Committee Management Officer.

The Advisory Committee Management Officer is responsible to the Administrator for the establishment of uniform administrative guidelines and management controls which must be

consistent with directives of the Director of the OMB under sections 7 and 10 of the Act.

Subpart B—Establishment of Advisory Committees

§ 214.11 Establishment and chartering requirements.

Provisions governing the establishment and chartering of Advisory Committees are contained in section 9 of the Act and paragraph 6 of OMB Circular A–63. In summary, these requirements include the following:

(a) Where establishment of an Advisory Committee is not specifically authorized by statute or by the President, the need for a new A.I.D. advisory committee is determined by the A.I.D. Administrator, in accordance with the guidelines set forth in section 5(b) of the Act. The determination also includes a certification that creation of the Committee is in the public interest and a description of the nature and purpose of the Committee.

(b) After written consultation to the OMB Secretariat and notification that the establishment of the Committee would be in accord with the Act, A.I.D. publishes the Administrator's Determination in the FEDERAL REGISTER at least fifteen (15) days prior to the filing of the Committee's Charter.

(c) Each advisory committee established or used by A.I.D. is required to file a charter with the A.I.D. Administrator, the House International Relations Committee, and the Senate Foreign Relations Committee, before meeting or taking any action.

(d) Advisory committee charters shall include the following information:

(1) Committee's official title;

(2) Committee's objectives and scope of activity;

(3) Period of time necessary for the committee to carry out its purposes;

(4) Agency official to whom the committee reports;

(5) Agency responsible for providing necessary support for the committee;

(6) Description of duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(7) Estimated annual operating costs in dollars and man-years for the committee;

(8) Estimated number and frequency of committee meetings;

(9) Committee's termination date; and

(10) Date the charter is filed.

(e) A copy of the charter is required to be sent to the Library of Congress, Exchange and Gift Division, Federal Advisory Committee Desk, Washington, DC 20540.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54777, Nov. 26, 1975]

§ 214.12 Considerations in membership selection.

Membership is to be fairly balanced in terms of points of view represented and functions to be performed. Appropriate attention is also given to factors of sex, race, creed, national origin, and religion.

§ 214.13 Responsibilities within A.I.D.

(a) The A.I.D. Office or Bureau seeking establishment of a new A.I.D. advisory committee:

(1) Justifies the need for the advisory committee to the satisfaction of the A.I.D. Advisory Committee Management Officer, the A.I.D. Administrator, and the OMB Secretariat.

(2) Prepares, clears with the Advisory Committee Management Officer and the General Counsel, and submits to the Administrator all documentation necessary to establish or use the advisory committee.

(b) The Advisory Committee Management Officer with assistance as appropriate from the General Counsel and the Office of Legislative Affairs:

(1) Appraises the need for the proposed advisory committee;

(2) Assures that the requirements of the Act and OMB guidelines have been followed;

(3) If satisfied with paragraphs (b) (1) and (2) of this section, clears the proposal for submission to the Administrator and obtains OMB concurrence in Agency actions to establish advisory committees;

(4) Maintains the agency file of approved charters and formal determinations;

(5) Publishes approved charters in the Agency's internal directives system;

(6) Reviews proposed committee membership for compliance with legal requirements, including conflict of interest;

(7) Assures publication of the Administrator's formal determinations in the FEDERAL REGISTER; and

(8) Transmits approved advisory committee charters to the House International Relations Committee, the Senate Foreign Relations Committee, and the Library of Congress.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54778, Nov. 26, 1975]

§ 214.14 Charter revision.

(a) Sponsoring A.I.D. Bureaus and Offices initiate revisions to advisory committee charters, as necessary, to reflect current information regarding scope, duties, etc.

(b) Charter revision requires clearances by the advisory committee, the A.I.D. Advisory Committee Management Officer and the General Counsel; consultation with OMB; approval by the A.I.D. Administrator, and notification of the change to the FEDERAL REGISTER, Congressional committees, and the Library of Congress.

§ 214.15 Changes in membership.

Changes in membership of advisory committees are proposed by the Bureau of Office through which the committee reports, are cleared by the Advisory Committee Management Officer and the Office of the General Counsel, and are approved by the A.I.D. Administrator.

Subpart C—Termination and Renewal of Advisory Committees

§ 214.21 Termination and renewal provisions.

Provisions governing the termination and renewal of advisory committees are contained in section 14 of the Act and paragraph 7 of OMB Circular A–63, as amended. As related to A.I.D.-established non-statutory committees, these provisions mean that:

(a) Each such committee which was in existence on January 5, 1973, shall terminate by January 5, 1975, unless it is renewed by the A.I.D. Administrator prior to the latter date.

(b) Each such committee established after January 5, 1973, shall terminate not later than two years after its establishment, unless it is renewed by the A.I.D. Administrator prior to its termination date.

(c) Any committee which is renewed shall continue for not more than two years unless, prior to the expiration of that period, it is renewed.

(d) Renewal requires advance approval of the Administrator in accordance with section 5(c) which requires application of the criteria set forth in section 5(b) of the Act; notification to the OMB Secretariat not more than sixty (60) days nor less than thirty (30) days before the expiration date, and concurrence by the Secretariat; publication of a notice of the renewal; and the filing of a new advisory committee charter with the appropriate House and Senate Committees and to the Library of Congress.

(e) Notification to the OMB Secretariat shall include:

(1) The A.I.D. Administrator's determination that renewal is necessary and is in the public interest;

(2) The reasons for his determination;

(3) The Agency's plan to attain or maintain balanced membership of the committee; and

(4) An explanation of why the committee's functions cannot be performed by the Agency or by an existing advisory committee.

§ 214.22 Responsibilities within A.I.D.

Responsibilities within A.I.D. for the renewal of advisory committees are as follows:

(a) The Office or Bureau through which the advisory committee reports: prepares, clears with the Advisory Committee Management Officer and the General Counsel, and submits to the Administrator all documentation necessary for committee renewal sixty-five (65) days prior to the expiration date of the Committee.

(b) The Office of General Counsel assists in the preparation of charters; reviews and clears the proposal for conformity with the Act and other requirements; and assures publication of

the Administrator's determination of renewal in the FEDERAL REGISTER.

(c) The Office of Legislative Affairs transmits approved advisory committee charters to the House and Senate Committees and to the Library of Congress.

Subpart D—Operation of Advisory Committees

§ 214.31 A.I.D. Advisory Committee Representative.

(a) For each advisory committee used by A.I.D., the Administrator designates an A.I.D., employee to serve as the A.I.D. Advisory Committee Representative.

(b) The designated A.I.D. employee performs functions required by section 10 of the Act and assigned herein. Such functions include:

(1) Calling, or giving advance approval to, advisory committee meetings;

(2) Approving an agenda for each meeting;

(3) Making recommendations on proposals to close meetings, or parts of meetings, to the public; and clearing such recommendation with the Advisory Committee Management Officer and the General Counsel for decisions by the Administrator;

(4) Assuring that advance notices of each meeting (whether open or closed) are published in the FEDERAL REGISTER, provided through other means such as press releases and direct mail, and provided to the Advisory Committee Management Officer.

(5) Assuring that open meetings are accessible to the public;

(6) As specified by the Administrator, chairing or attending each meeting;

(7) Determining the number of committee members necessary to be present at any meeting for the transaction of committee business;

(8) Adjourning any meeting, whenever he determines adjournment to be in the public interest;

(9) Assuring that minutes are kept of each advisory committee meeting and of the meetings of sub-committees and sub-groups, and that such minutes are certified for accuracy by the chairman or presiding officer of the committee; and

(10) Assuring that, subject to section 552 of title 5 United States Code, the documents of the advisory committee are made available for public inspection and copying.

(11) Maintaining a current list of members of the advisory committee, and furnishing membership information to the A.I.D. Advisory Committee Management Officer on request.

§ 214.32 Calling of advisory committee meetings.

(a) No advisory committee is to hold any meetings except at the call, or with the advance approval, of the designated A.I.D. Advisory Committee Representative.

(b) Each advisory committee meeting is conducted in accordance with an agenda approved by the designated A.I.D. Advisory Committee Representative.

(1) The agenda lists the matters to be considered at the meeting and indicates whether any portion of the meeting is to be closed to the public in accordance with subsection (c) of section 552(b) of title 5, United States Code.

(2) Copies of the agenda are distributed to members of the committee prior to the date of the meeting and are included in the official records of the Advisory Committee.

[40 FR 33205, Aug. 7, 1975, as amended at 42 FR 26975, May 26, 1977]

§ 214.33 Notice of meetings.

(a) Notice of each advisory committee meeting (whether the meeting is open or closed) shall be published in the FEDERAL REGISTER at least fifteen (15) days before the date of the meeting, and should also be provided through other means such as newspaper advertisements, press releases, and direct mail.

(1) Exceptions to the requirement for public notice are granted only for reasons of national security as determined by the Director, OMB and are requested and justified by the Administrator, A.I.D. at least thirty (30) days prior to the meeting.

(2) Exceptions to the fifteen (15) day advance publication requirement are granted in emergency situations as determined by the Administrator, A.I.D. In such situations, the facts on which

exception is based are to be included in the Notice of the meeting.

(3) Requests for exceptions under paragraphs (a) (1) and (2) of this section are prepared by the Advisory Committee Representative and are cleared by the Advisory Committee Management Officer and the General Counsel prior to submission to the Administrator.

(b) Notices include the name of the advisory committee; the time of the meeting; the purposes of the meeting; a statement regarding the extent to which the public will be permitted to attend and, if any portion is closed, why such closure or partial closure is necessary, including citation of the appropriate exemption permitted under subsection (c) of 5 U.S.C. 552b. Thus, A.I.D. Notices of Advisory Committee meetings normally state that the meeting is open to the public and include the place of the meeting; and instructions for gaining access to open meetings which are held in a ''secured'' building.

(c) Both formal and informal notices are prepared by the A.I.D. Advisory Committee Representative; formal notices to be published in the FEDERAL REGISTER are cleared with the Advisory Committee Management Officer and are sent to the Office of the General Counsel at least thirty-two (32) days before the scheduled meeting date.

(d) Copies of all public notices are provided to the Advisory Committee Management Officer.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54778, Nov. 26, 1975; 42 FR 26975, May 26, 1977]

§ 214.34 Public participation.

(a) Each advisory committee meeting is to be open to the public except where:

(1) The Director, OMB, has determined that public notice of a meeting would be inconsistent with national security; or

(2) The Administrator, AID, has formally determined that a meeting, or portion of a meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.

(b) Advisory committee requests to close all or part of a meeting or a series of meetings are to include the reasons for proposed closure, citing specific exceptions involved under subsection (c) of section 552b of Title 5, United States Code. Such requests are submitted by the AID Advisory Committee Representative, through the Advisory Committee Management Officer and the General Counsel to the Administrator at least forty (40) days before the scheduled date of the meeting.

(c) The Administrator's determination is to be in writing and is to contain a brief statement of the reasons for closing the meeting (or portion thereof). The determination itself is to be made available to the public on request.

(d) When all or part of an advisory committee meeting is closed and detailed minutes are not to be made available in their entirety to the public, the Committee shall prepare and make available to the public within thirty (30) days of the close of the meeting a summary of its activities and related matters which are informative to the public consistent with the policy of 5 U.S.C. 552(b). Notice of availability of such a summary shall be incorporated in the notice of the meeting published in the FEDERAL REGISTER.

(e) To facilitate public participation in advisory committee meetings which are to be open or partially open to the public:

(1) Meetings are to be held at a reasonable time and at a place that is accessible to members of the public.

(2) The size of the meeting room is to be large enough to accommodate the Advisory Committee, its staff, and those members of the public who might be expected to attend.

(3) Any member of the public is permitted to file a written statement with the committee, before or after the meeting.

(4) Interested persons may be permitted to present oral statements at the meeting in accordance with procedures established by the committee, and to the extent time available for the meeting permits.

(5) Other participation by members of the public is not permitted, except in

accordance with procedures established by the committee.

[40 FR 33205, Aug. 7, 1975, as amended at 42 FR 26975, May 26, 1977]

§ 214.35 Minutes of meetings.

(a) Minutes are to be kept of each meeting of each advisory committee and its formal and informal sub-groups.

(b) The chairman or presiding officer designates a member or other person to keep the minutes.

(c) The minutes are to include:

(1) The time and place of the meeting;

(2) A list of members, staff, and A.I.D. employees attending;

(3) A complete summary of matters discussed and conclusions reached;

(4) Copies of all reports received, issued, or approved;

(5) The extent to which the meeting was open to the public; and

(6) The extent of public participation, including a list of those who presented oral or written statements and an estimate of the number of those who attended the meeting.

(d) The chairman or presiding officer of the advisory committee is to certify to the accuracy of the minutes. The certification is to indicate that ''the minutes are an accurate and complete summary of the matters discussed and conclusions reached at the meeting held on (date(s)).''

§ 214.36 Records of advisory committees.

(a) The A.I.D. Advisory Committee Representative is to maintain the records of the advisory committee in a location known to the A.I.D. Advisory Committee Management Officer.

(b) Such records are to include the reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, and other documents which were made available to, or prepared for or by, the advisory committee.

(c) Advisory committee records are maintained and disposed of according to procedures prescribed in the Agency's Handbook 21—*Communications*, Part III, Records Filing and Disposition Manual.

§ 214.37 Public access to committee records.

Records maintained in accordance with § 214.36 are subject to the Freedom of Information Act, 5 U.S.C. 552 *et seq.* and, thus, are available for public inspection and copying pursuant to A.I.D. Regulation 12—Public Information (22 CFR part 212), subject to the general oversight of the A.I.D. Advisory Committee Management Officer.

(Sec. 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381); sec. 8(a) Federal Advisory Committee Pub. L. 92–463; E.O. 11686)

[40 FR 54778, Nov. 26, 1975]

§ 214.38 Submission of reports to the Library of Congress.

(a) Each advisory committee is to file with the Library of Congress eight copies of each of its reports, except where the report falls within an exemption listed in 5 U.S.C. 552(b) or relates to a meeting which was closed for reasons of national security.

(b) The A.I.D. Advisory Committee Representative provides copies of committee reports to the Office of Legislative Affairs for transmittal to the Library of Congress; and sends a copy to the A.I.D. Advisory Committee Management Officer for inclusion in the Agency's central file on advisory committees.

(c) As appropriate, the A.I.D. Advisory Committee Representative may also send copies of background papers and other advisory committee documents to Office of Legislative Affairs for transmittal to the Library of Congress.

Subpart E—Administration of Advisory Committees

§ 214.41 Support services.

(a) A.I.D. provides support services for advisory committees which are established by or report to the Agency, unless the establishing authority provides otherwise.

(b) Within A.I.D., support services are provided by and charged to the allotment of the A.I.D. office or bureau through which the advisory committee reports, and are coordinated by the

designated A.I.D. Advisory Committee Representative.

(c) Support services include staff, quarters, supplies, and funds.

§ 214.42 Uniform pay guidelines.

(a) A.I.D. follows OMB/CSC guidelines in section 11 of OMB Circular A–63 in establishing rates of pay for advisory committee members, staffs, and consultants.

(b) In summary, A.I.D. policy regarding compensation for advisory committee members is as follows:

(1) Advisory committee members who are not employed by the U.S. Government ordinarily serve without compensation. However, they may be reimbursed for travel and related expenses of invitational travel under the provisions of A.I.D. travel regulations.

(2) If committee members are appointed as A.I.D. consultants or experts, their compensation shall be fixed in accordance with CSC guidelines and regulations, and the general agreement between CSC and A.I.D.

(3) Expenses of committee members are charged to the allotments of the A.I.D. office or bureau through which the advisory committee reports.

§ 214.43 Agency records.

(a) The A.I.D. Advisory Committee Management Office maintains the Agency's Official central files on the nature functions, and operations of each A.I.D. advisory committee. Central files contain the following information with respect to each A.I.D. advisory committee:

(1) Original copy of Advisory Committee Charter filed with the Administrator;

(2) Official records copy of formal determinations by the A.I.D. Administrator with respect to the establishment renewal, operation, and termination of the committee;

(3) Annual reports of committee activity;

(4) Designations of Advisory Committee Representatives;

(5) Location of the official files of the Advisory Committee.

(b) Each A.I.D. Advisory Committee Representative maintains individual advisory committee files at a location known to the A.I.D. Advisory Committee Management Officer. These files contain the following information:

(1) Copies of documents establishing, renewing, and terminating the committee;

(2) Copies of committee charters filed with the A.I.D. Administrator;

(3) Fiscal records which fully disclose the disposition of any funds made available to the committee;

(4) Advisory committee records described above in § 214.36(b) (*i.e.*, the reports, transcripts, minutes, appendices, and other documents which were made available to, or prepared for or by, the committee).

(c) The A.I.D. Advisory Committee Management Officer, the A.I.D. Auditor General, the OMB Secretariat, and the Comptroller General shall have access to these records.

(d) Personnel documentation required by CSC and Agency regulations shall be maintained in the official personnel records of the Office of Personnel and Manpower.

§ 214.44 Annual review and reports.

(a) A.I.D. conducts an annual comprehensive review of advisory committees under instructions provided by OMB Circular A–63, section 10, as amended and submits required data to OMB on the prescribed format, by November 30 of each year.

(b) A.I.D. reports monthly to OMB on committee terminations or other significant changes in continuing A.I.D. Advisory Committees.

(c) A.I.D. also provides information to the General Services Administration (GSA) for an annual report to Congress. The Agency report is due on February 1 of each year; includes only those advisory committees established by or reporting to A.I.D.; and is submitted on a form prescribed by GSA.

(d) Within A.I.D., the Advisory Committee Management Officer collects required information from the A.I.D. Advisory Committee Representatives; appraises advisory committee activities for the Administrator; and prepares the Agency's reports for the Administrator.

Subpart F—Administrative Remedies

§214.51 Administrative review of denial for public access to records.

Any person whose request for access to an advisory committee document is denied may seek administrative review in accordance with §212.36(c) of A.I.D. Regulation 12, 22 CFR 212.36(c).

§214.52 Administrative review of other alleged non-compliance.

With regard to other alleged non-compliance with the Act, OMB Circular A–63, or this regulation, the following procedures are to be used:

(a) Advisory committee members or other aggrieved individuals or organizations must file a written complaint which contains specific information regarding the alleged non-compliance.

(b) The written complaint must be addressed to the Administrator or Deputy Administrator, Agency for International Development, 21st and Virginia Avenue, NW., Washington, DC 20523.

(c) The complaint must be filed within thirty (30) days after the date of the alleged non-compliance.

(d) The complaint will be considered by the Administrator or Deputy Administrator with the advice and assistance of the General Counsel and the A.I.D. Advisory Committee Management Office.

(e) Written notice of the disposition of the complaint shall be provided to the complainant within thirty (30) days of the date the complaint was received by the Agency.

PART 215—REGULATIONS FOR IMPLEMENTATION OF PRIVACY ACT OF 1974

Sec.

215.1 Purpose and scope.
215.2 Definitions.
215.3 Procedures for requests pertaining to individual records in a system of records.
215.4 Times, places, and requirements for indentification of individuals making requests.
215.5 Access to requested information by individuals.
215.6 Special procedures: Medical records.
215.7 Request for correction or amendment of record.
215.8 Agency review of request for amendment of record.
215.9 Appeal of initial adverse agency determination.
215.10 Disclosure of record to person other than the individual to whom it pertains.
215.11 Fees.
215.12 Penalties and remedies.
215.13 General exemptions.
215.14 Specific exemptions.

AUTHORITY: Public Law 93–579, 88 Stat. 1896 (5 U.S.C. 553, (b), (c), and (e))

SOURCE: 57 FR 38277, Aug. 24, 1992, unless otherwise noted.

§215.1 Purpose and scope.

(a) It is the purpose and objective of the International Development Cooperation Agency and the Agency for International Development to collect information, revise personal data collection forms or processes, and maintain Agency records in a manner that will prevent an unwarranted invasion of privacy of those individuals who are the subject of Agency records.

(b) These regulations establish the procedures by which an individual may obtain notification of the existence of Agency records pertaining to that individual, gain access to those records, request an amendment or correction to the records, and appeal adverse decisions to requests for amendment or correction of Agency records.

(c) The Agency separately states and publishes in the FEDERAL REGISTER a public notice of the existence and character of systems maintained by the Agency, pursuant to the provisions of sections (e)(4) and (e)(11) of the Privacy Act of 1974 (5 U.S.C. 552a; 88 Stat. 1896).

§215.2 Definitions.

(a) *Act* means the Privacy Act of 1974 (5 U.S.C. 552a; 88 Stat. 1896);

(b) *Agency* means the International Development Cooperation Agency or the Agency for International Development, its offices, bureaus, divisions, and posts abroad;

(c) *Amend* shall include the amendment of a record;

(d) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(e) *Maintain* includes maintain, collect, use or disseminate;

(f) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(g) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(h) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(i) *System of records* means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

§ 215.3 Procedures for requests pertaining to individual records in a system of records.

(a) Requests for notification of access to or amendment of Agency records contained in a system of records pertaining to an individual may be made in person or by mail as follows: For the International Development Cooperation Agency-Assistant Director for Administration, International Development Cooperation Agency, Room 4889 New State, 2201 C Street, NW., Washington, DC 20523 Attention: Privacy Liaison Officer. For the Agency for International Development-Privacy Liaison Officer, Agency for International Development, Room 4889 New State, 2201 C Street, NW., Washington, DC 20523.

(b) Such request should include information necessary to identify the record, e.g., the individual's full name, date of birth, place of birth, present mailing address, or system of record identification name and number, if known, and, to facilitate the retrieval of records contained in those systems of records which are retrieved by social security numbers, the social security number of the individual to whom the record pertains.

(c) With respect to a system of records which may be maintained by the Agency in offices outside the United States, an individual may inquire whether he or she is the subject of an Agency record or may request access to or amendment of such records by appearing in person or by writing to the Privacy Liaison Officer, Agency for International Development, at the overseas missions.

(d) The Assistant Director for Administration for requests to I.D.C.A. or the appropriate Privacy Liaison Officer for request to A.I.D., or their designees shall, within ten (10) working days of receipt of the request, furnish in writing to the requesting individual notice of the existence or nonexistence of any records described in the request.

§ 215.4 Times, places, and requirements for identification of individuals making requests.

(a) Individuals making personal requests for notification, access or contest may do so at the place designated in paragraph (a) of § 215.3, which is open 9 a.m. to 5 p.m. daily, except Saturdays, Sundays, and legal public holidays.

(b) Individuals making personal requests for notification, access or contest at offices outside the United States may do so at the overseas missions during the regular business hours of those offices.

(c) An individual requesting such information in person shall provide such personal identification as is reasonable under the circumstances to verify the individual's identity; e.g. driver's license, employee identification card or medicare card. (The identification should contain a photograph of the individual.)

(d) An individual requesting such information by mail shall include in his or her request a signed notarized statement to verify his or her identity and which stipulates that the individual understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is punishable by a fine

up to $5,000, as provided in section (i)(3) of the Act.

(e) Verification of identity as set forth in paragraphs (c) and (d) of this section shall not be required of individuals seeking access to records otherwise available to members of the public under the Freedom of Information Act (5 U.S.C. 552; 88 Stat. 1561).

(f) An individual who wishes to be accompanied by another person when reviewing a record shall furnish the Agency with a written statement authorizing discussion of his or her record in the presence of the accompanying person. Such statement need not contain any reasons for the access or for the accompanying person's presence.

§215.5 Access to requested information by individuals.

(a) Upon receipt of a request by an individual made in accordance with the provisions of §215.3, such individual shall be granted access to any record pertaining to him or her which is contained in a system of records maintained by the Agency subject to exemptions discussed in §§215.13 and 215.14.

(b) Notwithstanding the provisions of paragraph (a) of this section, access will not be allowed an individual to information or records compiled by the Agency in reasonable anticipation of a civil or criminal action or proceeding.

(c) Whenever possible, access to requested records will be granted;

(1) Where the request is presented in person and the record is readily available, promptly upon receipt of the request for access, determination that access to the record may be granted, verification of the identity of the individual seeking access, and, where applicable, receipt of consent to discuss the record with a person accompanying the individual;

(2) Where the request is made by mail, the record will, whenever possible, be provided within ten (10) working days of receipt of the request.

(d) Where access to a record cannot reasonably be granted as provided in paragraphs (c)(1) and (2) of this section, the Agency will acknowledge in writing receipt of the request for access and indicate a reasonable time within which access to the record can be granted.

(e) Where no reasonable means exist for an individual to have access to his or her record in person, a copy of the record must be provided through the mail.

§215.6 Special procedures: Medical records.

If the Assistant Director for Administration or the Privacy Liaison Officer, determines that the release directly to the individual of medical records maintained by the Agency could have an adverse effect upon such individual, the Director/Officer will attempt to arrange an alternative acceptable to both the individual and Agency (such as the release of said information to a doctor named by the individual) in granting access to such record.

§215.7 Request for correction or amendment of record.

(a) An individual may request the Agency to correct or amend a record pertaining to him or her which the individual believes is not accurate, relevant, timely or complete.

(b) Such request must be in writing and must be presented, in person or by mail to the addresses listed in §215.3(a).

(c) Such requests must set forth the following information:

(1) Identification of the system of records in which the particular record is maintained;

(2) The portion(s) of the record to be amended or corrected;

(3) The desired amendment or correction; and

(4) The reasons for the amendment or correction.

The request must be accompanied by evidence, documentation, or other information in support of the request.

(d) Assistance in preparing a request to amend a record may be obtained from the officials listed in §215.3(a).

§215.8 Agency review of request for amendment of record.

(a) The Agency will examine the information requested to be amended to determine its accuracy, timeliness, completeness, and its relevancy and necessity to accomplish a purpose of the

Agency required to be accomplished by statute or by executive order.

(b) Within ten (10) working days after the receipt by the Assistant Director for Administration or the Privacy Liaison Officer, of a request made in accordance with this section, the Assistant Director for Administration or the Privacy Liaison Officer shall acknowledge in writing such receipt and shall, after examination in accordance with the provisions of paragraph (a) of this section, promptly either:

(1) Make any amendment of any portion thereof which the individual believes is not accurate, relevant, timely or complete, and notify the individual of the amendment made; or

(2) Inform the individual of the Agency's refusal to amend the record in accordance with the request, the reason(s) for the refusal, and the procedures established by the Agency for the individual to request a review of that refusal.

(c) If the Agency agrees with the individual's request to amend a record, in addition to proceeding as set forth in paragraph (b)(1) of this section, it shall promptly advise all previous recipients of the record of the fact that the amendment was made and the substance of the amendment where an accounting of disclosures has been made.

(d) If unusual circumstances prevent the completion of Agency action on the request to amend within 30 days after the receipt thereof by the Assistant Director for Administration or the Privacy Liaison Officer, the individual will be promptly advised of the delay, the reasons for the delay, and of the date by which the review is expected to be completed.

(e) If the Agency, after its initial examination of the record and the request for Amendment, disagrees with all or any part of the individual's request to amend it shall:

(1) To the extent the Agency agrees with any part of the individual's request to amend, proceed as described in paragraphs (b)(1) and (c) of this section;

(2) Advise the individual of its refusal and the reason(s) therefor;

(3) Inform the individual that he or she may request a further review by the Director or the Administrator, or their designees; and

(4) Describe the procedures for requesting such review, including the name and address of the official to whom the request should be directed.

(f) No part of these regulations shall be construed to permit:

(1) The alteration of evidence presented in the course of judicial, quasi-judicial or quasi-legislative proceedings;

(2) Collateral attack upon any matter which has been the subject of judicial or quasi-judicial action; or

(3) An amendment or correction which would be in violation of an existing statute, executive order or regulation.

§ 215.9 Appeal of initial adverse agency determination.

(a) An individual who disagrees with the denial or partial denial of his or her request to amend a record may file a request for review of such refusal within 60 days after the date of notification of the denial or partial denial.

(b) The request for review must be in writing and may be presented in person or by mail to:

Director, International Development Cooperation Agency, 2201 C Street, NW., Washington, DC 20523. Attention: Privacy Review Request.

Director, Office of External Affairs, Agency for International Development, 2201 C Street, NW., Washington, DC 20523. Attention: Privacy Review Request.

Both the envelope and the letter should be clearly marked: Attention: Privacy Review Request. Such request should include any documentation, information or statements advanced for the amendment of the record, and a copy of the initial adverse determination.

(c) Upon receipt of the request for review, the Director or the Assistant Administrator, or an officer of the Agency designated in writing by the Director or Administrator, shall undertake an independent review of the initial determination.

(d) If someone other than the Director or the Assistant Administrator is designated to conduct the review, he or she shall be an officer who is organizationally independent of or senior to the officer or employee who made the initial determination.

(e) In conducting the review, the reviewing official, may at his or her option, request such additional information as is deemed necessary to establish that the record contains only that information which is accurate, timely, complete and necessary to assure fairness in any determination which may be made about the individual on the basis of the record.

(f) Within 30 days after receipt of the request for review, the Director, the Assistant Administrator, or the official designated to conduct the review, shall advise the individual of the Agency's final decision. If unusual circumstances prevent the completion of the review within the 30-day period, the Agency shall, prior to the expiration of the 30-day period, advise the individual in writing of the circumstances preventing the completion of such review and inform him or her of the date by which the review is expected to be completed.

(g) If the reviewing official determines that the record should be amended in accordance with the individual's request, the Agency shall:

(1) Amend the record accordingly;

(2) Advise the individual of the amendment; and

(3) Where an accounting of disclosures has been made, advise all previous recipients of the fact that the amendment was made and the nature of the amendment.

(h) If, after conducting the review, the reviewing official refuses to amend the record, in whole or in part, in accordance with the individual's request, Agency shall advise the individual:

(1) Of its refusal and the reasons therefor;

(2) Of the individual's right to file a concise statement of his or her reasons for disagreeing with the Agency's decision;

(3) Of the procedures for filing a statement of disagreement;

(4) That any such statement will be sent to anyone to whom the record is subsequently disclosed, together with a brief statement by the Agency summarizing its reasons for refusing to amend the record;

(5) That to the extent an accounting of disclose was maintained, prior recipients of the disputed record will be provided a copy of any statement of disagreement and of the Agency's statement summarizing its reasons for refusing to amend the record; and

(6) Of the individual's right to seek judicial review of the Agency's refusal to amend a record as provided for in section (g)(1)(a) of the Act.

§ 215.10 Disclosure of record to person other than the individual to whom it pertains.

(a) Subject to the conditions of paragraphs (b) and (c) of this section, the Agency shall not disclose any record which is contained in a system of records by any means of communication to any person or other agency who is not the individual to whom the record pertains.

(b) Upon written request or with prior written consent of the individual to whom the record pertains, the Agency may disclose any such record to a person or to another agency as requested or authorized.

(c) Notwithstanding the absence of written consent from the individual to whom the record pertains, the Agency may disclose any such record provided such disclosure is:

(1) To those officers and employees of the Agency who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use as defined in § 215.2;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 of the United States Code;

(5) To a recipient who has provided the Agency with adequate advance written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his or her designee,

to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity authorized by law: Provided, The head of the agency or instrumentality has made a prior written request to the Assistant Administrator of Administration or the Privacy Liaison Officer, specifying the particular record and the law enforcement activity for which it is sought;

(8) To a responsible person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification will be transmitted to the last known address of such individual;

(9) To either House of Congress, or, to the extent of a matter within its jurisdiction, any committee or subcommittee, or joint committee of Congress, or subcommittee of such joint committee;

(10) To the Comptroller General, or any of his/her authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to an order of a court of competent jurisdiction or;

(12) To a consumer reporting agency in accordance with section 3711(f) of title 31.

§ 215.11 Fees.

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual.

(b) No fees shall be charged or collected for the following: Search for and retrieval of the records; review of the records; copying at the initiative of the Agency without a request from the individual; the first 100 pages; and first-class postage. However if special handling or other than first-class mail is requested or required, the costs shall be added to the basic fee.

(c) The copying fees prescribed in paragraph (a) of this section are:

Ten (10) cents per page. Twenty (20) cents per page of computer printout.

(d) Payment may be in the form of a check, bank draft on a bank in the United States, or postal money order payable to the Treasurer of the United States.

(e) A receipt for fees paid will be given only upon request.

(f) A copying fee totaling $15.00 or less shall be waived but the copying fees for contemporaneous requests by the same individual shall be aggregated to determine the total fee.

(g) A fee may be reduced or waived by the Privacy Liaison Officer.

§ 215.12 Penalties and remedies.

The provisions of the Act relating to penalties and remedies are summarized below:

(a) An individual may bring a civil action against the Agency when the Agency:

(1) Makes a determination not to amend a record in accordance with the individual's request;

(2) Refuses to comply with an individual's request pursuant to 5 U.S.C. 552a (d)(1);

(3) Fails to maintain a record concerning an individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and as a result thereof a determination is made which is adverse to the individual; or

(4) Fails to comply with any other provision of section (d) of the Act in such a way as to have an adverse effect on an individual.

(b) The court may order the correction or amendment of the records, may enjoin the Agency from withholding the records, may order the Agency to produce any records improperly withheld, and may assess attorney's fees and costs.

(c) Where a court of competent jurisdiction makes a determination that the Agency action was willful or intentional with respect to 5 U.S.C. 552a (g)(1) (c) or (d), the United States shall be liable for actual damages of no less than $1,000, the costs of the action, and attorneys' fees.

(d) Criminal penalties may be imposed against an officer or employee of the Agency who willfully discloses material which he or she knows is prohibited from disclosure, or who maintains a system of records without complying with the notice requirements.

(e) Criminal penalties may be imposed against any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. The offenses enumerated in paragraphs (d) and (e) of this section are misdemeanors, with fines not to exceed $5,000.

§ 215.13 General exemptions.

(a) Pursuant to 5 U.S.C. 552a (j)(2), the Director or the Administrator may, where there is a compelling reason to do so, exempt a system of records within the Agency from any part of the Act, except subsections (b), (c) (1) and (2), (e)(4)(A) through (F), (e) (6), (7), (9), (10), and (11), and (i) thereof, if the system of records is maintained by the Agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of:

(1) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(2) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(3) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(b) Each notice of a system of records that is the subject of an exemption under this section will include a statement that the system has been exempted, the reasons therefore, and a reference to the FEDERAL REGISTER, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (j)(2) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(1) *Criminal Law Enforcement Records.* This system of records is to be exempted from sections (c) (3) and (4); (d); (e) (1), (2), and (3); (e) (4) (G), (H), and (I); (e) (5) and (8); (f), (g) and (h) of the Act. These exemptions are necessary to insure the proper functioning of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of the law enforcement procedures, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary bases of possible enforcement actions, to prevent interference with law enforcement proceeding, to avoid the disclosure of investigative techniques, and to avoid the endangering the law enforcement personnel.

(2) *Partner Vetting System.* This system is exempt from sections (c)(3) and (4); (d); (e)(1), (2), and (3); (e)(4)(G), (H), and (I); (e)(5) and (8); (f), (g), and (h) of 5 U.S.C. 552a. These exemptions are necessary to insure the proper functioning of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of law enforcement procedures, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary basis of possible enforcement actions, to prevent interference with law enforcement proceeding, to avoid the disclosure of investigative techniques, to avoid endangering law enforcement personnel, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Although the primary functions of USAID are not of a law enforcement nature, the mandate to ensure USAID

funding is not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security necessarily requires coordination with law enforcement and intelligence agencies as well as use of their information. Use of these agencies' information necessitates the conveyance of these other systems exemptions to protect the information as stated.

[57 FR 38277, Aug. 24, 1992, as amended at 74 FR 16, Jan. 2, 2009]

§ 215.14 Specific exemptions.

(a) Pursuant to 5 U.S.C. 552a(k), the Director or the Administrator may, where there is a compelling reason to do so, exempt a system of records, from any of the provisions of subsections (c)(3); (d); (e)(1); (e)(4) (G), (H), and (I); and (f) of the Act if a system of records is:

(1) Subject to the provisions of 5 U.S.C. 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of the Act: Provided, however, That if any individual is denied any right, privilege, or benefit to which he or she would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) Maintained in connection with providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056;

(4) Required by statute to be maintained and used solely as statistical records;

(5) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(b) Each notice of a system of records that is the subject of an exemption under 5 U.S.C. 552a(k) will include a statement that the system has been exempted, the reasons therefore, and a reference to the FEDERAL REGISTER, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (k) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(1) *Criminal Law Enforcement Records.* If the 5 U.S.C. 552a(j)(2) exemption claimed under paragraph (c) of § 215.13 and on the notice of systems of records to be published in the FEDERAL REGISTER on this same date is held to be invalid, then this system is determined to be exempt, under 5 U.S.C. 552(a)(k)(1) and (2) of the Act, from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). The reasons for asserting the exemptions are to protect the materials required by executive order to be kept secret in the interest of the national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper

functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain necessary information, to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel.

(2) *Personnel Security and Suitability Investigatory Records.* This system is exempt under U.S.C. 552a (k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering those sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted.

(3) *Litigation Records.* This system is exempt under 5 U.S.C. 552(k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information.

(4) *Employee Equal Employment Opportunity Complaint Investigatory Records.* This system is exempt under 5 U.S.C. 552a (k)(1) and (k)(2) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources.

(5) The following systems of records are exempt under 5 U.S.C. 552a (k)(5) from the provision of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f):

(i) Employee Conduct and Discipline Records.

(ii) Employee Relations Records.

NOTE TO PARAGRAPH (c)(5): This exemption is claimed for these systems of records to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted. The existence and general character of the information exempted will be made known to the individual to whom it pertains.

(6) *Partner Vetting System.* This system is exempt under 5 U.S.C. 552a (k)(1), (k)(2), and (k)(5) from the provision of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate proper

selection or continuance of the best applicants or persons for a given position or contract.

[57 FR 38277, Aug. 24, 1992, as amended at 74 FR 17, Jan. 2, 2009]

PART 216—ENVIRONMENTAL PROCEDURES

Sec.
216.1 Introduction.
216.2 Applicability of procedures.
216.3 Procedures.
216.4 Private applicants.
216.5 Endangered species.
216.6 Environmental assessments.
216.7 Environmental impact statements.
216.8 Public hearings.
216.9 Bilateral and multi-lateral studies and concise reviews of environmental issues.
216.10 Records and reports.

AUTHORITY: 42 U.S.C.4332; 22 U.S.C. 2381.

SOURCE: 41 FR 26913, June 30, 1976, unless otherwise noted.

§ 216.1 Introduction.

(a) *Purpose*. In accordance with sections 118(b) and 621 of the Foreign Assistance Act of 1961, as amended, (the FAA) the following general procedures shall be used by A.I.D. to ensure that environmental factors and values are integrated into the A.I.D. decision making process. These procedures also assign responsibility within the Agency for assessing the environmental effects of A.I.D.'s actions. These procedures are consistent with Executive Order 12114, issued January 4, 1979, entitled Environmental Effects Abroad of Major Federal Actions, and the purposes of the National Environmental Policy Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) (NEPA). They are intended to implement the requirements of NEPA as they effect the A.I.D. program.

(b) *Environmental policy*. In the conduct of its mandate to help upgrade the quality of life of the poor in developing countries, A.I.D. conducts a broad range of activities. These activities address such basic problems as hunger, malnutrition, overpopulation, disease, disaster, deterioration of the environment and the natural resource base, illiteracy as well as the lack of adequate housing and transportation. Pursuant to the FAA, A.I.D. provides development assistance in the form of technical advisory services, research, training, construction and commodity support. In addition, A.I.D. conducts programs under the Agricultural Trade Development and Assistance Act of 1954 (Pub. L. 480) that are designed to combat hunger, malnutrition and to facilitate economic development. Assistance programs are carried out under the foreign policy guidance of the Secretary of State and in cooperation with the governments of sovereign states. Within this framework, it is A.I.D. policy to:

(1) Ensure that the environmental consequences of A.I.D.-financed activities are identified and considered by A.I.D. and the host country prior to a final decision to proceed and that appropriate environmental safeguards are adopted;

(2) Assist developing countries to strengthen their capabilities to appreciate and effectively evaluate the potential environmental effects of proposed development strategies and projects, and to select, implement and manage effective environmental programs;

(3) Identify impacts resulting from A.I.D.'s actions upon the environment, including those aspects of the biosphere which are the common and cultural heritage of all mankind; and

(4) Define environmental limiting factors that constrain development and identify and carry out activities that assist in restoring the renewable resource base on which sustained development depends.

(c) *Definitions*—(1) *CEQ regulations*. Regulations promulgated by the President's Council on Environmental Quality (CEQ) (FEDERAL REGISTER, Volume 43, Number 230, November 29, 1978) under the authority of NEPA and Executive Order 11514, entitled Protection and Enhancement of Environmental Quality (March 5, 1970) as amended by Executive Order 11991 (May 24, 1977).

(2) *Initial Environmental Examination*. An Initial Environmental Examination is the first review of the reasonably foreseeable effects of a proposed action on the environment. Its function is to provide a brief statement of the factual basis for a Threshold Decision as to whether an Environmental Assessment

or an Environmental Impact Statement will be required.

(3) *Threshold Decision*. A formal Agency decision which determines, based on an Initial Environmental Examination, whether a proposed Agency action is a major action significantly affecting the environment.

(4) *Environmental Assessment*. A detailed study of the reasonably forseeable significant effects, both beneficial and adverse, of a proposed action on the environment of a foreign country or countries.

(5) *Environmental Impact Statement*. A detailed study of the reasonably foreseeable environmental impacts, both positive and negative, of a proposed A.I.D. action and its reasonable alternatives on the United States, the global environment or areas outside the jurisdiction of any nation as described in §216.7 of these procedures. It is a specific document having a definite format and content, as provided in NEPA and the CEQ Regulations. The required form and content of an Environmental Impact Statement is further described in §216.7 infra.

(6) *Project Identification Document (PID)*. An internal A.I.D. document which initially identifies and describes a proposed project.

(7) *Program Assistance Initial Proposal (PAIP)*. An internal A.I.D. document used to initiate and identify proposed non-project assistance, including commodity import programs. It is analogous to the PID.

(8) *Project Paper (PP)*. An internal A.I.D. document which provides a definitive description and appraisal of the project and particularly the plan or implementation.

(9) *Program Assistance Approval Document (PAAD)*. An internal A.I.D. document approving non-project assistance. It is analogous to the PP.

(10) *Environment*. The term environment, as used in these procedures with respect to effects occurring outside the United States, means the natural and physical environment. With respect to effects occurring within the United States see §216.7(b).

(11) *Significant effect*. With respect to effects on the environment outside the United States, a proposed action has a significant effect on the environment if it does significant harm to the environment.

(12) *Minor donor*. For purposes of these procedures, A.I.D. is a minor donor to a multidonor project when A.I.D. does not control the planning or design of the multidonor project and either (i) A.I.D.'s total contribution to the project is both less than $1,000,000 and less than 25 percent of the estimated project cost, or (ii) A.I.D.'s total contribution is more than $1,000,000 but less than 25 percent of the estimated project cost and the environmental procedures of the donor in control of the planning of design of the project are followed, but only if the A.I.D. Environmental Coordinator determines that such procedures are adequate.

[45 FR 70244, Oct. 23, 1980]

§216.2 Applicability of procedures.

(a) *Scope*. Except as provided in §216.2(b), these procedures apply to all new projects, programs or activities authorized or approved by A.I.D. and to substantive amendments or extensions of ongoing projects, programs, or activities.

(b) *Exemptions*. (1) Projects, programs or activities involving the following are exempt from these procedures:

(i) International disaster assistance;

(ii) Other emergency circumstances; and

(iii) Circumstances involving exceptional foreign policy sensitivities.

(2) A formal written determination, including a statement of the justification therefore, is required for each project, program or activity for which an exemption is made under paragraphs (b)(1) (ii) and (iii) of this section, but is not required for projects, programs or activities under paragraph (b)(1)(i) of this section. The determination shall be made either by the Assistant Administrator having responsibility for the program, project or activity, or by the Administrator, where authority to approve financing has been reserved by the Administrator. The determination shall be made after consultation with CEQ regarding the environmental consequences of the proposed program, project or activity.

(c) *Categorical exclusions.* (1) The following criteria have been applied in determining the classes of actions including in § 216.2(c)(2) for which an Initial Environmental Examination, Environmental Assessment and Environmental Impact Statement generally are not required;

(i) The action does not have an effect on the natural or physicial environment;

(ii) A.I.D. does not have knowledge of or control over, and the objective of A.I.D. in furnishing assistance does not require, either prior to approval of financing or prior to implementation of specific activities, knowledge of or control over, the details of the specific activities that have an effect on the physicial and natural environment for which financing is provided by A.I.D.;

(iii) Research activities which may have an affect on the physicial and natural environment but will not have a significant effect as a result of limited scope, carefully controlled nature and effective monitoring.

(2) The following classes of actions are not subject to the procedures set forth in § 216.3, except to the extent provided herein;

(i) Education, technical assistance, or training programs except to the extent such programs include activities directly affecting the environment (such as construction of facilities, etc.);

(ii) Controlled experimentation exclusively for the purpose of research and field evaluation which are confined to small areas and carefully monitored;

(iii) Analyses, studies, academic or research workshops and meetings;

(iv) Projects in which A.I.D. is a minor donor to a multidonor project and there is no potential significant effects upon the environment of the United States, areas outside any nation's jurisdiction or endangered or threatened species or their critical habitat;

(v) Document and information transfers;

(vi) Contributions to international, regional or national organizations by the United States which are not for the purpose of carrying out a specifically identifiable project or projects;

(vii) Institution building grants to research and educational institutions in the United States such as those provided for under section 122(d) and title XII of chapter 2 of part I of the FAA (22 USCA 2151 p. (b) 2220a. (1979));

(viii) Programs involving nutrition, health care or population and family planning services except to the extent designed to include activities directly affecting the environment (such as construction of facilities, water supply systems, waste water treatment, etc.)

(ix) Assistance provided under a Commodity Import Program when, prior to approval, A.I.D. does not have knowledge of the specific commodities to be financed and when the objective in furnishing such assistance requires neither knowledge, at the time the assistance is authorized, nor control, during implementation, of the commodities or their use in the host country.

(x) Support for intermediate credit institutions when the objective is to assist in the capitalization of the institution or part thereof and when such support does not involve reservation of the right to review and approve individual loans made by the institution;

(xi) Programs of maternal or child feeding conducted under title II of Pub. L. 480;

(xii) Food for development programs conducted by food recipient countries under title III of Pub. L. 480, when achieving A.I.D.'s objectives in such programs does not require knowledge of or control over the details of the specific activities conducted by the foreign country under such program;

(xiii) Matching, general support and institutional support grants provided to private voluntary organizations (PVOs) to assist in financing programs where A.I.D.'s objective in providing such financing does not require knowledge of or control over the details of the specific activities conducted by the PVO;

(xiv) Studies, projects or programs intended to develop the capability of recipient countries to engage in development planning, except to the extent designed to result in activities directly affecting the environment (such as construction of facilities, etc.); and

(xv) Activities which involve the application of design criteria or standards developed and approved by A.I.D.

(3) The originator of a project, program or activity shall determine the extent to which it is within the classes of actions described in paragraph (c)(2) of this section. This determination shall be made in writing and be submitted with the PID, PAIP or comparable document. This determination, which must include a brief statement supporting application of the exclusion shall be reviewed by the Bureau Environmental Officer in the same manner as a Threshold Decision under §216.3(a)(2) of these procedures. Notwithstanding paragraph (c)(2) of this section, the procedures set forth in §216.3 shall apply to any project, program or activity included in the classes of actions listed in paragraph (c)(2) of this section, or any aspect or component thereof, if at any time in the design, review or approval of the activity it is determined that the project, program or activity, or aspect or component thereof, is subject to the control of A.I.D. and may have a significant effect on the environment.

(d) *Classes of actions normally having a significant effect on the environment.* (1) The following classes of actions have been determined generally to have a significant effect on the environment and an Environmental Assessment or Environmental Impact Statement, as appropriate, will be required:

(i) Programs of river basin development;

(ii) Irrigation or water management projects, including dams and impoundments;

(iii) Agricultural land leveling;

(iv) Drainage projects;

(v) Large scale agricultural mechanization;

(vi) New lands development;

(vii) Resettlement projects;

(viii) Penetration road building or road improvement projects;

(ix) Powerplants;

(x) Industrial plants;

(xi) Potable water and sewerage projects other than those that are small-scale.

(2) An Initial Environmental Examination normally will not be necessary for activities within the classes described in §216.2(d), except when the originator of the project believes that the project will not have a significant effect on the environment. In such cases, the activity may be subjected to the procedures set forth in §216.3.

(e) *Pesticides.* The exemptions of paragraph (b)(1) of this section and the categorical exclusions of paragraph (c)(2) of this section are not applicable to assistance for the procurement or use of pesticides.

[45 FR 70244, Oct. 23, 1980]

§216.3 Procedures.

(a) *General procedures*—(1) *Preparation of the Initial Environmental Examination.* Except as otherwise provided, an Initial Environmental Examination is not required for activities identified in §216.2(b)(1), (c) (2), and (d). For all other A.I.D. activities described in §216.2(a) an Initial Environmental Examination will be prepared by the originator of an action. Except as indicated in this section, it should be prepared with the PID or PAIP. For projects including the procurement or use of pesticides, the procedures set forth in paragraph (b) of this section will be followed, in addition to the procedures in this paragraph. Activities which cannot be identified in sufficient detail to permit the completion of an Initial Environmental Examination with the PID or PAIP, shall be described by including with the PID or PAIP: (i) An explanation indicating why the Initial Environmental Examination cannot be completed; (ii) an estimate of the amount of time required to complete the Initial Environmental Examination; and (iii) a recommendation that a Threshold Decision be deferred until the Initial Environmental Examination is completed. The responsible Assistant Administrator will act on the request for deferral concurrently with action on the PID or PAIP and will designate a time for completion of the Initial Environmental Examination. In all instances, except as provided in paragraph (a)(7) of this section, this completion date will be in sufficient time to allow for the completion of an Environmental Assessment or Environmental Impact Statement, if required, before a final decision is

made to provide A.I.D. funding for the action.

(2) *Threshold decision*. (i) The Initial Environmental Examination will include a Threshold Decision made by the officer in the originating office who signs the PID or PAIP. If the Initial Environmental Examination is completed prior to or at the same time as the PID or PAIP, the Threshold Decision will be reviewed by the Bureau Environmental Officer concurrently with approval of the PID or PAIP. The Bureau Environmental Officer will either concur in the Threshold Decision or request reconsideration by the officer who made the Threshold Decision, stating the reasons for the request. Differences of opinion between these officers shall be submitted for resolution to the Assistant Administrator at the same time that the PID is submitted for approval.

(ii) An Initial Environmental Examination, completed subsequent to approval of the PID or PAIP, will be forwarded immediately together with the Threshold Determination to the Bureau Environmental Officer for action as described in this section.

(iii) A Positive Threshold Decision shall result from a finding that the proposed action will have a significant effect on the environment. An Environmental Impact Statement shall be prepared if required pursuant to § 216.7. If an impact statement is not required, an Environmental Assessment will be prepared in accordance with § 216.6. The cognizant Bureau or Office will record a Negative Determination if the proposed action will not have a significant effect on the environment.

(3) *Negative Declaration*. The Assistant Administrator, or the Administrator in actions for which the approval of the Administrator is required for the authorization of financing, may make a Negative Declaration, in writing, that the Agency will not develop an Environmental Assessment or an Environmental Impact Statement regarding an action found to have a significant effect on the environment when (i) a substantial number of Environmental Assessments or Environmental Impact Statements relating to similar activities have been prepared in the past, if relevant to the proposed action, (ii) the Agency has previously prepared a programmatic Statement or Assessment covering the activity in question which has been considered in the development of such activity, or (iii) the Agency has developed design criteria for such an action which, if applied in the design of the action, will avoid a significant effect on the environment.

(4) *Scope of Environmental Assessment or Impact Statement*—(i) *Procedure and Content*. After a Positive Threshold Decision has been made, or a determination is made under the pesticide procedures set forth in paragraph (b) of this section that an Environmental Assessment or Environmental Impact Statement is required, the originator of the action shall commence the process of identifying the significant issues relating to the proposed action and of determining the scope of the issues to be addressed in the Environmental Assessment or Environmental Impact Statement. The originator of an action within the classes of actions described in § 216.2(d) shall commence this scoping process as soon as practicable. Persons having expertise relevant to the environmental aspects of the proposed action shall also participate in this scoping process. (Participants may include but are not limited to representatives of host governments, public and private institutions, the A.I.D. Mission staff and contractors.) This process shall result in a written statement which shall include the following matters:

(*a*) A determination of the scope and significance of issues to be analyzed in the Environmental Assessment or Impact Statement, including direct and indirect effects of the project on the environment.

(*b*) Identification and elimination from detailed study of the issues that are not significant or have been covered by earlier environmental review, or approved design considerations, narrowing the discussion of these issues to a brief presentation of why they will not have a significant effect on the environment.

(*c*) A description of (*1*) the timing of the preparation of environmental analyses, including phasing if appropriate, (*2*) variations required in the format of

the Environmental Assessment, and (*3*) the tentative planning and decision making schedule; and

(*d*) A description of how the analysis will be conducted and the disciplines that will participate in the analysis.

(ii) These written statements shall be reviewed and approved by the Bureau Environmental Officer.

(iii) *Circulation of scoping statement*. To assist in the preparation of an Environmental Assessment, the Bureau Environmental Office may circulate copies of the written statement, together with a request for written comments, within thirty days, to selected federal agencies if that Officer believes comments by such federal agencies will be useful in the preparation of an Environmental Assessment. Comments received from reviewing federal agencies will be considered in the preparation of the Environmental Assessment and in the formulation of the design and implementation of the project, and will, together with the scoping statement, will be included in the project file.

(iv) *Change in Threshold Decision*. If it becomes evident that the action will not have a significant effect on the environment (*i.e.*, will not cause significant harm to the environment), the Positive Threshold Decision may be withdrawn with the concurrence of the Bureau Environmental Officer. In the case of an action included in §216.2(d)(2), the request for withdrawal shall be made to the Bureau Environmental Officer.

(5) *Preparation of Environmental Assessments and Environmental Impact Statement*. If the PID or PAIP is approved, and the Threshold Decision is positive, or the action is included in §216.2(d), the originator of the action will be responsible for the preparation of an Environmental Assessment or Environmental Impact Statement as required. Draft Environmental Impact Statements will be circulated for review and comment as part of the review of Project Papers and as outlined further in §216.7 of those procedures. Except as provided in paragraph (a)(7) of this section, final approval of the PP or PAAD and the method of implementation will include consideration of the Environmental Assessment of final Environmental Impact Statement.

(6) *Processing and review within A.I.D.* (i) Initial Environmental Examinations, Environmental Assessments and final Environmental Impact Statements will be processed pursuant to standard A.I.D. procedures for project approval documents. Except as provided in paragraph (a)(7) of this section, Environmental Assessments and final Environmental Impact Statements will be reviewed as an integral part of the Project Paper or equivalent document. In addition to these procedures, Environmental Assessments will be reviewed and cleared by the Bureau Environmental Officer. They may also be reviewed by the Agency's Environmental Coordinator who will monitor the Environmental Assessment process.

(ii) When project approval authority is delegated to field posts, Environmental Assessments shall be reviewed and cleared by the Bureau Environmental Officer prior to the approval of such actions.

(iii) Draft and final Environmental Impact Statements will be reviewed and cleared by the Environmental Coordinator and the Office of the General Counsel.

(7) *Environmental review after authorization of financing*. (i) Environmental review may be performed after authorization of a project, program or activity only with respect to subprojects or significant aspects of the project, program or activity that are unidentified at the time of authorization. Environmental review shall be completed prior to authorization for all subprojects and aspects of a project, program or activity that are identified.

(ii) Environmental review should occur at the earliest time in design or implementation at which a meaningful review can be undertaken, but in no event later than when previously unidentified subprojects or aspects of projects, programs or activities are identified and planned. To the extent possible, adequate information to undertake deferred environmental review should be obtained before funds are obligated for unidentified subprojects or aspects of projects, programs or activities. (Funds may be obligated for the other aspects for which environmental review has been completed.) To avoid

an irreversible commitment of resources prior to the conclusion of environmental review, the obligation of funds can be made incrementally as subprojects or aspects of projects, programs or activities are identified; or if necessary while planning continues, including environmental review, the agreement or other document obligating funds may contain appropriate convenants or conditions precedent to disbursement for unidentified subprojects or aspects of projects, programs or activities.

(iii) When environmetal review must be deferred beyond the time some of the funds are to be disbursed (e.g. long lead times for the delivery of goods or services), the project agreement or other document obligating funds shall contain a covenant or covenants requiring environmental review, including an Environmental Assessment or Environmental Impact Statement, when appropriate, to be completed and taken into account prior to implementation of those subprojects or aspects of the project, program or activity for which environmental review is deferred. Such convenants shall ensure that implementation plans will be modified in accordance with environmental review if the parties decide that modifications are necessary.

(iv) When environmental review will not be completed for an entire project, program or activity prior to authorization, the Initial Environmental Examination and Threshold Decision required under paragraphs (a)(1) and (2) of this section shall identify those aspects of the project, program or activity for which environmental review will be completed prior to the time financing is authorized. It shall also include those subprojects or aspects for which environmental review will be deferred, stating the reasons for deferral and the time when environmental review will be completed. Further, it shall state how an irreversible commitment of funds will be avoided until environmental review is completed. The A.I.D. officer responsible for making environmental decisions for such projects, programs or activities shall also be identified (the same officer who has decision making authority for the other aspects of implementation). This deferral shall be reviewed and approved by the officer making the Threshold Decision and the officer who authorizes the project, program or activity. Such approval may be made only after consultation with the Office of General Counsel for the purpose of establishing the manner in which conditions precedent to disbursement or covenants in project and other agreements will avoid an irreversible commitment of resources before environmental review is completed.

(8) *Monitoring.* To the extent feasible and relevant, projects and programs for which Environmental Impact Statements or Environmental Assessments have been prepared should be designed to include measurement of any changes in environmental quality, positive or negative, during their implementation. This will require recording of baseline data at the start. To the extent that available data permit, originating offices of A.I.D. will formulate systems in collaboration with recipient nations, to monitor such impacts during the life of A.I.D.'s involvement. Monitoring implementation of projects, programs and activities shall take into account environmental impacts to the same extent as other aspects of such projects, programs and activities. If during implementation of any project, program or activity, whether or not an Environmental Assessment or Environmental Impact Statement was originally required, it appears to the Mission Director, or officer responsible for the project, program or activity, that it is having or will have a significant effect on the environment that was not previously studied in an Environmental Assessment or Environmental Impact Statement, the procedures contained in this part shall be followed including, as appropriate, a Threshold Decision, Scoping and an Environmental Assessment or Environmental Impact Statement.

(9) *Revisions.* If, after a Threshold Decision is made resulting in a Negative Determination, a project is revised or new information becomes available which indicates that a proposed action might be ''major'' and its effects ''significant'', the Negative Determination will be reviewed and revised by the cognizant Bureau and an Environmental

Assessment or Environmental Impact Statement will be prepared, if appropriate. Environmental Assessments and Environmental Impact Statements will be amended and processed appropriately if there are major changes in the project or program, or if significant new information becomes available which relates to the impact of the project, program or activity on the environment that was not considered at the time the Environmental Assessment or Environmental Impact Statement was approved. When on-going programs are revised to incorporate a change in scope or nature, a determination will be made as to whether such change may have an environmental impact not previously assessed. If so, the procedures outlined in this part will be followed.

(10) *Other approval documents*. These procedures refer to certain A.I.D. documents such as PIDs, PAIPs, PPs and PAADs as the A.I.D. internal instruments for approval of projects, programs or activities. From time to time, certain special procedures, such as those in §216.4, may not require the use of the aforementioned documents. In these situations, these environmental procedures shall apply to those special approval procedures, unless otherwise exempt, at approval times and levels comparable to projects, programs and activities in which the aforementioned documents are used.

(b) *Pesticide procedures*—(1) *Project Assistance*. Except as provided in paragraph (b)(2) of this section, all proposed projects involving assistance for the procurement or use, or both, of pesticides shall be subject to the procedures prescribed in paragraphs (b)(1) (i) through (v) of this section. These procedures shall also apply, to the extent permitted by agreements entered into by A.I.D. before the effective date of these pesticide procedures, to such projects that have been authorized but for which pesticides have not been procured as of the effective date of these pesticide procedures.

(i) When a project includes assistance for procurement or use, or both, of pesticides registered for the same or similar uses by USEPA without restriction, the Initial Environmental Examination for the project shall include a separate section evaluating the economic, social and environmental risks and benefits of the planned pesticide use to determine whether the use may result in significant environmental impact. Factors to be considered in such an evaluation shall include, but not be limited to the following:

(*a*) The USEPA registration status of the requested pesticide;

(*b*) The basis for selection of the requested pesticide;

(*c*) The extent to which the proposed pesticide use is part of an integrated pest management program;

(*d*) The proposed method or methods of application, including availability of appropriate application and safety equipment;

(*e*) Any acute and long-term toxicological hazards, either human or environmental, associated with the proposed use and measures available to minimize such hazards;

(*f*) The effectiveness of the requested pesticide for the proposed use;

(*g*) Compatibility of the proposed pesticide with target and nontarget ecosystems;

(*h*) The conditions under which the pesticide is to be used, including climate, flora, fauna, geography, hydrology, and soils;

(*i*) The availability and effectiveness of other pesticides or nonchemical control methods;

(*j*) The requesting country's ability to regulate or control the distribution, storage, use and disposal of the requested pesticide;

(*k*) The provisions made for training of users and applicators; and

(*l*) The provisions made for monitoring the use and effectiveness of the pesticide.

In those cases where the evaluation of the proposed pesticide use in the Initial Environmental Examination indicates that the use will significantly effect the human environment, the Threshold Decision will include a recommendation for the preparation of an Environmental Assessment or Environmental Impact Statement, as appropriate. In the event a decision is made to approve the planned pesticide use, the Project Paper shall include to the extent practicable, provisions designed to mitigate

potential adverse effects of the pesticide. When the pesticide evaluation section of the Initial Environmental Examination does not indicate a potentially unreasonable risk arising from the pesticide use, an Environmental Assessment or Environmental Impact Statement shall nevertheless be prepared if the environmental effects of the project otherwise require further assessment.

(ii) When a project includes assistance for the procurement or use, or both, of any pesticide registered for the same or similar uses in the United States but the proposed use is restricted by the USEPA on the basis of user hazard, the procedures set forth in paragraph (b)(1)(i) of this section will be followed. In addition, the Initial Environmental Examination will include an evaluation of the user hazards associated with the proposed USEPA restricted uses to ensure that the implementation plan which is contained in the Project Paper incorporates provisions for making the recipient government aware of these risks and providing, if necessary, such technical assistance as may be required to mitigate these risks. If the proposed pesticide use is also restricted on a basis other than user hazard, the procedures in paragraph (b)(1)(iii) of this section shall be followed in lieu of the procedures in this section.

(iii) If the project includes assistance for the procurement or use, or both of:

(*a*) Any pesticide other than one registered for the same or similar uses by USEPA without restriction or for restricted use on the basis of user hazard; or

(*b*) Any pesticide for which a notice of rebuttable presumption against reregistration, notice of intent to cancel, or notice of intent to suspend has been issued by USEPA.

The Threshold Decision will provide for the preparation of an Environmental Assessment or Environmental Impact Statement, as appropriate (§ 216.6(a)). The EA or EIS shall include, but not be limited to, an analysis of the factors identified in paragraph (b)(1)(i) of this section.

(iv) Notwithstanding the provisions of paragraphs (b)(1) (i) through (iii) of this section, if the project includes assistance for the procurement or use, or both, of a pesticide against which USEPA has initiated a regulatory action for cause, or for which it has issued a notice of rebuttable presumption against reregistration, the nature of the action or notice, including the relevant technical and scientific factors will be discussed with the requesting government and considered in the IEE and, if prepared, in the EA or EIS. If USEPA initiates any of the regulatory actions above against a pesticide subsequent to its evaluation in an IEE, EA or EIS, the nature of the action will be discussed with the recipient government and considered in an amended IEE or amended EA or EIS, as appropriate.

(v) If the project includes assistance for the procurement or use, or both of pesticides but the specific pesticides to be procured or used cannot be identified at the time the IEE is prepared, the procedures outlined in paragraphs (b) (i) through (iv) of this section will be followed when the specific pesticides are identified and before procurement or use is authorized. Where identification of the pesticides to be procured or used does not occur until after Project Paper approval, neither the procurement nor the use of the pesticides shall be undertaken unless approved, in writing, by the Assistant Administrator (or in the case of projects authorized at the Mission level, the Mission Director) who approved the Project Paper.

(2) *Exceptions to pesticide procedures.* The procedures set forth in paragraph (b)(1) of this section shall not apply to the following projects including assistance for the procurement or use, or both, of pesticides.

(i) Projects under emergency conditions.

Emergency conditions shall be deemed to exist when it is determined by the Administrator, A.I.D., in writing that:

(*a*) A pest outbreak has occurred or is imminent; and

(*b*) Significant health problems (either human or animal) or significant economic problems will occur without the prompt use of the proposed pesticide; and

(*c*) Insufficient time is available before the pesticide must be used to

evaluate the proposed use in accordance with the provisions of this regulation.

(ii) Projects where A.I.D. is a minor donor, as defined in §216.1(c)(12) of this part, to a multi-donor project.

(iii) Projects including assistance for procurement or use, or both, of pesticides for research or limited field evaluation purposes by or under the supervision of project personnel. In such instances, however, A.I.D. will ensure that the manufacturers of the pesticides provide toxicological and environmental data necessary to safeguard the health or research personnel and the quality of the local environment in which the pesticides will be used. Furthermore, treated crops will not be used for human or animal consumption unless appropriate tolerances have been established by EPA or recommended by FAO/WHO, and the rates and frequency of application, together with the prescribed preharvest intervals, do not result in residues exceeding such tolerances. This prohibition does not apply to the feeding of such crops to animals for research purposes.

(3) *Non-project assistance.* In a very few limited number of circumstances A.I.D. may provide non-project assistance for the procurement and use of pesticides. Assistance in such cases shall be provided if the A.I.D. Administrator determines in writing that (i) emergency conditions, as defined in paragraph (b)(2)(i) of this section exists; or (ii) that compelling circumstances exist such that failure to provide the proposed assistance would seriously impede the attainment of U.S. foreign policy objectives or the objectives of the foreign assistance program. In the latter case, a decision to provide the assistance will be based to the maximum extent practicable, upon a consideration of the factors set forth in paragraph (b)(1)(i) of this section and, to the extent available, the history of efficacy and safety covering the past use of the pesticide the in recipient country.

[43 FR 20491, May 12, 1978, as amended at 45 FR 70245, Oct. 23, 1980]

§216.4 Private applicants.

Programs, projects or activities for which financing from A.I.D. is sought by private applicants, such as PVOs and educational and research institutions, are subject to these procedures. Except as provided in §216.2 (b), (c) or (d), preliminary proposals for financing submitted by private applicants shall be accompanied by an Initial Environmental Examination or adequate information to permit preparation of an Initial Environmental Examination. The Threshold Decision shall be made by the Mission Director for the country to which the proposal relates, if the preliminary proposal is submitted to the A.I.D. Mission, or shall be made by the officer in A.I.D. who approves the preliminary proposal. In either case, the concurrence of the Bureau Environmental Officer is required in the same manner as in §216.3(a)(2), except for PVO projects approved in A.I.D. Missions with total life of project costs less than $500,000. Thereafter, the same procedures set forth in §216.3 including as appropriate scoping and Environmental Assessments or Environmental Impact Statements, shall be applicable to programs, projects or activities submitted by private applicants. The final proposal submitted for financing shall be treated, for purposes of these procedures, as a Project Paper. The Bureau Environmental Officer shall advise private applicants of studies or other information foreseeably required for action by A.I.D.

[45 FR 70247, Oct. 23, 1980]

§216.5 Endangered species.

It is A.I.D. policy to conduct its assistance programs in a manner that is sensitive to the protection of endangered or threatened species and their critical habitats. The Initial Environmental Examination for each project, program or activity having an effect on the environment shall specifically determine whether the project, program or activity will have an effect on an endangered or threatened species, or critical habitat. If the proposed project, program or activity will have the effect of jeopardizing an endangered or threatened species or of adversely modifying its critical habitat, the Threshold Decision shall be a Positive Determination and an Environmental Assessment or Environmental Impact Statement completed as appropriate,

which shall discuss alternatives or modifications to avoid or mitigate such impact on the species or its habitat.

[45 FR 70247, Oct. 23, 1980]

§ 216.6 Environmental assessments.

(a) *General purpose*. The purpose of the Environmental Assessment is to provide Agency and host country decision makers with a full discussion of significant environmental effects of a proposed action. It includes alternatives which would avoid or minimize adverse effects or enhance the quality of the environment so that the expected benefits of development objectives can be weighed against any adverse impacts upon the human environment or any irreversible or irretrievable commitment of resources.

(b) *Collaboration with affected nation on preparation*. Collaboration in obtaining data, conducting analyses and considering alternatives will help build an awareness of development associated environmental problems in less developed countries as well as assist in building an indigenous institutional capability to deal nationally with such problems. Missions, Bureaus and Offices will collaborate with affected countries to the maximum extent possible, in the development of any Environmental Assessments and consideration of environmental consequences as set forth therein.

(c) *Content and form*. The Environmental Assessment shall be based upon the scoping statement and shall address the following elements, as appropriate:

(1) *Summary*. The summary shall stress the major conclusions, areas of controversy, if any, and the issues to be resolved.

(2) *Purpose*. The Environmental Assessment shall briefly specify the underlying purpose and need to which the Agency is responding in proposing the alternatives including the proposed action.

(3) *Alternatives including the proposed action*. This section should present the environmental impacts of the proposal and its alternatives in comparative form, thereby sharpening the issues and providing a clear basis for choice among options by the decision maker. This section should explore and evaluate reasonable alternatives and briefly discuss the reasons for eliminating those alternatives which were not included in the detailed study; devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; include the alternative of no action; identify the Agency's preferred alternative or alternatives, if one or more exists; include appropriate mitigation measures not already included in the proposed action or alternatives.

(4) *Affected environment*. The Environmental Assessment shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in the Environmental Assessment shall be commensurate with the significance of the impact with less important material summarized, consolidated or simply referenced.

(5) *Environmental consequences*. This section forms the analytic basis for the comparisons under paragraph (c)(3) of this section. It will include the environmental impacts of the alternatives including the proposed action; any adverse effects that cannot be avoided should the proposed action be implemented; the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. It should not duplicate discussions in paragraph (c)(3) of this section. This section of the Environmental Assessment should include discussions of direct effects and their significance; indirect effects and their significance; possible conflicts between the proposed action and land use plans, policies and controls for the areas concerned; energy requirements and conservation potential of various alternatives and mitigation measures; natural or depletable resource requirements and conservation potential of various requirements and mitigation measures; urban quality; historic and

cultural resources and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures; and means to mitigate adverse environmental impacts.

(6) *List of preparers*. The Environmental Assessment shall list the names and qualifications (expertise, experience, professional discipline) of the persons primarily responsible for preparing the Environmental Assessment or significant background papers.

(7) *Appendix*. An appendix may be prepared.

(d) *Program assessment*. Program Assessments may be appropriate in order to assess the environmental effects of a number of individual actions and their cumulative environmental impact in a given country or geographic area, or the environmental impacts that are generic or common to a class of agency actions, or other activities which are not country-specific. In these cases, a single, programmatic assessment will be prepared in A.I.D./Washington and circulated to appropriate overseas Missions, host governments, and to interested parties within the United States. To the extent practicable, the form and content of the programmatic Environmental Assessment will be the same as for project Assessments. Subsequent Environmental Assessments on major individual actions will only be necessary where such follow-on or subsequent activities may have significant environmental impacts on specific countries where such impacts have not been adequately evaluated in the programmatic Environmental Assessment. Other programmatic evaluations of classes of actions may be conducted in an effort to establish additional categorical exclusions or design standards or criteria for such classes that will eliminate or minimize adverse effects of such actions, enhance the environmental effect of such action or reduce the amount of paperwork or time involved in these procedures. Programmatic evaluations conducted for the purpose of establishing additional categorical exclusions under §216.2(c) or design considerations that will eliminate significant effects for classes of actions shall be made available for public comment before the categorical exclusions or design standards or criteria are adopted by A.I.D. Notice of the availability of such document shall be published in the FEDERAL REGISTER. Additional categorical exclusions shall be adopted by A.I.D. upon the approval of the Administrator, and design consideration in accordance with usual agency procedures.

(e) *Consultation and review*. (1) When Environmental Assessments are prepared on activities carried out within or focused on specific developing countries, consultation will be held between A.I.D. staff and the host government both in the early stages of preparation and on the results and significance of the completed Assessment before the project is authorized.

(2) Missions will encourage the host government to make the Environmental Assessment available to the general public of the recipient country. If Environmental Assessments are prepared on activities which are not country-specific, the Assessment will be circulated by the Environmental Coordinator to A.I.D.'s Overseas Missions and interested governments for information, guidance and comment and will be made available in the U.S. to interested parties.

(f) *Effect in other countries*. In a situation where an analysis indicates that potential effects may extend beyond the national boundaries of a recipient country and adjacent foreign nations may be affected, A.I.D. will urge the recipient country to consult with such countries in advance of project approval and to negotiate mutually acceptable accommodations.

(g) *Classified material*. Environmental Assessments will not normally include classified or administratively controlled material. However, there may be situations where environmental aspects cannot be adequately discussed without the inclusion of such material. The handling and disclosure of classified or administratively controlled material shall be governed by 22 CFR part 9. Those portions of an Environmental Assessment which are not classified or administratively controlled will be made available to persons outside the Agency as provided for in 22 CFR part 212.

[45 FR 70247, Oct. 23, 1980]

§ 216.7 Environmental impact statements.

(a) *Applicability.* An Environmental Impact Statement shall be prepared when agency actions significantly affect:

(1) The global environment or areas outside the jurisdiction of any nation (e.g., the oceans);

(2) The environment of the United States; or

(3) Other aspects of the environment at the discretion of the Administrator.

(b) *Effects on the United States: Content and form.* An Environmental Impact Statement relating to paragraph (a)(2) of this section shall comply with the CEQ Regulations. With respect to effects on the United States, the terms environment and significant effect wherever used in these procedures have the same meaning as in the CEQ Regulations rather than as defined in § 216.1(c) (12) and (13) of these procedures.

(c) *Other effects: Content and form.* An Environmental Impact Statement relating to paragraphs (a)(1) and (a)(3) of this section will generally follow the CEQ Regulations, but will take into account the special considerations and concerns of A.I.D. Circulation of such Environmental Impact Statements in draft form will precede approval of a Project Paper or equivalent and comments from such circulation will be considered before final project authorization as outlined in § 216.3 of these procedures. The draft Environmental Impact Statement will also be circulated by the Missions to affected foreign governments for information and comment. Draft Environmental Impact Statements generally will be made available for comment to Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved, and to public and private organizations and individuals for not less than forty-five (45) days. Notice of availability of the draft Environmental Impact Statements will be published in the FEDERAL REGISTER. Cognizant Bureaus and Offices will submit these drafts for circulation through the Environmental Coordinator who will have the responsibility for coordinating all such communications with persons outside A.I.D. Any comments received by the Environmental Coordinator will be forwarded to the originating Bureau or Office for consideration in final policy decisions and the preparation of a final Environmental Impact Statement. All such comments will be attached to the final Statement, and those relevant comments not adequately discussed in the draft Environmental Impact Statement will be appropriately dealt with in the final Environmental Impact Statement. Copies of the final Environmental Impact Statement, with comments attached, will be sent by the Environmental Coordinator to CEQ and to all other Federal, state, and local agencies and private organizations that made substantive comments on the draft, including affected foreign governments. Where emergency circumstances or considerations of foreign policy make it necessary to take an action without observing the provisions of § 1506.10 of the CEQ Regulations, or when there are overriding considerations of expense to the United States or foreign governments, the originating Office will advise the Environmental Coordinator who will consult with Department of State and CEQ concerning appropriate modification of review procedures.

[45 FR 70249, Oct. 23, 1980]

§ 216.8 Public hearings.

(a) In most instances AID will be able to gain the benefit of public participation in the impact statement process through circulation of draft statements and notice of public availability in CEQ publications. However, in some cases the Administrator may wish to hold public hearings on draft Environmental Impact Statements. In deciding whether or not a public hearing is appropriate, Bureaus in conjunction with the Environmental Coordinator should consider:

(1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved;

(2) The degree of interest in the proposal as evidenced by requests from the public and from Federal, state and

local authorities, and private organizations and individuals, that a hearing be held;

(3) The complexity of the issue and likelihood that information will be presented at the hearing which will be of assistance to the Agency; and

(4) The extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action.

(b) If public hearings are held, draft Environmental Impact Statements to be discussed should be made available to the public at least fifteen (15) days prior to the time of the public hearings, and a notice will be placed in the FEDERAL REGISTER giving the subject, time and place of the proposed hearings.

[41 FR 26913, June 30, 1976. Redesignated at 45 FR 70249, Oct. 23, 1980]

§ 216.9 Bilateral and multilateral studies and concise reviews of environmental issues.

Notwithstanding anything to the contrary in these procedures, the Administrator may approve the use of either of the following documents as a substitute for an Environmental Assessment (but not a substitute for an Environmental Impact Statement) required under these procedures:

(a) Bilateral or multilateral environmental studies, relevant or related to the proposed action, prepared by the United States and one or more foreign countries or by an international body or organization in which the United States is a member or participant; or

(b) Concise reviews of the environmental issues involved including summary environmental analyses or other appropriate documents.

[45 FR 70249, Oct. 23, 1980]

§ 216.10 Records and reports.

Each Agency Bureau will maintain a current list of activities for which Environmental Assessments and Environmental Impact Statements are being prepared and for which Negative Determinations and Declarations have been made. Copies of final Initial Environmental Examinations, scoping statements, Assessments and Impact Statements will be available to interested Federal agencies upon request. The cognizant Bureau will maintain a permanent file (which may be part of its normal project files) of Environmental Impact Statements, Environmental Assessments, final Initial Environmental Examinations, scoping statements, Determinations and Declarations which will be available to the public under the Freedom of Information Act. Interested persons can obtain information or status reports regarding Environmental Assessments and Environmental Impact Statements through the A.I.D. Environmental Coordinator.

[45 FR 70249, Oct. 23, 1980]

PART 217—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Sec.
217.1 Purpose.
217.2 Application.
217.3 Definitions.
217.4 Discrimination prohibited.
217.5 Assurances required.
217.6 Remedial action, voluntary action, and self-evaluation.
217.7 Designation of responsible employee and adoption of grievance procedures.
217.8 Notice.
217.9 Administrative requirements for small recipients.
217.10 Effect of state or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

217.11 Discrimination prohibited.
217.12 Reasonable accommodation.
217.13 Employment criteria.
217.14 Preemployment inquiries.
217.15–217.20 [Reserved]

Subpart C—Accessibility

217.21 Discrimination prohibited.
217.22 Existing facilities.
217.23 New construction.
217.24–217.40 [Reserved]

Subpart D—Postsecondary Education

217.41 Application of this subpart.
217.42 Admissions and recruitment.

217.43 Treatment of students; general.
217.44 Academic adjustments.
217.45 Housing.
217.46 Financial and employment assistance to students.
217.47 Nonacademic services.
217.48–217.60 [Reserved]

Subpart E—Procedures

217.61 Procedures.
217.62–217.99 [Reserved]
APPENDIX A TO PART 217—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

AUTHORITY: 29 U.S.C. 794, unless otherwise noted.

SOURCE: 45 FR 66415, Oct. 6, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 217 appear at 68 FR 51362, Aug. 26, 2003.

Subpart A—General Provisions

§ 217.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity within the United States receiving Federal financial assistance.

§ 217.2 Application.

This part applies to all programs or activities carried on within the United States by recipients of Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development, including the types of Federal financial assistance listed in appendix A of this part. (appendix A may be revised from time to time by notice in the FEDERAL REGISTER). It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this regulation, even if the application for such assistance is approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred or other assistance extended before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary, and (d) any procurement of goods or services, including the procurement of training. This part does not bar selection and treatment reasonably related to the foreign assistance objective or such other authorized purpose as the Federal assistance may have. It does not bar selections which are limited to particular groups where the purpose of the Federal financial assistance calls for such a limitation nor does it bar special treatment including special courses of training, orientation or counseling consistent with such purpose.

§ 217.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1979, Pub. L. 95–602.

(b) *Section 504* means section 504 of the Act.

(c) *Agency* means the Agency for International Development.

(d) The term *Administrator* means the Administrator of the Agency for International Development or any person specifically designated by him to perform any function provided for under this part.

(e) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance and any sovereign foreign government.

(f) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by an Agency official or by a recipient as a condition to becoming a recipient.

(g) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than the fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(h) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(i) *Handicapped person.* (1) ''Handicapped persons'' means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (i)(1) of this section the phrase:

(i) *Physical or mental impairment* includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism. Such term does not include alcoholism or drug abuse, where by reason of such condition the individual is prevented from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

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

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

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (C) has none of the impairments defined in paragraph (i)(2)(i) of this section but is treated by a recipient as having such an impairment.

(j) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(k) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

(l) *Program or activity* means all of the operations of any entity described in paragraphs (l)(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. 7801), 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 (l)(1), (2), or (3) of this section.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§ 217.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

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

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

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

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

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefits, or service to beneficiaries of the recipient's program or activity;

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

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an 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 handicapped and nonhandicapped persons, but must afford handicapped persons 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 person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or service that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or

(ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law*. The exclusion of nonhandicapped persons from aid, benefits, or services program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§217.5 Assurances required.

(a) *Assurances*. An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Administrator, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Agency.

(b) *Duration of obligation*. (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants*. (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency the covenant shall also include a condition coupled with a right to be reserved by the Agency to revert title to the property in the event of a breach of the covenant. 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 the property for the purposes for which the property was transferred, the Administrator may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§217.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action*. (1) If the Administrator finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Administrator deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the

basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Administrator, where appropriate, may require either or both recipients to take remedial action.

(3) The Administrator may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons presently in the program or activity but not receiving full benefits or equal and integrated treatment within the program or (iii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effect of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate with the assistance of interested persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirement of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Administrator upon request: (i) A list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 217.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 217.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504, and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 217.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the

posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 217.9 Administrative requirements for small recipients.

The Administrator may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 217.7 and 217.8 in whole or in part, when the Administrator finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 217.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 217.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any

inconsistent term of any collective bargaining agreement to which it is a party.

§ 217.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipients workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to made reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 217.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Administrator to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).

§ 217.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 217.6(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 217.6(b) or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped. *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment,

and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentially as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 217.15–217.20 [Reserved]

Subpart C—Accessibility

§ 217.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities within the United States are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 217.22 Existing facilities.

(a) *Accessibility*. A recipient shall operate each program or activity to which this part applies so that when each part is viewed in its entirety it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, alteration of existing facilities, assignment of aids to beneficiaries, and construction of new facilities in conformance with the requirements of § 217.23, or any other methods that may result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph(s) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Time period*. A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

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

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under § 217.22(a) 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 person responsible for implementation of the plan.

(e) *Notice*. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§ 217.23 New construction.

(a) *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration*. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards*. (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 66415, Oct. 6, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

§§ 217.24–217.40 [Reserved]

Subpart D—Postsecondary Education

§ 217.41 Application of this subpart.

Subpart D applies within the United States to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of such programs or activities within the United States.

§ 217.42 Admissions and recruitment.

(a) *General*. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions*. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitation upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Administrator to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as to best to ensure that, when

a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 217.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 217.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 217.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

§ 217.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include

changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 217.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 217.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not vio-

late subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 217.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 217.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interest and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 217.48–217.60 [Reserved]

Subpart E—Procedures

§ 217.61 Procedures.

The procedural provisons applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 209.6–209.13 of this title.

§§ 217.62–217.99 [Reserved]

APPENDIX A TO PART 217—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

1. Grants to research and educational institutions in the United States to strengthen their capacity to develop and carry out programs concerned with the economic and social development of developing countries. (Section 122(d), Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151(d).)

2. Grants to land grant and other qualified agricultural universities and colleges in the United States to develop their capabilities to assist developing countries in agricultural teaching, research and extension services. (Section 297, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2220(b).)

3. Grants to private and voluntary agencies, non-profit organizations, educational institutions, and other qualified organizations for programs in the United States to promote the economic and social development of developing countries. (Section 103—106, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151a—2151d.)

PART 218—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Sec.
218.01 What is the purpose of age discrimination regulations?
218.02 To what programs or activities do these regulations apply?
218.03 Definitions.

Subpart B—Standards for Determining Age Discrimination

218.11 Standards.

Subpart C—Duties of Agency Recipients

218.21 General responsibilities.
218.22 Notice to subrecipients.

218.23 Self-evaluation.
218.24 Information requirements.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

218.31 Compliance reviews.
218.32 Complaints.
218.33 Mediation.
218.34 Investigation.
218.35 Prohibition against intimidation or retaliation.
218.36 Compliance procedure.
218.37 Hearings, decisions, post-termination proceedings.
218.38 Remedial action by recipients.
218.39 Alternate funds disbursal procedure.

APPENDIX A TO PART 218—LIST OF FEDERAL FINANCIAL ASSISTANCE
APPENDIX B TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE
APPENDIX C TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

AUTHORITY: Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.;* 45 CFR part 90; 22 U.S.C. 2658, unless otherwise noted.

SOURCE: 45 FR 62980, Sept. 23, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 218 appear at 68 FR 51363, Aug. 26, 2003.

Subpart A—General

§ 218.01 What is the purpose of the age discrimination regulations?

The purpose of these regulations is to set out the policies and procedures for the three foreign affairs agencies (State, USICA and AID) under the Age Discrimination Act of 1975 and the government-wide age discrimination regulations at 45 CFR part 90 (published at 44 FR 33768, June 12, 1979). The Act and the government-wide regulations prohibit discrimination on the basis of age in programs or activities in the United States receiving Federal financial assistance. The Act and the government-wide regulations permit federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and the government-wide regulations.

§ 218.02 To what programs or activities do these regulations apply?

These regulations apply to each foreign affairs agency recipient and to each program or activity in the United States operated by the recipient which receives Federal financial assistance provided by any of these agencies.

§ 218.03 Definitions.

(a) The following terms used in this part are defined in the government-wide regulations (45 CFR 90.4, 44 FR 33768):

Act
Action
Age
Age distinction
Age-related term
Federal financial assistance
Recipient (including subrecipients)
United States

(b) As used in this part,

(1) *Agency* means the Department of State, the U.S. International Communication Agency, and the Agency for International Development.

(2) *Secretary* means the Secretary of State, the Director of the U.S. International Communication Agency, and the Administrator of the Agency for International Development, or the designee of such officer.

(3) *Subrecipient* means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(4) *Program or activity* means all of the operations of any entity described in paragraphs (b)(4)(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. 7801), 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 which is established by two or more of the entities described in paragraph (b)(4)(i), (ii), or (iii) of this section.

[45 FR 62980, Sept. 23, 1980, as amended at 68 FR 51363, Aug. 26, 2003]

Subpart B—Standards for Determining Age Discrimination

§ 218.11 Standards.

The standards each agency uses to determine whether an age distinction or age-related term is prohibited are set out in part 90 (primarily subpart B) of 45 CFR.

Subpart C—Duties of Agency Recipients

§ 218.21 General responsibilities.

Each agency recipient has primary responsibility to ensure that its programs or activities are in compliance with the Act, the government-wide regulations, and these regulations.

§ 218.22 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from an agency to subrecipients, the recipient shall provide the subrecipients written notice to their obligations under these regulations.

§ 218.23 Self-evaluation.

(a) Each recipient employing the equivalent of 15 or more full-time employees shall complete a one-time written self-evaluation of its compliance under the act within 18 months of the effective date of these regulations.

(b) In its self-evaluation each recipient shall identify each age distinction it uses and justify each age distinction it imposes on the program or activity receiving Federal financial assistance from an agency.

(c) Each recipient shall take corrective action whenever a self-evaluation indicates a violation of these regulations.

(d) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of three years following its completion.

§ 218.24 Information requirements.

Each recipient shall:

(a) Make available upon request to the agency information necessary to determine whether the recipient is complying with the regulations.

(b) Permit reasonable access by the agency to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether a recipient is in compliance with these regulations.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 218.31 Compliance reviews.

(a) The agency may conduct compliance reviews and pre-award reviews of recipients that will permit it to investigate and correct violations of these regulations. The agency may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review or preaward review indicates a violation of this part, the agency will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be

achieved, the agency will arrange for enforcement as described in § 143.36

§ 218.32 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with an agency, alleging discrimination prohibited by these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, the agency may extend this time limit.

(b) The agency will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights under the complaint procedure, including the right to have a representative at all stages of the complaint process.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact the agency for information and assistance regarding the complaint resolution process.

(c) The agency will return to the complainant any complaint outside the jurisdiction of these regulations and will state the reason(s) why it is outside the jurisdiction of these regulations.

§ 218.33 Mediation.

(a) *Referral of complaints for mediation.* The agency will refer to the Federal Mediation and Conciliation Service all complaints that:

(1) fall within the jurisdiction of these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extend necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator, before the agency will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it. The mediator shall send a copy of the agreement to the agency. The agency shall take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) The agency will use the mediation process for a maximum of 60 days after receiving a compliant. Mediation ends if:

(1) Sixty days elapse from the time the agency receives the complaints; *or*

(2) Prior to the end of that 60-day period, an agreement is reached; *or*

(3) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(f) The mediator shall return unresolved complaints to the agency.

§ 218.34 Investigation.

(a) *Informal investigation.* (1) The agency will investigate complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation, the agency will use informal fact finding methods, including joint or separate discussions with the complainant and recipient to establish the facts, and, if possible, settle the complaint on terms that are mutually agreeable. The

agency may seek the assistance of any involved State agency.

(3) The agency will put any agreement in writing and have it signed by the parties and an authorized official of the agency.

(4) The settlement shall not affect the operation of any other enforcement efforts of the agency, including compliance reviews and other individual complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal investigation.* If the agency cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, the agency will attempt to obtain voluntary compliance. If the agency cannot obtain voluntary compliance, it will begin enforcement as described in § 218.36.

§ 218.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.

§ 218.36 Compliance procedure.

(a) An agency may enforce the Act and these regulations through:

(1) Termination of a recipient's Federal financial assistance from the agency under the program or activity involved where the recipient has violated the Act and these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. Therefore, cases which are settled in mediation or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from the agency.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations by the Act and these regulations.

(ii) Use of any requirement of or referral to any Federal, state, or local government agency which will have the effect of correcting a violation of the Act or these regulations.

(b) The agency will limit any termination under paragraph (a)(1) of this section to the particular recipient and particular program or activity the agency finds in violation of these regulations. The agency will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from the agency.

(c) The agency will take no action under paragraph (a) of this section until:

(1) The agency head has advised the recipient of its failure to comply with these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have lapsed after the agency head has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The agency head shall file a report whenever any action is taken under paragraph (a) of this section.

(d) The agency head also may defer granting new Federal financial assistance from the agency to a recipient when a hearing under paragraph (a)(1) of this section is initiated.

(1) New Federal financial assistance from the agency includes all assistance for which the agency requires an application or approval, including renewal of continuation of existing activities, or authorization of the new activities, during the deferral period. New Federal financial assistance from the agency does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under paragraph (a)(1) of this section.

(2) The agency will not begin a deferral until the recipient has received a notice of opportunity for a hearing under paragraph (a)(1) of this section. The agency will not continue a deferral for more than 60 days unless a hearing

has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the agency head. The agency will not continue a deferral for more than 30 days after the close of a hearing unless the hearing results in a finding against the recipient.

§ 218.37 Hearings, decisions, post-termination proceedings.

Certain procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to enforcement of this part. They are 22 CFR part 209.

§ 218.38 Remedial action by recipient.

Where the agency head finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that the agency head may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, the agency head may require both recipients to take remedial action.

§ 218.39 Alternate funds disbursal procedure.

(a) When an agency withholds funds from a recipient under these regulations, the agency head may disburse the withheld funds directly to an alternate recipient, any public or non-profit private organization or agency, or State or political subdivision of the State.

(b) The agency head will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

APPENDIX A TO PART 218—LIST OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE DEPARTMENT OF STATE SUBJECT TO AGE DISCRIMINATION REGULATIONS

Resettlement of Refugees in the United States Under the Migration and Refugee Assistant Act of 1962, as amended (22 U.S.C. 2601 *et seq.*).

Diplomat in Residence Program of the Foreign Service Institute Under Title VII of the Foreign Service Act of 1946, as amended (22 U.S.C. 1041 *et seq.*).

Assignments under section 576 of the Foreign Service Act of 1946, as amended (22 U.S.C. 966).

APPENDIX B TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE UNITED STATES INTERNATIONAL COMMUNICATION AGENCY SUBJECT TO AGE DISCRIMINATION REGULATIONS

Educational and Cultural Exchanges under the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 1431–1479).

APPENDIX C TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY AID SUBJECT TO AGE DISCRIMINATION REGULATIONS

1. Grants to research and educational institutions in the United States to strengthen their capacity to develop and carry out programs concerned with the economic and social development of developing countries. (Section 122(d), Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151(d)).

2. Grants to land grant and other qualified agricultural universities and colleges in the United States to develop their capabilities to assist developing countries in agricultural teaching, research and extension services. (Section 297, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2220(b)).

3. Grants to private and voluntary agencies, non-profit organization, educational institutions, and other qualified organizations for programs in the United States to promote the economic and social development of developing countries. (Sections 103–106, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151a–2151d).

PART 219—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY INTERNATIONAL DEVELOPMENT COOPERATION AGENCY, AGENCY FOR INTERNATIONAL DEVELOPMENT

Sec.

219.101 Purpose.
219.102 Application.
219.103 Definitions.
219.104–219.109 [Reserved]
219.110 Self-evaluation.
219.111 Notice.

219.112–219.129 [Reserved]
219.130 General prohibitions against discrimination.
219.131–219.139 [Reserved]
219.140 Employment.
219.141–219.148 [Reserved]
219.149 Program accessibility: Discrimination prohibited.
219.150 Program accessibility: Existing facilities.
219.151 Program accessibility: New construction and alterations.
219.152–219.159 [Reserved]
219.160 Communications.
219.161–219.169 [Reserved]
219.170 Compliance procedures.
219.171–219.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4576, Feb. 5, 1986, unless otherwise noted.

§ 219.101 Purpose.

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

§ 219.102 Application.

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

§ 219.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

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

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

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

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

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

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

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

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or

physical impairment that substantially limits one or more major life activities.

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

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

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

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

Qualified handicapped person means—

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

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

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 219.140.

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

[51 FR 4576, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§ 219.104–219.109 [Reserved]

§ 219.110 Self-evaluation.

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

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

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

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

(2) A description of any modifications made.

§ 219.111 Notice.

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

§§ 219.112–219.129 [Reserved]

§ 219.130 General prohibitions against discrimination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§§ 219.131–219.139 [Reserved]

§ 219.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 219.141–219.148 [Reserved]

§ 219.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 219.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 219.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the

program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

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

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 219.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is nor required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

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

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

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

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

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

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

[51 FR 4576, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§ 219.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency

shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 219.152–219.159 [Reserved]

§ 219.160 Communications.

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

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

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

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

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

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

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

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 219.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 219.161–219.169 [Reserved]

§ 219.170 Compliance procedures.

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

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

(c) Director, Office of Equal Opportunity Programs shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Office of Equal Opportunity Programs, Agency for International Development, International Development Cooperation Agency, Room 1224, SA–1, Washington, DC.

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

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

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

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

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §219.170(g). The agency may extend this time for good cause.

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

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

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

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

[51 FR 4576, Feb. 5, 1986, as amended at 51 FR 4576, Feb. 5, 1986]

§§ 219.171–219.999 [Reserved]

PART 221—ISRAEL LOAN GUARANTEE STANDARD TERMS AND CONDITIONS

Subpart A—Definitions

Sec.
221.01 Definitions.

Subpart B—The Guarantee

221.11 The Guarantee.
221.12 Guarantee eligibility.
221.13 Non-impairment of the Guarantee.
221.14 Transferability of Guarantee; Note Register.
221.15 Fiscal Agent obligations.

Subpart C—Procedure for Obtaining Compensation

221.21 Event of Default; Application for Compensation; payment.
221.22 No acceleration of Eligible Notes.
221.23 Payment to A.I.D. of excess amounts received by a Noteholder.
221.24 Subrogation of A.I.D.

Subpart D—Covenants

221.31 Prosecution of claims.
221.32 Change in agreements.

Subpart E—Administration

221.41 Arbitration.
221.42 Notice.
221.43 Governing law.
APPENDIX A TO PART 221—APPLICATION FOR COMPENSATION

AUTHORITY: 22 U.S.C. 2186.

SOURCE: 58 FR 14148, Mar. 16, 1993, unless otherwise noted.

Subpart A—Definitions

§221.01 Definitions.

Wherever used in these standard terms and conditions:

(a) *A.I.D.* means the United States Agency for International Development or its successor with respect to the guarantee authorities contained in title III, chapter 2 of part I of the Foreign Assistance Act of 1961, as amended (the ''Act'').

(b) *Eligible Note(s)* means [a] Notes[s] meeting the eligibility criteria set out in §221.12 hereof.

(c) *Noteholder* means the owner of an Eligible Note who is registered as such

on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

(d) *Borrower* means the Government of Israel, on behalf of the State of Israel.

(e) *Defaulted payment* means, as of any date,

(1) In respect of any current coupon Eligible Note, any interest amount and/or principal amount not paid when due, and

(2) In respect of any zero-coupon Eligible Note, any maturity amount not paid when due.

(f) *Further guaranteed payments* means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

(g) *Loss of investment* respecting any Eligible Note means an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

(h) *Application for compensation* means an executed application in the form of appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with A.I.D. pursuant to § 221.21 of this part.

(i) *Applicant* means a Noteholder who files an Application for Compensation with A.I.D., either directly or through the Fiscal Agent acting on behalf of a Noteholder.

(j) *Date of application* means the effective date of an Application for Compensation filed with A.I.D. pursuant to § 221.21 of this part.

(k) *Business day* means any day other than a day on which banks in New York, New York are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

(l) *Guarantee payment date* means a Business Day not more than three (3) Business Days after the related Date of Application.

(m) *Person* means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

Subpart B—The Guarantee

§ 221.11 The Guarantee.

Subject to these terms and conditions, the United States of America, acting through A.I.D., agrees to pay to, or upon the instructions of, any Noteholder on each Guarantee Payment Date compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder, for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder.

This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 221.12 Guarantee eligibility.

(a) Eligible Notes only may be guaranteed hereunder. Notes in order to achieve Eligible Note status must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower; and they must contain a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of A.I.D. by either a manual signature or a facsimile signature of an authorized representative of A.I.D., together with a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by A.I.D. in a Fiscal Agency Agreement (the ''Fiscal Agent'').

(b) A.I.D. shall designate, in a certificate delivered to the Fiscal Agent, the Person(s) whose signature shall be binding on A.I.D. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on A.I.D. that a Note has been duly executed on behalf of the Borrower and delivered.

§ 221.13 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall not be affected or impaired by any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, A.I.D., the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee. This non-impairment of the guarantee provision shall not, however, be operative with respect to any amount with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder, is responsible or of which it had knowledge at the time it became a Noteholder.

§ 221.14 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. A.I.D. shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and A.I.D. shall not be affected by notice to the contrary.

§ 221.15 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by A.I.D. as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

Subpart C—Procedure for Obtaining Compensation

§ 221.21 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with A.I.D. an Application for Compensation in the form provided in exhibit A. A.I.D. shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than three (3) Business Days after the Date of Application. In the event that A.I.D. receives any other notice of an Event of Default, A.I.D. may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with A.I.D. an Application for Compensation in respect of such amount.

§ 221.22 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration by A.I.D., the Noteholder or any other party.

§ 221.23 Payment to A.I.D. of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of A.I.D. paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to A.I.D.

§ 221.24 Subrogation of A.I.D.

In the event of payment by A.I.D. to a Noteholder under this Guarantee, A.I.D. shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

Subpart D—Covenants

§ 221.31 Prosecution of claims.

After payment by A.I.D. to an Applicant pursuant to § 221.21, A.I.D. shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and A.I.D. shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 221.32 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of A.I.D.

Subpart E—Administration

§ 221.41 Arbitration.

Any controversy or claim between A.I.D. and any noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 221.42 Notice.

Any communication to A.I.D. pursuant to this Guarantee shall be in writing in the English language, shall refer to the Israel Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by A.I.D. at the Office of Housing and Urban Programs, Bureau for Private Enterprise, Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 221.43 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 221—APPLICATION FOR COMPENSATION

[_____]

Agency for International Development, International Development Cooperation Agency, Washington, DC 20523.

Ref: Guarantee dated as of _____, 19___:

Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments, as defined in § 221.01(f) of the Standard Terms and Conditions of the above-mentioned Guarantee) [(consisting of $_____ maturity amount and $_____ in Further Guaranteed Payments, as defined in § 221.01(f) of the Standard Terms and Conditions of the above-mentioned Guarantee)][1] was due on _____, 19 ___, on $_____ principal [maturity][1] amount of Notes held by the undersigned of the Government of Israel, on behalf of the State of Israel (the ''Borrower''). Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 221.21 of said Guarantee, for payment of $_____, representing $_____, the principal amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $_____, the interest amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid, [$_____, the maturity amount of such Note that was due and payable on _____ and that remains unpaid][2] and $_____ in Further Guaranteed Payments,[3] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date

[1] Alternate language for zero-coupon Eligible Notes.

[2] Alternate language for zero-coupon Eligible Notes.

[3] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

payment in full is made by you pursuant to said Guarantee, at the rate of _____% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder.]

[Name of Applicant]

By _____
Name _____
Title _____
Dated _____

PART 223—ADMINISTRATIVE ENFORCEMENT PROCEDURES OF POST-EMPLOYMENT RESTRICTIONS

Sec.
223.1 General.
223.2 Report of violations.
223.3 Initiation of proceeding.
223.4 Examiner.
223.5 Agency representative.
223.6 Time, date and place of hearing.
223.7 Rights of parties at hearing.
223.8 Initial decision.
223.9 Appeal.
223.10 Final decision.
223.11 Appropriate action.

AUTHORITY: 18 U.S.C. 207.

SOURCE: 46 FR 55957, Nov. 13, 1981, unless otherwise noted.

§ 223.1 General.

The following procedures are hereby established with respect to the administrative enforcement of restrictions on post-employment activities (18 U.S.C. 207 (a), (b) or (c)) and implementing regulations published by the Office of Government Ethics (5 CFR part 737).

§ 223.2 Report of violations.

On receipt of information regarding a possible violation of the statutory or regulatory post-employment restrictions by a former employee and after determining that such information does not appear to be frivolous, the General Counsel shall provide such information to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. Any investigation or administrative action shall be coordinated with the Department of Justice to avoid prejudicing possible criminal proceedings. If the Department of Justice informs the Agency that it does not intend to institute criminal proceedings, such coordination shall no longer be required and the General Counsel is free to decide whether to pursue administrative action.

§ 223.3 Initiation of proceeding.

Whenever the General Counsel has reasonable cause to believe that a former Government employee has violated the statutory or regulatory post-employment restrictions, he or she shall initiate an administrative action by providing the former Government employee with written notice of intention to institute administrative action. Notice must include:

(a) A statement of allegations and the basis thereof sufficiently detailed to enable the former Government employee to prepare an adequate defense;

(b) Notification of the right to respond to the allegations in writing and/or to request a hearing, together with an explanation of the method by which a hearing may be requested; and

(c) A statement that, in the absence of a request for a hearing, the General Counsel shall issue a final decision based upon the evidence gathered to date, including any written reply made by the former Government employee.

§ 223.4 Examiner.

When a former Government employee after receiving adequate notice requests a hearing, a presiding official (hereinafter referred to as ''examiner'') shall be appointed by the Administrator to make an initial decision. The examiner shall be a responsible person who is impartial and who has not participated in any manner in the decision to initiate the proceeding. The hearing officer shall be an individual with suitable experience and training to conduct the hearing, reach a determination and render an initial decision in an equitable manner.

§ 223.5 Agency representative.

The General Counsel shall appoint an agency representative to present evidence and otherwise participate in the hearing.

§ 223.6 Time, date and place of hearing.

The examiner shall establish a reasonable time, date and place to conduct

the hearing. In establishing a date, the examiner shall give due regard to the former employee's need for:

(a) Adequate time to prepare a defense properly, and

(b) An expeditious resolution of allegations that may be damaging to his or her reputation.

§ 223.7 Rights of parties at hearing.

A hearing shall include, at a minimum, the following rights for both parties:

(a) To represent oneself or to be represented by counsel;

(b) To examine or cross-examine witnesses;

(c) To submit evidence (including the use of interrogatories);

(d) To present oral arguments; and

(e) To receive a transcript of recording of the proceedings on request.

In any hearing, the agency has the burden of proof and must establish substantial evidence of a violation.

§ 223.8 Initial decision.

The examiner shall issue an initial decision based exclusively on matters of record in the proceedings and shall set forth all findings of fact and conclusions of law relevant to the matters at issue.

§ 223.9 Appeal.

Within twenty days of the date of initial decision, either party may appeal the decision to the Administrator. The opposing party shall have ten days after receipt of a copy of the appeal to reply.

§ 223.10 Final decision.

(a) In cases where the former employee failed to request a hearing after receiving adequate notice, the General Counsel shall decide the matter on its merits based upon the evidence gathered to date, including any written reply of the former employee.

(b) In cases of appeal under § 223.9, the Administrator shall accept, reject or modify the initial decision based solely on the record of the proceedings or those portions cited by the parties to limit the issues.

§ 223.11 Appropriate action.

The Administrator may take appropriate action in the case of any individual who is found in violation of the statutory or regulatory post employment restrictions after a final decision by:

(a) Prohibiting the individual from making, on behalf of any other person (except the United States), any formal or informal appearance before, or with the intent to influence, any oral or written communication to, the Agency on any matter of business for a period not to exceed five years, which may be accomplished by directing Agency employees to refuse to participate in such appearance or to accept any such communication; and

(b) Taking other appropriate disciplinary action.

PART 224—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

224.1 Basis and purpose.
224.2 Definitions.
224.3 Basis for civil penalties and assessments.
224.4 Investigation.
224.5 Review by the reviewing official.
224.6 Prerequisites for issuing a complaint.
224.7 Complaint.
224.8 Service of complaint.
224.9 Answer.
224.10 Default upon failure to file an answer.
224.11 Referral of complaint and answer to the ALJ.
224.12 Notice of hearing.
224.13 Parties to the hearing.
224.14 Separation of functions.
224.15 Ex parte contacts.
224.16 Disqualification of reviewing official or ALJ.
224.17 Rights of parties.
224.18 Authority of the ALJ.
224.19 Prehearing conferences.
224.20 Disclosure of documents.
224.21 Discovery.
224.22 Exchange of witness lists, statements, and exhibits.
224.23 Subpoenas for attendance at hearing.
224.24 Protective order.
224.25 Fees.
224.26 Form, filing and service of papers.
224.27 Computation of time.
224.28 Motions.
224.29 Sanctions.
224.30 The hearing and burden of proof.

224.31 Determining the amount of penalties and assessments.
224.32 Location of hearing.
224.33 Witnesses.
224.34 Evidence.
224.35 The record.
224.36 Post-hearing briefs.
224.37 Initial decision.
224.38 Reconsideration of initial decision.
224.39 Appeal to A.I.D. Administrator.
224.40 Stays ordered by the Department of Justice.
224.41 Stay pending appeal.
224.42 Judicial review.
224.43 Collection of civil penalties and assessments.
224.44 Right to administrative offset.
224.45 Deposit in Treasury of United States.
224.46 Compromise or settlement.
224.47 Limitations.

AUTHORITY: 22 U.S.C. 2381; 31 U.S.C. 3801–3812.

SOURCE: 52 FR 45313, Nov. 27, 1987, unless otherwise noted.

§ 224.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the Statute requires each authority head to promulgate regulations necessary to implement to 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 Agency for International Development or to its agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 224.2 Definitions.

A.I.D. means the Agency for International Development.

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.

Benefit means, in the context of ''statement,'' anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to A.I.D. for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from A.I.D. or to a party to a contract with A.I.D.—

(1) For property or services if the United States—

(i) Provided such property or services;

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

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

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

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

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

(c) Made to A.I.D. which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 224.7.

Defendant means any person alleged in a complaint under § 224.7 to be liable for a civil penalty or assessment under § 224.3.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 224.10 or § 224.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General for A.I.D. or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization and includes the plural of that term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or the District of Columbia or the Commonwealth of Puerto Rico.

Reviewing official means the General Counsel of A.I.D. or his designee who is:

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of A.I.D. in which the investigating official is employed; and

(c) Is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, A.I.D., 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.

§ 224.3 Basis for civil penalties and assessments.

(a) *Claims* (1) Any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

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

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

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

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

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

(3) A claim shall be considered made to A.I.D., a 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 A.I.D. or such recipient or party.

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

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

sustained by the Government because of such claim.

(b) *Statements.* (1) Any person who makes a written statement that—

(i) The person knows or has reason to know—

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

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement had a duty to include in such statement; and

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

shall be subject, in addition to any other remedy and may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

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

(3) A statement shall be considered made to A.I.D. 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 A.I.D.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 224.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued, and shall identify the records of documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that 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 Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

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

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

§ 224.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 224.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 224.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 224.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

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

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 224.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

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

§ 224.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 224.7 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 § 224.3(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 § 224.3(a) does not exceed $150,000.

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

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 224.7 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 § 224.8.

(b) The complaint shall state:

(1) 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 § 224.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 224.8 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 is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

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

(3) Written acknowledgment of receipt by the defendant or his representative.

§ 224.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

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

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 224.11. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 224.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 224.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 224.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 224.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 224.38.

(h) The defendant may appeal to the A.I.D. Administrator the decision denying a motion to reopen by filing a notice of appeal with the A.I.D. Administrator within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the A.I.D. Administrator decides the issue.

(i) If the defendant files a timely notice of appeal with the A.I.D. Administrator, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(j) The A.I.D. Administrator shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the A.I.D. Administrator decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the A.I.D. Administrator shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the A.I.D. Administrator decides that the defendant's failure to file a timely answer is not excused, the A.I.D. Administrator shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the A.I.D. Administrator issues such decision.

§ 224.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 224.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 224.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include:

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

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

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

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

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

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

§ 224.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and A.I.D.

(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.

§ 224.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of A.I.D. 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 A.I.D. Administrator, except as a witness or representative in public proceedings; or

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

(b) The ALJ shall not be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in A.I.D., including in the offices of either the investigating official or the reviewing official.

§ 224.15 Ex parte contacts.

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

§ 224.16 Disqualification of reviewing official or ALJ.

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

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

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

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

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that the reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

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

(3) If the ALJ denies a motion to disqualify, the A.I.D. Administrator may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 224.17 Rights of parties.

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

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

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

(c) Conduct discovery;

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

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

(f) Present and cross-examine witnesses;

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

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

§ 224.18 Authority of the ALJ.

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

(b) The ALJ may:

(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) Adminster oaths and affirmations;

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

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

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

(9) Examine witnesses;

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

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

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

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

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

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 224.19 Prehearing conferences.

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

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

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

(1) Simplification of the issues;

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

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

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

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

(6) Limitation of the number of witnesses;

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

(8) Discovery;

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

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

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

§ 224.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendent may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 224.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 224.5 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 with the ALJ following the filing of an answer pursuant to § 224.9.

§ 224.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and § 224.22 and § 224.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

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

(d) *Motions for discovery*. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service a party may file an opposition to the motion and/or a motion for protective order as provided in § 224.24.

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

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

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

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

(5) The ALJ may grant discovery subject to a protective order under § 224.24.

(e) *Deposition*. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 224.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

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

(f) Each party shall bear its own costs of discovery.

§ 224.22 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior

statements of proposed witnesses, 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 § 224.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

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

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

§ 224.23 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.

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

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

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

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 224.8. A subpoena on a party or upon an individual under the control of a party may be served by first-class mail.

(f) A party or individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 224.24 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 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

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

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

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

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

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

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

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

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

§ 224.25 Fees.

The party requesting a subpoena shall pay the cost of the fee and mileage of any witness subpoenaed in the

amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of A.I.D., a check for witness fees and mileage need not accompany the subpoena.

§ 224.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

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

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

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 224.8, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 224.27 Computation of time.

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

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

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

§ 224.28 Motions.

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

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

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

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

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 224.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

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

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

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

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section,

shall reasonably relate to the severity and nature of the failure or misconduct.

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

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

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

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

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 224.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 224.3, and if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) A.I.D. shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 224.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the A.I.D. Administrator, 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 A.I.D. Administrator in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the 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 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 shall be construed to limit the ALJ or the A.I.D. Administrator from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 224.32 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 shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 224.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 224.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 224.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence, where appropriate, e g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from 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, all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the A.I.D. Administrator.

(c) The record of the hearing may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing briefs, at a time not exceeding 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 224.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portion thereof, violate § 224.3;

(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 § 224.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the A.I.D. Administrator. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the A.I.D. Administrator, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 224.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the A.I.D. Administrator in accordance with § 224.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the A.I.D. Administrator in accordance with § 224.39.

§ 224.39 Appeal to A.I.D. Administrator.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the A.I.D. Administrator by filing a notice of appeal with the A.I.D. Administrator in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 224.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The A.I.D. Administrator may extend the initial 30 day period for an additional 30 days if the defendant files with the A.I.D. Administrator a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the A.I.D. Administrator, and the time for filing motions for reconsideration under § 224.38 has expired, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the A.I.D. Administrator.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the A.I.D. Administrator shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the A.I.D. Administrator 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 A.I.D. Administrator shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The A.I.D. Administrator may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in an initial decision.

(k) The A.I.D. Administrator shall promptly serve each party to the appeal with a copy of his/her decision and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which

the A.I.D. Administrator serves the defendant with a copy of his/her decision, a determination that a defendant is liable under § 224.3 is final and is not subject to judicial review.

§ 224.40 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 A.I.D. Administrator 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 A.I.D. Administrator shall stay the process immediately. The A.I.D. Administrator may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 224.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the A.I.D. Administrator.

(b) No administrative stay is available following a final decision of the A.I.D. Administrator.

§ 224.42 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 A.I.D. Administrator imposing penalties or assessments under this part and specifies the procedures for such review.

§ 224.43 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.

§ 224.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 224.42 or § 224.43, or any amount agreed upon in a compromise or settlement under § 224.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under the subsection against a refund of an overpayment of Federal taxes, then or later owning by the United States to the defendant.

§ 224.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 224.46 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 A.I.D. Administrator 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 pendency of any review under § 224.42 or during the pendency of any action to collect penalties and assessments under § 224.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 224.42 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 A.I.D. Administrator, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the A.I.D. Administrator, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 224.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 224.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice

under § 224.10(b) shall be deemed notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 225—PROTECTION OF HUMAN SUBJECTS

Sec.

225.101 To what does this policy apply?
225.102 Definitions.
225.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.
225.104–225.106 [Reserved]
225.107 IRB membership.
225.108 IRB functions and operations.
225.109 IRB review of research.
225.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.
225.111 Criteria for IRB approval of research.
225.112 Review by institution.
225.113 Suspension or termination of IRB approval of research.
225.114 Cooperative research.
225.115 IRB records.
225.116 General requirements for informed consent.
225.117 Documentation of informed consent.
225.118 Applications and proposals lacking definite plans for involvement of human subjects.
225.119 Research undertaken without the intention of involving human subjects.
225.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.
225.121 [Reserved]
225.122 Use of Federal funds.
225.123 Early termination of research support: Evaluation of applications and proposals.
225.124 Conditions.

AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 300v–1(b), unless otherwise noted.

SOURCE: 56 FR 28012, 28020, June 18, 1991, unless otherwise noted.

§ 225.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(1) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in § 225.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a federal department or agency but is subject to regulation as defined in § 225.102(e) must be reviewed and approved, in compliance with §§ 225.101, 225.102, and §§ 225.107 through 225.117 of this policy, by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic,

aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or (ii) federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the

Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures.[1]

[56 FR 28012, 28020, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.102 Definitions.

(a) *Department or agency head* means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including federal, state, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains—

(1) data through intervention or interaction with the individual, or

(2) identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. ''Private information'' includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (*i.e.*, the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

[1] Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A-D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR part 46.101(b) do not apply to research involving prisoners, subpart C. The exemption at 45 CFR part 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

§ 225.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for federalwide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, HHS, or any successor office.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under § 225.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with § 225.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Human Research Protections, HHS, or any successor office.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to

the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under § 225.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by § 225.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by § 225.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

(Approved by the Office of Management and Budget under control number 0990–0260)

[56 FR 28012, 28020, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

§§ 225.104–225.106 [Reserved]

§ 225.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews

research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 225.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in § 225.103(b)(4) and, to the extent required by, § 225.103(b)(5).

(b) Except when an expedited review procedure is used (see § 225.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

§ 225.109 IRB Review of Research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with § 225.116. The IRB may require that information, in addition to that specifically mentioned in § 225.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 225.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

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[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with

other departments and agencies, through periodic republication by the Secretary, HHS, in the FEDERAL REGISTER. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in § 225.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by § 225.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 225.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 225.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 225.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

§ 225.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described is § 225.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in § 225.103(b)(4) and § 225.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by § 225.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

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[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language

through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

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[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 225.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 225.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

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[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 225.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon

completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under § 225.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

§ 225.119 Research undertaken without the intention of involving human subjects.

In the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

§ 225.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.

The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

§ 225.121 [Reserved]

§ 225.122 Use of Federal funds.

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§ 225.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragarph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§ 225.124 Conditions.

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

PART 226—ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON-GOVERNMENTAL ORGANIZATIONS

Subpart A—General

Sec.
226.1 Purpose and applicability.
226.2 Definitions.
226.3 Effect on other issuances.
226.4 Deviations.
226.5 Subawards.

Subpart B—Pre-award Requirements

226.10 Purpose.
226.11 Pre-award policies.
226.12 Forms for applying for Federal assistance.
226.13 Debarment and suspension.
226.14 Special award conditions.
226.15 Metric system of measurement.
226.16 Resource Conservation and Recovery Act.
226.17 Certifications and representations.

Subpart C—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

226.20 Purpose of financial and program management.
226.21 Standards for financial management systems.
226.22 Payment.
226.23 Cost sharing or matching.
226.24 Program income.
226.25 Revision of budget and program plans.
226.26 Non-Federal audits.
226.27 Allowable costs.
226.28 Period of availability of funds.

PROPERTY STANDARDS

226.30 Purpose of property standards.
226.31 Insurance coverage.
226.32 Real property.
226.33 Federally-owned and exempt property.
226.34 Equipment.
226.35 Supplies and other expendable equipment.
226.36 Intangible property.
226.37 Property trust relationship.

PROCUREMENT STANDARDS

226.40 Purpose of procurement standards.
226.41 Recipient responsibilities.
226.42 Codes of conduct.
226.43 Competition.
226.44 Procurement procedures.
226.45 Cost and price analysis.
226.46 Procurement records.
226.47 Contract administration.
226.48 Contract provisions.
226.49 USAID-Specific procurement requirements.

REPORTS AND RECORDS

226.50 Purpose of reports and records.
226.51 Monitoring and reporting program performance.
226.52 Financial reporting.
226.53 Retention and access requirements for records.

SUSPENSION, TERMINATION AND ENFORCEMENT

226.60 Purpose of suspension, termination and enforcement.
226.61 Suspension and termination.
226.62 Enforcement.

Subpart D—After-the-Award Requirements

226.70 Purpose.
226.71 Closeout procedures.
226.72 Subsequent adjustments and continuing responsibilities.
226.73 Collection of amounts due.

Subpart E—Special Provisions for Awards to Commercial Organizations

226.80 Scope of subpart.
226.81 Prohibition against profit.
226.82 Program income.

Subpart F—Miscellaneous

226.90 Disputes.
226.91 Marking.

Subpart G—USAID-Specific Requirements

226.1001 Eligibility rules for goods and services. [Reserved]
226.1002 Local cost financing. [Reserved]
226.1003 Air transportation. [Reserved]
226.1004 Ocean shipment of goods. [Reserved]

APPENDIX A TO PART 226—CONTRACT PROVISIONS

AUTHORITY: 22 U.S.C. 2381(a) and 2401.

SOURCE: 60 FR 3744, Jan. 19, 1995, unless otherwise noted.

Subpart A—General

§ 226.1 Purpose and applicability.

Except as otherwise authorized by statute, this part establishes uniform administrative requirements for grants and cooperative agreements awarded by USAID to U.S. institutions of higher education, hospitals, and other non-profit organizations, and to U.S. commercial organizations; and to subawards thereunder. USAID shall not impose additional or inconsistent requirements, except as provided in Sections 226.4, and 226.14, or unless specifically required by Federal statute or executive order. Non-profit and commercial organizations that implement Federal programs for the States are also subject to State requirements. This part shall be administered in compliance with the standards set forth in

part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[60 FR 3744, Jan. 19, 1995, as amended at 69 FR 61724, Oct. 20, 2004]

§ 226.2 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

(1) Earnings during a given period from services performed by the recipient, and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Activity mean a set of actions through which inputs—such as commodities, technical assistance, training, or resource transfers—are mobilized to produce specific outputs, such as vaccinations given, schools built, microenterprise loans issued, or policies changed. Activities are undertaken to achieve objectives that have been formally approved and notified to Congress.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Agreement Officer means a person with the authority to enter into, administer, terminate and/or closeout assistance agreements subject to this part, and make related determinations and findings on behalf of USAID. An Agreement Officer can only act within the scope of a duly authorized warrant or other valid delegation of authority. The term ''Agreement Officer'' includes persons warranted as ''Grant Officers.'' It also includes certain authorized representatives of the Agreement Officer acting within the limits of their authority as delegated by the Agreement Officer.

Apparent successful applicant(s) means the applicant(s) for USAID funding recommended for an award after technical evaluation, but who has not yet been awarded a grant, cooperative agreement or other assistance award by the Agreement Officer. Apparent Successful Applicants will be requested by the Agreement Officer to submit a Branding Strategy and Marking Plan. Apparent Successful Applicant status confers no right and constitutes no USAID commitment to an award, which still must be obligated by the Agreement Officer.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants, cooperative agreements and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: Technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

Branding strategy means a strategy the Apparent Successful Applicant submits at the specific request of a USAID Agreement Officer after technical evaluation of an application for USAID funding, describing how the program, project, or activity is named and positioned, as well as how it is promoted and communicated to beneficiaries and cooperating country citizens. It identifies all donors and explains how they

will be acknowledged. A Branding Strategy is required even if a Presumptive Exception is approved in the Marking Plan.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which the Agreement Officer determines that all applicable administrative actions and all required work of the award have been completed by the recipient and USAID.

Commodities mean any material, article, supply, goods or equipment, excluding recipient offices, vehicles, and non-deliverable items for recipient's internal use in administration of the USAID funded grant, cooperative agreement, or other agreement or subagreement.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which USAID sponsorship ends.

Disallowed costs means those charges to an award that the USAID Agreement Officer determines to be unallowable, in accordance with the applicable Federal costs principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of USAID that, as determined by the head of the Agency, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal awarding agency means the Federal agency that provides an award to the recipient.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

Marking plan means a plan that the Apparent Successful Applicant submits at the specific request of a USAID Agreement Officer after technical evaluation of an application for USAID funding, detailing the public communications, commodities, and program materials and other items that will visibly bear the USAID Identity. Recipients may request approval of Presumptive Exceptions to marking requirements in the Marking Plan.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applies and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Principal officers means the most senior officer in a USAID Operating Unit in the field, e.g., USAID Mission Director or USAID Representative. For global programs managed from Washington but executed across many countries such as disaster relief and assistance to internally displaced persons, humanitarian emergencies or immediate post conflict and political crisis response, the cognizant Principal Officer may be an Office Director, for example, the Directors of USAID/W/Office of Foreign Disaster Assistance and Office of Transition Initiatives. For non-presence countries, the cognizant Principal Officer is the Senior USAID officer in a regional USAID Operating Unit responsible for the non-presence country, or in the absence of such a responsible operating unit, the Principle U.S Diplomatic Officer in the non-presence country exercising delegated authority from USAID.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §§226.24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in USAID regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Programs mean an organized set of activities and allocation of resources directed toward a common purpose, objective, or goal undertaken or proposed by an organization to carry out the responsibilities assigned to it.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Projects include all the marginal costs of inputs (including the proposed investment) technically required to produce a discrete marketable output or a desired result (for example, services from a fully functional water/sewage treatment facility).

Property means, unless otherwise stated, real property, equipment, supplies, intangible property and debt instruments.

Public communications are documents and messages intended for distribution to audiences external to the recipient's organization. They include, but are not limited to, correspondence, publications, studies, reports, audio visual productions, and other informational products; applications, forms, press and

promotional materials used in connection with USAID funded programs, projects or activities, including signage and plaques; Web sites/Internet activities; and events such as training courses, conferences, seminars, press conferences and the like.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving a grant or cooperative agreement directly from USAID to carry out a project or program. The term includes the following types of U.S. organizations: public and private institutions of higher education; public and private hospitals; quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers; and commercial organizations. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of ''award'' in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

Suspension means an action by USAID that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award. Suspension of an award is a separate action from suspension under USAID regulations implementing E.O.s 12549 and 12689, ''Debarment and Suspension.'' See 22 CFR Part 208.

Technical assistance means the provision of funds, goods, services or other foreign assistance such as loan guarantees or food for work, to developing countries and other USAID recipients, and through such recipients to subrecipients, in direct support of a development objective—as opposed to the internal management of the foreign assistance program. This definition is applicable only to 22 CFR 226.91.

Termination means the cancellation of USAID sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third

parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by USAID that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

USAID means the United States Agency for International Development.

USAID Identity (Identity) means the official marking for the United States Agency for International Development (USAID) comprised of the USAID logo or seal and new brandmark with the tagline that clearly communicates our assistance is ''from the American people.'' The USAID Identity is available on the USAID Web site at *http://www.usaid.gov/branding* and is provided without royalty, license or other fee to recipients of USAID funded grants or cooperative agreements or other assistance awards.

USAID Partner Co-Branding Guide is a USAID produced publication that is provided free of charge to recipients of USAID funded grants or cooperative agreements or other assistance awards or subawards, that details recommended marking practices and provides examples of USAID funded programs, projects, activities, public communications, and commodities marked with the USAID Identity.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

[60 FR 3744, Jan. 19, 1995, as amended at 70 FR 50189, Aug. 26, 2005]

EDITORIAL NOTE: At 70 FR 50189, Aug. 26, 2005, § 226.2 was amended by adding a definition of *Subrecipient*, effective Jan. 2, 2006. However, § 226.2 already includes a definition of *Subrecipient*, so the amendment could not be incorporated.

§ 226.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision § 226.4.

§ 226.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances. USAID may apply more restrictive requirements to a class of recipients when approved by OMB. USAID may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the USAID Deputy Assistant Administrator for Management.

§ 226.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients if such subrecipients are organizations which, if receiving awards directly from USAID, would fall within the definition of recipients. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, ''Uniform Administrative Requirements for Grants and Cooperative

Agreements to State and Local Governments,'' as amended.

Subpart B—Pre-award Requirements

§ 226.10 Purpose.

Sections 226.11 through 226.17 prescribe forms and instructions and other pre-award matters to be used in applying for USAID awards.

§ 226.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance USAID shall decide on the appropriate award instrument (*i.e.*, grant cooperative agreement or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* USAID shall notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 226.12 Forms for applying for Federal assistance.

(a) USAID shall comply with the applicable report clearance requirements of 5 CFR part 1320, ''Controlling Paperwork Burdens on the Public,'' with regard to all forms used in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by USAID.

(c) For Federal programs covered by E.O. 12372, ''Intergovernmental Review of Federal Programs,'' the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the Catalog of Federal Domestic Assistance. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Federal awarding agencies that do not use the SF–424 form should indicate whether the application is subject to review by the State under E.O. 12372.

§ 226.13 Debarment and suspension.

USAID and recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.s 12549 and 12689, ''Debarment and Suspension,'' 22 CFR part 208. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 226.14 Special award conditions.

If an applicant or recipient: Has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this part, has not conformed to the terms and conditions of a previous award, or is not otherwise responsible, the USAID Agreement Officer may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: The nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions will be promptly removed once the conditions that prompted them have been corrected.

§ 226.15 Metric system of measurement.

(a) The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce.

(b) Wherever measurements are required or authorized, they shall be made, computed, and recorded in metric system units of measurement, unless otherwise authorized by the agreement officer in writing when it has been found that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets. Where the metric system is not the predominant standard for a particular application, measurements may be expressed in both the metric and the traditional equivalent units, provided the metric units are listed first.

§ 226.16 Resource Conservation and Recovery Act.

Under the Act, any U.S. State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with Section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education and hospitals that receive direct Federal awards or other Federal funds shall given preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 226.17 Certifications and representations.

Unless prohibited by statute or codified regulation, USAID may at some future date, allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart C—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 226.20 Purpose of financial and program management.

Sections 226.21 through 226.28 prescribe standards for financial management systems, methods for making payments and rules for: Satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of costs and establishing funds availability.

§ 226.21 Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 226.52. While USAID requires reporting on an accrual basis, if the recipient maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to all Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever

appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records, including cost accounting records, that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, USAID, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) USAID may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

§ 226.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients will be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(ii) financial management systems that meet the standards for fund control and accountability as established in Section 226.21.

(2) Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances will be consolidated to cover anticipated cash needs for all awards made by USAID to the recipient.

(1) Advance payment mechanisms include, but are not limited to, USAID Letter of Credit, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients will be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special USAID instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. USAID may also use this method on any construction agreement, or if the major portion of the construction

project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, USAID shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit a request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and USAID has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the USAID Agreement Officer may provide cash on a working capital advance basis. Under this procedure, USAID shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle, normally 30 days. Thereafter, USAID shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment will not be used for recipients unwilling or unable to provide timely advances to their subrecipients to meet the subrecipients' actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments. This paragraph is not applicable to such earnings which are generated as foreign currencies.

(h) Unless otherwise required by statute, USAID will not withhold payments for proper charges made by recipients at any time during the project period unless:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements, or

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Managing Federal Credit Programs.'' Under such conditions, USAID may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, or as otherwise provided in USAID regulations or implementing guidance governing endowment funds, USAID does not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless:

(1) The recipient receives less than $120,000 in Federal awards per year,

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances, or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) Except as otherwise provided in the terms and conditions of the award in accordance with USAID regulations or other implementing guidance, for those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense.

State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. USAID shall not require more than an original and two copies of these forms.

(1) The SF–270, Request for Advance or Reimbursement, is the standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. USAID has the option of using this form for construction programs in lieu of the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) The SF–271, Outlay Report and Request for Reimbursement for Construction Programs, is the standard form to be used for requesting reimbursement for construction programs. However, USAID may substitute the SF–270 when it determines that it provides adequate information to meet Federal needs.

§ 226.23 Cost sharing or matching.

(a) All contributions, including cash and third party inkind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If USAID authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation, or

(2) The current fair market value. However, when there is sufficient justification, the USAID Agreement Officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organizations. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies.

Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if:

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching, or

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the USAID Agreement Officer has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees,

(2) The basis for determining the valuation for personal services, material, equipment, buildings and land shall be documented.

§ 226.24 Program income.

(a) Recipients shall apply the standards set forth in this section to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with USAID regulations, other implementing guidance, or the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed by USAID and the recipient to the project or program, and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When the agreement authorizes the disposition of program income as described in paragraph (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) If the terms and conditions of the award do not specify how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the terms and conditions of the award provide another alternative, or the recipient is subject to special award conditions, as indicated in § 226.14. Recipients which are commercial organizations may not apply paragraph (b)(1) of this section, in accordance with § 226.82 of this part.

(e) Unless the terms and conditions of the award provide otherwise, recipients shall have no obligation to the

Federal Government regarding program income earned after the end of the project period.

(f) Costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award and they comply with the cost principles applicable to the award funds.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 226.30 through 226.37).

(h) Unless the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 226.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon USAID requirements as reflected in the terms and conditions of the agreement. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the USAID Agreement Officer for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

(6) The inclusion, unless waived in the agreement by USAID, of costs that require prior approval in accordance with OMB Circular A–21, ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122, ''Cost Principles for Non-Profit Organizations,'' or 45 CFR part 74, Appendix E, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved budget of the award, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) USAID may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122, except for requirements listed in paragraphs (c)(1) and (c)(4) of this section. Such waivers may authorize recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the USAID Agreement Officer. All pre-award costs are incurred at the recipient's risk (*i.e.*, USAID is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months. For one-time extensions,

the recipient must notify the USAID Agreement Officer in writing, with the supporting reasons and revised expiration date, at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The recipient may initiate a one-time extension unless one or more of the following conditions apply:

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) Except for awards under section 226.14 and subpart E of this part, for awards that support research, unless USAID provides otherwise in the award or in its regulations or other implementing guidance, the prior approval requirements described in paragraphs (e) (1) through (3) of this section are automatically waived (*i.e.*, recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) USAID may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the USAID Agreement Officer. USAID shall not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to non-construction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the USAID Agreement Officer for budget revisions whenever:

(1) The revision results from changes in the scope or the objective of the project or program,

(2) The need arises for additional Federal funds to complete the project, or

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with the applicable cost principles listed in § 226.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When USAID makes an award that provides support for both construction and nonconstruction work, the USAID Agreement Officer may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify the USAID Agreement Officer in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the USAID Agreement Officer indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the USAID Agreement Officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the USAID Agreement Officer shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 226.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the

Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of USAID or the prime recipient as incorporated in the award document.

[60 FR 3744, Jan. 19, 1995, as amended at 62 FR 45939, 45941, Aug. 29, 1997]

§ 226.27 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined by the Agreement Officer in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, ''Cost Principles for State and Local Governments.'' The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.'' The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, ''Cost Principles for Educational Institutions.'' The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.'' The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 226.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the USAID Agreement Officer.

PROPERTY STANDARDS

§ 226.30 Purpose of property standards.

Sections 226.31 through 226.37 set forth uniform standards governing management and or disposition of property furnished by the Federal Government or whose cost was charged to a project supported by a Federal award. USAID shall not impose additional requirements unless specifically required by statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 226.31 through 226.37.

§ 226.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 226.32 Real property.

(a) Unless the agreement provides otherwise, title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Agreement Officer.

(b) The recipient shall obtain written approval from the Agreement Officer for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (*i.e.*,

awards) or programs that have purposes consistent with those authorized for support by USAID.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Agreement Officer. The Agreement Officer will give one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by USAID and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 226.33 Federally-owned and exempt property.

(a) *Federally-owned property*. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to USAID. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to USAID for further Federal agency utilization.

(2) If USAID has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless USAID has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, ''Improving Mathematics and Science Education in Support of the National Education Goals.'') Appropriate instructions shall be issued to the recipient by USAID.

(b) *Exempt property*. When statutory authority exists, USAID has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions USAID considers appropriate. Such property is ''exempt property'' (see definition in § 226.2). Should USAID not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 226.34 Equipment.

(a) Unless the agreement provides otherwise, title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this part.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of USAID. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by USAID, then

(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by USAID; second preference shall be given to projects or programs sponsored by other Federal agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by USAID. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of USAID.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient, the Federal Government, or other specified entity.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates USAID for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency with whose funds the equipment was purchased.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for USAID-financed equipment, the recipient shall request disposition instructions from the Agreement Officer. USAID shall determine whether the equipment can be used to meet the

agency's requirements. If no requirement exists within USAID, the availability of the equipment shall be reported to the General Services Administration to determine whether a requirement for the equipment exists in other Federal agencies. The USAID Agreement Officer shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse USAID an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient will be reimbursed by USAID for such costs incurred in its disposition.

(h) USAID reserves the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards:

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) USAID shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned equipment. If USAID fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(3) When USAID exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 226.35 Supplies and other expendable equipment.

(a) Title to supplies and other expendable equipment shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 226.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. USAID reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of USAID. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 226.34(g).

[60 FR 3744, Jan. 19, 1995, as amended at 65 FR 14407, 14410, Mar. 16, 2000]

§ 226.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Recipients shall record liens or other appropriate notices of record to indicate that personal or real property has been acquired, improved or constructed with Federal funds and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 226.40 Purpose of procurement standards.

Sections 226.41 through 226.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions

of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by USAID upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 226.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to USAID, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 226.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 226.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly establish all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 226.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items,

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government, and

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or

performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of USAID awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises. To permit USAID, in accordance with the small business provisions of the Foreign Assistance Act of 1961, as amended, to give United States small business firms an opportunity to participate in supplying commodities and services procured under the award, the recipient shall to the maximum extent possible provide the following information to the Office of Small Disadvantaged Business Utilization (OSDBU/MRC), USAID Washington, DC 20523, at least 45 days prior to placing any order or contract in excess of the small purchase threshold:

(i) Brief general description and quantity of goods or services;

(ii) Closing date for receiving quotations, proposals or bids; and

(iii) Address where solicitations or specifications can be obtained.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, ''Debarment and Suspension.''

(e) Recipients shall, on request, make available for USAID, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403(11) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a ''brand name'' product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 226.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 226.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection,

(b) Justification for lack of competition when competitive bids or offers are not obtained, and

(c) Basis for award cost or price.

§ 226.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 226.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the USAID Agreement Officer may accept the bonding policy and requirements of the recipient, provided that USAID determines that the Federal Government's interest is adequately protected. In making this determination for contract or subcontracts to be performed overseas, the Agreement Officer shall take into consideration any established local practices relating to security. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of its bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the

contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, USAID, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable. Whenever a provision is required to be inserted in a contract under an agreement, the recipient shall insert a statement in the contract that in all instances where the U.S. Government or USAID is mentioned, the recipient's name shall be substituted.

§ 226.49 USAID-Specific procurement requirements

Procurement requirements which are applicable to USAID because of statute and regulation are in subpart G.

REPORTS AND RECORDS

§ 226.50 Purpose of reports and records.

Sections 226.51 through 226.53 establish the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 226.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in Section 226.26.

(b) The terms and conditions of the agreement will prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph 226.51(f), performance reports will not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 days after the reporting period. USAID may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) Performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall submit the original and two copies of performance reports.

(f) Recipients shall immediately notify USAID of developments that have

a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) USAID may make site visits, as needed.

(h) USAID shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 226.52 Financial reporting.

USAID requires recipients to use the Standard Form 425 or Standard Form 425a, Federal Financial Report, or such other forms authorized for obtaining financial information as may be approved by OMB.

[74 FR 51762, Oct. 8, 2009]

§ 226.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. USAID shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by USAID. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by USAID, the 3-year retention requirements is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph 226.53(g).

(c) Copies of original records may be substituted for the original records if authorized by USAID.

(d) USAID shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, USAID may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) USAID, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, USAID will not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when USAID can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to USAID.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

SUSPENSION, TERMINATION AND ENFORCEMENT

§ 226.60 Purpose of suspension, termination and enforcement.

Sections 226.61 and 226.62 set forth uniform suspension, termination and enforcement procedures.

§ 226.61 Suspension and termination.

(a) Awards may be terminated (or, with respect to paragraphs (a) (1) and (3) of this section, suspended) in whole or in part if any of the circumstances stated in paragraphs (a)(1) through (4) of this section apply.

(1) By USAID, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By USAID with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) If at any time USAID determines that continuation of all or part of the funding for a program should be suspended or terminated because such assistance would not be in the national interest of the United States or would be in violation of an applicable law, then USAID may, following notice to the recipient, suspend or terminate the award in whole or in part and prohibit the recipient from incurring additional obligations chargeable to the award other than those costs specified in the notice of suspension. If a suspension is effected and the situation causing the suspension continues for 60 days or more, then USAID may terminate the award in whole or in part on written notice to the recipient and cancel any portion of the award which has not been disbursed or irrevocably committed to third parties.

(4) By the recipient upon sending to USAID written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if USAID determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the grant was made, it may terminate the award in its entirety under paragraph (a)(1), (a)(2) or (a)(3) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in paragraph 226.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 226.62 Enforcement.

(a) *Remedies for noncompliance*. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, USAID may, in addition to imposing any of the special conditions outlined in § 226.14, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by USAID.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals*. The recipient may appeal, in accordance with Subpart F, any action taken by USAID on which a dispute exists and a decision by the Agreement Officer has been obtained. There is no right to a hearing on such an appeal.

(c) *Effects of suspension and termination*. Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless USAID expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable, and

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension*. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and USAID's implementing regulations (see 22 CFR part 208).

Subpart D—After-the-Award Requirements

§ 226.70 Purpose.

Sections 226.71 through 226.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 226.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. USAID may approve extensions when requested by the recipient.

(b) Unless USAID authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) USAID will make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that USAID has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, USAID shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 226.31 through 226.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, USAID retains the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 226.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of USAID to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in §§ 226.26.

(4) Property management requirements in §§ 226.31 through 226.37.

(5) Records retention as required in § 226.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of USAID and

the recipient, provided the responsibilities of the recipient referred to in paragraph 226.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 226.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. USAID reserves the right to require refund by the recipient of any amount which USAID determines to have been expended for purposes not in accordance with the terms and condition of the award, including but not limited to costs which are not allowable in accordance with the applicable Federal cost principles or other terms and conditions of the award. If not paid within a reasonable period after the demand for payment, USAID may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the recipient, or

(3) Taking other action permitted by law.

(b) Except as otherwise provided by law, USAID will charge interest on an overdue debt in accordance with 4 CFR Chapter II, ''Federal Claims Collection Standards.''

Subpart E—Additional Provisions For Awards to Commercial Organizations

§ 226.80 Scope of subpart.

This subpart contains additional provisions that apply to awards to commercial organizations. These provisions supplement and make exceptions for awards to commercial organizations from other provisions of this part.

§ 226.81 Prohibition against profit.

No funds shall be paid as profit to any recipient that is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs.

§ 226.82 Program income.

The additional costs alternative described in § 226.24(b)(1) may not be applied to program income earned by a commercial organization.

Subpart F—Miscellaneous

§ 226.90 Disputes.

(a) Any dispute under or relating to a grant or agreement shall be decided by the USAID Agreement Officer. The Agreement Officer shall furnish the recipient a written copy of the decision.

(b) Decisions of the USAID Agreement Officer shall be final unless, within 30 days of receipt of the decision, the grantee appeals the decision to USAID's Deputy Assistant Administrator for Management, USAID, Washington, DC 20523. Appeals must be in writing with a copy concurrently furnished to the Agreement Officer.

(c) In order to facilitate review on the record by the Deputy Assistant Administrator for Management, the recipient shall be given an opportunity to submit written evidence in support of its appeal. No hearing will be provided.

(d) Decisions by the Deputy Assistant Administrator for Management shall be final.

§ 226.91 Marking.

(a) USAID policy is that all programs, projects, activities, public communications, and commodities, specified further at paragraph (b)–(e) of this section, partially or fully funded by a USAID grant or cooperative agreement or other assistance award or subaward must be marked appropriately overseas with the USAID Identity, of a size and prominence equivalent to or greater than the recipient's, other donor's or any other third party's identity or logo.

(1) USAID reserves the right to require the USAID Identity to be larger and more prominent if it is the majority donor, or to require that a cooperating country government's identity be

larger and more prominent if circumstances warrant; any such requirement will be on a case-by-case basis depending on the audience, program goals and materials produced.

(2) USAID reserves the right to request pre-production review of USAID funded public communications and program materials for compliance with the approved Marking Plan.

(3) USAID reserves the right to require marking with the USAID Identity in the event the recipient does not choose to mark with its own identity or logo.

(4) To ensure that the marking requirements ''flow down'' to subrecipients of subawards, recipients of USAID funded grants and cooperative agreements or other assistance awards are required to include a USAID-approved marking provision in any USAID funded subaward, as follows:

As a condition of receipt of this subaward, marking with the USAID Identity of a size and prominence equivalent to or greater than the recipient's, subrecipient's, other donor's or third party's is required. In the event the recipient chooses not to require marking with its own identity or logo by the subrecipient, USAID may, at its discretion, require marking by the subrecipient with the USAID Identity.

(b) Subject to § 226.91 (a), (h), and (j), program, project, or activity sites funded by USAID, including visible infrastructure projects (for example, roads, bridges, buildings) or other programs, projects, or activities that are physical in nature (for example, agriculture, forestry, water management), must be marked with the USAID Identity. Temporary signs or plaques should be erected early in the construction or implementation phase. When construction or implementation is complete, a permanent, durable sign, plaque or other marking must be installed.

(c) Subject to § 226.91 (a), (h), and (j), technical assistance, studies, reports, papers, publications, audio-visual productions, public service announcements, Web sites/Internet activities and other promotional, informational, media, or communications products funded by USAID must be marked with the USAID Identity.

(1) Any ''public communications'' as defined in § 226.2, funded by USAID, in which the content has not been approved by USAID, must contain the following disclaimer:

This study/report/audio/visual/other information/media product (specify) is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of [insert recipient name] and do not necessarily reflect the views of USAID or the United States Government.

(2) The recipient shall provide the Cognizant Technical Officer (CTO) or other USAID personnel designated in the grant or cooperative agreement with at least two copies of all program and communications materials produced under the award. In addition, the recipient shall submit one electronic and/or one hard copy of all final documents to USAID's Development Experience Clearinghouse.

(d) Subject to § 226.91 (a), (h), and (j), events financed by USAID such as training courses, conferences, seminars, exhibitions, fairs, workshops, press conferences and other public activities, must be marked appropriately with the USAID Identity. Unless directly prohibited and as appropriate to the surroundings, recipients should display additional materials such as signs and banners with the USAID Identity. In circumstances in which the USAID Identity cannot be displayed visually, recipients are encouraged otherwise to acknowledge USAID and the American people's support.

(e) Subject to § 226.91 (a), (h), and (j), all commodities financed by USAID, including commodities or equipment provided under humanitarian assistance or disaster relief programs, and all other equipment, supplies and other materials funded by USAID, and their export packaging, must be marked with the USAID Identity.

(f) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Branding Strategy, defined in § 226.2. The proposed Branding Strategy will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Branding Strategy,

and will negotiate, approve and include the Branding Strategy in the award. Failure to submit or negotiate a Branding Strategy within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award.

(g) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Marking Plan, defined in § 226.2. The Marking Plan may include requests for approval of Presumptive Exceptions, paragraph (h) of this section. All estimated costs associated with branding and marking USAID programs, such as plaques, labels, banners, press events, promotional materials, and the like, must be included in the total cost estimate of the grant or cooperative agreement or other assistance award, and are subject to revision and negotiation with the Agreement Officer upon submission of the Marking Plan. The Marking Plan will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Marking Plan, and will negotiate, approve and include the Marking Plan in the award. Failure to submit or negotiate a Marking Plan within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award. Agreement Officers have the discretion to suspend the implementation requirements of the Marking Plan if circumstances warrant. Recipients of USAID funded grant or cooperative agreement or other assistance award or subaward should retain copies of any specific marking instructions or waivers in their project, program or activity files. Cognizant Technical Officers will be assigned responsibility to monitor marking requirements on the basis of the approved Marking Plan.

(h) *Presumptive exceptions:* (1) The above marking requirements in § 226.91 (a)–(e) may not apply if marking would:

(i) Compromise the intrinsic independence or neutrality of a program or materials where independence or neutrality is an inherent aspect of the program and materials, such as election monitoring or ballots, and voter information literature; political party support or public policy advocacy or reform; independent media, such as television and radio broadcasts, newspaper articles and editorials; public service announcements or public opinion polls and surveys.

(ii) Diminish the credibility of audits, reports, analyses, studies, or policy recommendations whose data or findings must be seen as independent.

(iii) Undercut host-country government ''ownership'' of constitutions, laws, regulations, policies, studies, assessments, reports, publications, surveys or audits, public service announcements, or other communications better positioned as ''by'' or ''from'' a cooperating country ministry or government official.

(iv) Impair the functionality of an item, such as sterilized equipment or spare parts.

(v) Incur substantial costs or be impractical, such as items too small or other otherwise unsuited for individual marking, such as food in bulk.

(vi) Offend local cultural or social norms, or be considered inappropriate on such items as condoms, toilets, bed pans, or similar commodities.

(vii) Conflict with international law.

(2) These exceptions are presumptive, not automatic and must be approved by the Agreement Officer. Apparent Successful Applicants may request approval of one or more of the presumptive exceptions, depending on the circumstances, in their Marking Plan. The Agreement Officer will review requests for presumptive exceptions for adequacy, along with the rest of the Marking Plan. When reviewing a request for approval of a presumptive exception, the Agreement Officer may review how program materials will be marked (if at all) if the USAID identity is removed. Exceptions approved will apply to subrecipients unless otherwise provided by USAID.

(i) In cases where the Marking Plan has not been complied with, the Agreement Officer will initiate corrective action. Such action may involve informing the recipient of a USAID grant or cooperative agreement or other assistance award or subaward of instances of noncompliance and requesting that the recipient carry out it's responsibilities as set forth in the Marking Plan and

award. Major or repeated non-compliance with the Marking Plan will be governed by the uniform suspension and termination procedures set forth at 22 CFR 226.61 and 226.62.

(j) USAID Principal Officers, defined for purposes of this provision at § 226.2, may at any time after award waive in whole or in part the USAID approved Marking Plan, including USAID marking requirements for each USAID funded program, project, activity, public communication or commodity, or in exceptional circumstances may make a waiver by region or country, if the Principal Officer determines that otherwise USAID required marking would pose compelling political, safety, or security concerns, or marking would have an adverse impact in the cooperating country. USAID recipients may request waivers of the Marking Plan in whole or in part, through the Cognizant Technical Officer. No marking is required while a waiver determination is pending. The waiver determination on safety or security grounds must be made in consultation with U.S. Government security personnel if available, and must consider the same information that applies to determinations of the safety and security of U.S. Government employees in the cooperating country, as well as any information supplied by the Cognizant Technical Officer or the recipient for whom the waiver is sought. When reviewing a request for approval of a waiver, the Principal Officer may review how program materials will be marked (if at all) if the USAID Identity is removed. Approved waivers are not limited in duration but are subject to Principal Officer review at any time due to changed circumstances. Approved waivers ''flow down'' to recipients of subawards unless specified otherwise. Principal Officers may also authorize the removal of USAID markings already affixed if circumstances warrant. Principal Officers' determinations regarding waiver requests are subject to appeal to the Principal Officer's cognizant Assistant Administrator. Recipients may appeal by submitting a written request to reconsider the Principal Officer's waiver determination to the cognizant Assistant Administrator.

(k) *Non-retroactivity*. Marking requirements apply to any obligation of USAID funds for new awards as of January 2, 2006. Marking requirements also will apply to new obligations under existing awards, such as incremental funding actions, as of January 2, 2006, when the total estimated cost of the existing award has been increased by USAID or the scope of work is changed to accommodate any costs associated with marking. In the event a waiver is rescinded, the marking requirements shall apply from the date forward that the waiver is rescinded. In the event of the rescinding of a waiver after the date of completion as defined in 22 CFR 226.2 but before closeout as defined in 22 CFR 226.2., the USAID mission or operating unit with initial responsibility to administer the marking requirements shall make a cost benefit analysis as to requiring USAID marking requirements after the date of completion of the affected programs, projects, activities, public communications or commodities.

(l) The USAID Identity, USAID Partner Co-Branding Guide, and other guidance will be provided at no cost or fee to recipients of USAID grants, cooperative agreements or other assistance awards or subawards. Additional costs associated with marking requirements will be met by USAID if reasonable, allowable, and allocable under the cost principles of OMB Cost Circular A–122. The standard cost reimbursement provisions of the grant, cooperative agreement, other assistance award or subaward should be followed when applying for reimbursement of additional marking costs.

(m) This section shall become effective on January 2, 2006.

[70 FR 50190, Aug. 26, 2005]

Subpart G—USAID-Specific Requirements

§ 226.1001 Eligibility rules for goods and services. [Reserved]

§ 226.1002 Local cost financing. [Reserved]

§ 226.1003 Air transportation. [Reserved]

§ 226.1004 Ocean shipment of goods. [Reserved]

APPENDIX A TO PART 226—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*— All contracts to be performed in the United States, or to be performed with employees who were recruited in the United States, shall contain a provision requiring compliance with E.O. 11246, ''Equal Employment Opportunity,'' as amended by E.O. 11375, ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR Chapter 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,'' to the extent required by the foregoing.

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*— All contracts and subawards in excess of $2,000 for construction or repair to be performed in the United States awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*— When required by Federal program legislation, all construction, alteration, and/or repair contracts to be performed in the United States awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*— Where applicable, all contracts awarded by recipients in excess of $2000 for construction contracts to be performed in the United States and in excess of $2500 for other such contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*— Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,'' and any implementing regulations issued by the awarding agency.

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the *Federal Water Pollution Control Act* (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subawards of amounts in excess of $100,000 to be performed in the United States shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued

pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*— Contractors who apply or bid for an award exceeding $100,000 shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*— Certain contracts shall not be made to parties listed on the nonprocurement portion of the General Services Administration's ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' in accordance with E.O.s 12549 and 12689, ''Debarment and Suspension.'' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principals.

9. Contracts which require performance outside the United States shall contain a provision requiring Worker's Compensation Insurance (42 U.S.C. 1651, *et seq.*). As a general rule, Department of Labor waivers will be obtained for persons employed outside the United States who are not United States citizens or residents provided adequate protection will be given such persons. The recipient should refer questions on this subject to the USAID Agreement Officer.

PART 227—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
227.100 Conditions on use of funds.
227.105 Definitions.
227.110 Certification and disclosure.

Subpart B—Activities by Own Employees

227.200 Agency and legislative liaison.
227.205 Professional and technical services.
227.210 Reporting.

Subpart C—Activities by Other Than Own Employees

227.300 Professional and technical services.

Subpart D—Penalties and Enforcement

227.400 Penalties.
227.405 Penalty procedures.
227.410 Enforcement.

Subpart E—Exemptions

227.500 Secretary of Defense.

Subpart F—Agency Reports

227.600 Semi-annual compilation.
227.605 Inspector General report.
APPENDIX A TO PART 227—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 227—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 101–121 (31 U.S.C. 1352); Sec. 621, Foreign Assistance Act of 1961, as amended, 75 Stat. 445 (22 U.S.C. 2381).

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

SOURCE: 55 FR 6737, 6749, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 227.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative

agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 227.105 Definitions.

For purposes of this part:

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

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

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

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

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

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

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

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

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

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

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

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

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

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

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

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

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

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

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

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

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

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

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

§ 227.110 Certification and disclosure.

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

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

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

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

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

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

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

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

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

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

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

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

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

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

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

Subpart B—Activities by Own Employees

§ 227.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

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

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

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

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

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

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

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

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

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

§ 227.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

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

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

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

§ 227.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 227.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 227.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

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

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

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

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

Subpart D—Penalties and Enforcement

§ 227.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent

the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

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

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

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

§ 227.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 227.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 227.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 227.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 227.605 Inspector General report.

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

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

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

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

APPENDIX A TO PART 227—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

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

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

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

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States

to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 227—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

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

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

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

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 228—RULES FOR PROCUREMENT OF COMMODITIES AND SERVICES FINANCED BY USAID

Subpart A—Definitions and Scope of This Part

Sec.
228.01 Definitions.
228.02 Scope and application.
228.03 Identification of the authorized principal geographic procurement codes.

Subpart B—Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

228.10 Purpose.
228.11 Source of commodities.
228.12 Nationality of suppliers of commodities and services.
228.13 Foreign government-controlled organizations.
228.14 Construction procurement with foreign-owned local firms.
228.15 Nationality of employees and individuals under contracts or subcontracts for services.
228.16 Miscellaneous service transactions.
228.17 Special procurement rules for construction and engineering services.
228.18 Long-term leases.
228.19 Special source rules requiring United States manufacture or procurement.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

228.20 Purpose.
228.21 Ocean transportation.
228.22 Air transportation.
228.23 Other delivery services.
228.24 Incidental services.

Subpart D—Waivers

228.30 General.
228.31 Authority to approve waivers.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended, E.O. 12163, Sept. 29, 1979, 44 FR 56673: 3 CFR 1979 Comp., p. 435.

SOURCE: 77 FR 1401, Jan. 10, 2012, unless otherwise noted.

Subpart A—Definitions and Scope of This Part

§ 228.01 Definitions.

As used in this part, the following terms shall have the following meanings:

Advanced developing countries mean those countries that are categorized by the World Bank as upper middle income countries according to their gross national income per capita, except for those countries in which USAID provides assistance. USAID will maintain a list of advanced developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310. This list will include determinations made under § 228.17 of this part.

Available for purchase means for commodities, that the commodity is offered for sale in a country in the authorized principal geographic code at the time of purchase from the supplier, irrespective of the place of manufacture or production, unless it is a prohibited source country. If applicable, the commodity must also be able to be serviced, and, if warrantied, have a valid warranty. For services, available for purchase means the service is offered from a vendor which has complied with nationality and foreign government-owned organization requirements of this regulation, and is otherwise organized in a country in the authorized principal geographic code designated in an implementing instrument. This definition does not apply to procurements under the geographic Code 935, see § 228.03 of this part, because that geographic code is for any country or area except for prohibited source countries.

Commission means any payment or allowance by a supplier to any person for the contribution which that person has made to secure the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

Commodities or *goods* means any material, article, supply, good, or equipment.

Commodity-related services means delivery services and/or incidental services.

Cooperating country or *recipient country* means the country receiving the USAID assistance subject to this part 228, and includes all the countries receiving assistance under a regional program or project.

Delivery means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

Delivery service means any service customarily performed in a commercial export or import transaction which is necessary to affect a physical transfer of commodities to the cooperating/recipient country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. ''Delivery service'' may also include work and materials necessary to meet USAID marking requirements.

Developing countries means those countries that are categorized by the World Bank as low or lower middle income economies according to their gross national income per capita, and also includes all countries to which USAID provides assistance. USAID will maintain a list of developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310.

Free Port or *Bonded Warehouse* is a special customs area with favorable customs regulations (or no customs duties and controls for transshipment).

Implementing instrument means a binding relationship established between USAID and an outside party or parties to carry out USAID programs, by authorizing the use of USAID funds and/or nonfinancial resources for the procurement of services or commodities and/or commodity related services. Implementing instruments include specific conditions that apply to each such procurement. Examples of such instruments include contracts, grants, cooperating agreements, and interagency agreements.

Incidental services means services such as installation, erection, maintenance, or upgrading of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment, or similar services provided for the authorized disposition of such commodities.

Long term lease means, for purposes of subpart B, a single lease of more than 180 calendar days; or repetitive or intermittent leases under a single award within a one-year period, which cumulatively total more than 180 calendar days. A single lease may consist of lease of one or more of the same type of commodity within the same lease term.

Motor vehicles means self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles, ATVs, and utility vehicles. Excluded from this definition are ambulances, snowmobiles, industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks), boats, and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above).

Mission means the USAID Mission, office or representative in a cooperating/recipient country.

Nationality refers to the place of legal organization, ownership, citizenship, or lawful permanent residence (or equivalent immigration status to live and work on a continuing basis) of suppliers of commodities and services.

Pharmaceutical means any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in humans or animals; any substances (other than food) intended to affect the structure or any function of the body of humans or animals; and, any substance intended for use as a component in the above. The term includes drugs, vitamins, oral rehydration salts, biologicals, and some in-vitro diagnostic reagents/test kits; but

does not include devices or their components, parts, or accessories. Contraceptives, including condoms, are not included in this definition.

Prohibited sources means countries to which assistance is prohibited by the annual appropriations acts of Congress or other statutes, or those subject to other executive branch restrictions, such as applicable sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control. USAID maintains a list of prohibited sources, available in USAID's Automated Directives System, ADS 310.

Recipients and contractors. Recipient has the same meaning as defined in 22 CFR 226.02, except that it shall include non-U.S. individuals, entities and organizations, as well as subrecipients. *Contractors* mean those entities which enter into a contract, as the term is defined in 48 CFR part 2, with the U.S. Government, and includes subcontractors.

Services means the performance of identifiable tasks, rather than the delivery of an end item of supply.

Source means the country from which a commodity is shipped to the cooperating/recipient country or the cooperating/recipient country itself if the commodity is located therein at the time of the purchase, irrespective of the place of manufacture or production, unless it is a prohibited source country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, ''source'' means the country from which the commodity was shipped to the free port or bonded warehouse.

Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities, and/or commodity related services, including delivery or incidental services, financed by USAID.

United States means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

USAID means the United States Agency for International Development or any successor agency, including when applicable, each USAID Mission or office abroad.

USAID Principal Geographic Code means a USAID code which designates a country, a group of countries, or an otherwise defined area. The USAID principal geographic codes for purposes of procurement are described in § 228.03 of this part.

§ 228.02 Scope and application.

This part is applicable to commodities and services procured under implementing instruments using Federal program funds made available for assistance under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.* (FAA). The authorities and conditions applicable to the procurement of commodities or services shall be those in effect on the effective date of an implementing instrument for procurement of commodities or services. They include any directives, prohibitions, restrictions or other statutory and related requirements by the United States Congress that govern the Federal program funds appropriated to fund the specific procurement, including those on types of assistance and recipients of assistance. If additional authorities and conditions are otherwise provided by statute, regulation, or related administrative authorities, those authorities and conditions shall be incorporated in the implementing instrument and shall prevail in the event of any conflict with this part 228. This part is not applicable to

(a) Procurements of commodities and services under General Services Administration (GSA) supply schedules;

(b) Procurements with donated funds received under USAID's gift authority, FAA section 635(d);

(c) Procurements funded by cost share or program income as defined in 22 CFR 226.24;

(d) USAID Title II food programs, including monetization proceeds thereunder.

(e) Procurements funded from any congressional appropriation authorized by any statute other than the FAA;

(f) Procurements with non-program funds (such as operational expense account funds) made available under the FAA for any purpose other than assistance.

§ 228.03 Identification of the authorized principal geographic procurement codes.

(a) USAID has established principal geographic codes which are used by USAID in implementing instruments. This regulation establishes a presumptive authorized principal geographic code, Code 937, for procurement of commodities and services unless otherwise specified in the implementing instrument. Code 937 is defined as the United States, the cooperating/recipient country, and developing countries other than advanced developing countries, and excluding prohibited sources. USAID maintains a list of developing countries, advanced developing countries, and prohibited sources, which will be available in USAID's Automated Directives System, ADS 310.

(b) For purposes of procurements under the authority of the Development Fund for Africa, 22 U.S.C. 2293 *et seq.;* for any waivers authorized under Subpart D of this regulation; and if otherwise designated in an implementing instrument, the authorized principal geographic code shall be Code 935, any area or country but excluding prohibited sources.

(c) For purposes of procurements under the Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. 2295b, the authorized principal geographic codes are Code 937 and Code 110 (New Independent States).

(d) Additional principal geographic codes may be added to this section if authorized by Congress.

Subpart B—Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

§ 228.10 Purpose.

Sections 228.11 through 228.19 set forth the rules governing the eligible source of commodities and nationality of commodity and service suppliers for USAID Federal share financing under prime and subawards. These rules may be waived in accordance with the provisions in subpart D of this part.

§ 228.11 Source of commodities.

The source of all commodities financed with Federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall be Code 937 (unless Code 935 or 110 are designated in the implementing instrument). Procurements of agricultural commodities, motor vehicles and pharmaceuticals must also comply with the special procurement rules in § 228.19 of this part. Recipients and contractors are prohibited from engaging suppliers of commodities in an authorized country to import commodities from a country outside of the authorized principal geographic codes for the purposes of circumventing the requirements of this rule. Any violation of this prohibition will result in the disallowance by USAID of the cost of the procurement of the subject commodity.

§ 228.12 Nationality of suppliers of commodities and services.

The suppliers of all commodities and services financed with federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall:

(a) If an individual, except as provided in § 228.15, be a citizen or lawful permanent resident (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument),

(b) If an organization,

(1) Be incorporated or legally organized under the laws of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument);

(2) Must be operating as a going concern in a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), and either

(3) Be managed by a governing body, the majority of whom are citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of countries in Code 937 (or other principal geographic procurement code designated in an implementing instrument), or

(4) Employ citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), in more than half its permanent full-time positions and more than half of its principal management positions.

§ 228.13 Foreign government-controlled organizations.

Firms operated as commercial companies or other organizations or enterprises (including nonprofit organizations) in which foreign governments or their agents or agencies have a controlling interest are not eligible as suppliers of commodities and services, except if their eligibility has been established by a waiver approved by USAID in accordance with the provisions set forth in subpart D of this part. Government ministries or agencies of the cooperating/recipient country, including those at the regional and local levels, and government educational institutions, health care providers, and other technical entities of the cooperating/recipient country not formed primarily for commercial or business purposes, are eligible as suppliers of commodities and services.

§ 228.14 Construction procurement with foreign-owned local firms.

(a) When the estimated cost of a contract for construction is $10 million or less and only local firms will be solicited, a local corporation or partnership which is a foreign-owned (owned or controlling interest by individuals not citizens or permanent residents, or equivalent immigration status, of the United States or the cooperating/recipient country) local firm will be eligible if it is determined by USAID to be an integral part of the local economy, see paragraph (b) of this section. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating/recipient country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating/recipient country on a continuing basis for at least three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are lawfully resident (or equivalent immigration status to live and work on a continuing basis) in the cooperating/recipient country; and

(4) Most of its operating equipment and physical plant are in the cooperating/recipient country.

§ 228.15 Nationality of employees and individuals under contracts or subcontracts for services.

The rules set forth in §§ 228.10 through 228.13 of this part do not apply to the employees of contractors, or individuals providing technical or professional services to recipients or contractors. However, such individuals must not be citizens or lawful permanent residents (or equivalent immigration status) of countries which are prohibited sources.

§ 228.16 Miscellaneous service transactions.

This section governs certain miscellaneous services.

(a) *Commissions.* The nationality rules of this part do not apply to the payment of commissions by suppliers.

(b) *Bonds and guarantees.* The nationality rules of this part do not apply to sureties, insurance companies or banks who issue bonds or guarantees under USAID-financed contracts.

(c) *Liability insurance under construction contracts.* The nationality rules of this part do not apply to firms providing liability insurance under construction contracts.

§ 228.17 Special procurement rules for construction and engineering services.

Advanced developing countries, as defined in § 228.01, which USAID has determined to have attained a competitive capability in international markets for construction services or engineering services are not eligible to furnish USAID-financed construction and engineering services unless approved to do so under a waiver to Code 935 under subpart D of this part.

§ 228.18 Long-term leases.

Any commodity obtained under a long-term lease agreement as defined in § 228.01, including motor vehicles, is subject to the source and nationality requirements of this subpart B of this part, including the special procurement rules as set forth in § 228.19.

§ 228.19 Special source rules requiring United States manufacture or procurement.

(a) Certain agricultural commodities and products thereof must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the United States in fulfillment of the objectives of a particular assistance program under which such commodity procurement is to be financed. (22 U.S.C. 2354). USAID maintains a list of restricted agricultural commodities and related policies, which is available in USAID's Automated Directives System, ADS 312.

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing (22 U.S.C. 2396). Any vehicle to be financed by USAID under a long-term lease or where the sale is to be guaranteed by USAID must be manufactured in the United States. However, financing of transportation or driver services from an individual or commercial entity and not directly financing the purchase or lease of a vehicle, is subject to the requirements at § 228.12. Financing transportation or driver services means:

(1) The vehicle is independently owned or leased by the hired driver or company;

(2) The vehicle will be maintained by the individual or commercial entity and driven only by the hired driver(s); and

(3) The vehicle is not directly leased, either as a separate line item in the contract separate from the cost of the driver's services, or under a separate contract.

(c) Under section 606(c) of the FAA, USAID cannot finance any pharmaceutical product that is manufactured outside of the United States if the pharmaceutical is covered by a valid U.S. patent, unless the U.S. patent holder expressly authorizes the manufacture of the pharmaceutical. Without such express authorization, the pharmaceutical must be purchased from the U.S. patent holder. In addition, USAID shall not finance non-contraceptive pharmaceuticals without prior written approval as provided in USAID's Automated Directives System Chapter 312. Contraceptives may be financed in accordance with the procedures in ADS 312.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

§ 228.20 Purpose.

Sections 228.21 through 228.24 of this part set forth the rules governing the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules, except for §§ 228.21 and 228.22, may be waived in accordance with the provisions in subpart D of this part. The rules on delivery services apply whether or not USAID is also financing the commodities being transported. In order to be identified and eligible as incidental services, such services must be connected with a USAID-financed commodity procurement.

§ 228.21 Ocean transportation.

When transporting commodities subject to the provisions of the Cargo Preference Act, 46 U.S.C. 55305, USAID will administer its programs in accordance with that act and its implementing regulations in 46 CFR part 381 (and any waivers applicable thereto). Subpart D of 22 CFR part 228 does not apply to this provision.

§ 228.22 Air transportation.

The Fly America Act, Title 49 of the United States Code, Subtitle VII, part A, subpart I, Chapter 401, 40118—Government-Financed Air Transportation, is applicable to all transportation of commodities subject to this part. Subpart D of 22 CFR part 228 does not apply to this provision.

§ 228.23 Other delivery services.

No source or nationality rules apply to other delivery services, such as export packing, loading, commodity inspection services, and services of a freight forwarder. Such services are eligible when provided as part of a commodity procurement financed by USAID.

§ 228.24 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment.

Subpart D—Waivers

§ 228.30 General.

USAID may waive the rules contained in subparts A, B and C of this part (except for prohibited sources as defined in § 228.01, and §§ 228.21 and 228.22), in order to accomplish project or program objectives. For any waivers authorized, the principal geographic code shall be Code 935, any area or country but excluding prohibited sources. All waivers must be in writing, and where applicable, are limited to the term established by the waiver. All waiver decisions will be made solely on the basis of the following criteria:

(a) Waivers to permit procurement outside of Code 937 or 110 must be based on a case by case determination that

(1) The provision of assistance requires commodities or services of the type that are not produced in and available for purchase in Code 937 or 110, or;

(2) It is important to permit procurement from a country not specified in Code 937 or 110 to meet unforeseen circumstances, or;

(3) To promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives

(b) Case by case waivers under paragraph (a) of this section may be made on the basis of a commodity or service type or category, rather than processing repeat, individual waivers for an identical or substantially similar commodity or service. Such waivers may be approved on a regional, country or program basis. For purposes of paragraph (a)(1) of this section, ''produced in and available for purchase in'' shall have the same meaning as the definition of ''available for purchase'' in § 228.01. A waiver under paragraph (a)(1) may also be based on the fact that a commodity is not available for purchase in Code 937 or 110 in sufficient, reasonable and available quantities or sufficient and reasonable quality that is fit for the intended purpose.

(c) A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, and pharmaceuticals must meet the requirements of § 228.19.

(d) Any individual transaction not exceeding $25,000 (excluding those covered by special procurement rules in § 228.19 and excluding procurements from prohibited sources) does not require a waiver and is hereby authorized.

§ 228.31 Authority to approve waivers.

The authority to approve waivers of established policies under this regulation is delegated within USAID. Recipients or contractors shall request any necessary waivers through the USAID agreement or contracting officer.

PART 229—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.

229.100 Purpose and effective date.
229.105 Definitions.
229.110 Remedial and affirmative action and self-evaluation.
229.115 Assurance required.
229.120 Transfers of property.
229.125 Effect of other requirements.
229.130 Effect of employment opportunities.

229.135 Designation of responsible employee and adoption of grievance procedures.
229.140 Dissemination of policy.

Subpart B—Coverage

229.200 Application.
229.205 Educational institutions and other entities controlled by religious organizations.
229.210 Military and merchant marine educational institutions.
229.215 Membership practices of certain organizations.
229.220 Admissions.
229.225 Educational institutions eligible to submit transition plans.
229.230 Transition plans.
229.235 Statutory amendments.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

229.300 Admission.
229.305 Preference in admission.
229.310 Recruitment.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

229.400 Education programs or activities.
229.405 Housing.
229.410 Comparable facilities.
229.415 Access to course offerings.
229.420 Access to schools operated by LEAs.
229.425 Counseling and use of appraisal and counseling materials.
229.430 Financial assistance.
229.435 Employment assistance to students.
229.440 Health and insurance benefits and services.
229.445 Marital or parental status.
229.450 Athletics.
229.455 Textbooks and curricular material.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

229.500 Employment.
229.505 Employment criteria.
229.510 Recruitment.
229.515 Compensation.
229.520 Job classification and structure.
229.525 Fringe benefits.
229.530 Marital or parental status.
229.535 Effect of state or local law or other requirements.
229.540 Advertising.
229.545 Pre-employment inquiries.
229.550 Sex as a bona fide occupational qualification.

Subpart F—Procedures

229.600 Notice of covered programs.
229.605 Enforcement procedures.

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52879, Aug. 30, 2000, unless otherwise noted.

Subpart A—Introduction

§ 229.100 Purpose and effective date.

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 September 29, 2000.

§ 229.105 Definitions.

As used in these Title IX regulations, the term:

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.

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.

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.

Designated agency official means Director, Office of Equal Opportunity Programs.

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.

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.

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.

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.

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; or

(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.

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 semiskilled 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.

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.

Student means a person who has gained admission.

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).

Title IX regulations means the provisions set forth at §§ 229.100 through 229.605.

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.

[65 FR 52865, 52879, Aug. 30, 2000]

§ 229.110 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 September 29, 2000:

(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.

§ 229.115 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 § 229.110(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.

§ 229.120 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 §§ 229.205 through 229.235(a).

§ 229.125 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.

§ 229.130 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.

§ 229.135 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.

§ 229.140 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 §§ 229.300 through 229.310 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 § 229.135, 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 September 29, 2000 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

§ 229.200 Application.

Except as provided in §§ 229.205 through 229.235(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.

§ 229.205 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.

§ 229.210 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.

§ 229.215 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 1954, 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.

§ 229.220 Admissions.

(a) 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, §§ 229.225 and 229.230, and §§ 229.300 through 229.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 229.300 through .310*. Except as provided in paragraphs (d) and (e) of this section, §§ 229.300 through 229.310 apply to each recipient. A recipient to which §§ 229.300 through 229.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 229.300 through 229.310.

(d) *Educational institutions*. Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 229.300 through 229.310 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*. §§ 229.300 through 229.310 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.

§ 229.225 Educational institutions eligible to submit transition plans.

(a) *Application*. This section applies to each educational institution to which §§ 229.300 through 229.310 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 §§ 229.300 through 229.310.

§ 229.230 Transition plans.

(a) *Submission of plans.* An institution to which § 229.225 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 § 229.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 229.300 through 229.310 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 § 229.225 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.

§ 229.235 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) *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 section 8801 of title 20), 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

§ 229.300 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 §§ 229.300 through §§ 229.310 apply, except as provided in § 229.225 and § 229.230.

(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 §§ 229.300 through 229.310 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 §§ 229.300 through 229.310 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 § 229.235(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.

§ 229.305 Preference in admission.

A recipient to which §§ 229.300 through 229.310 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 §§ 229.300 through 229.310.

§ 229.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 229.300 through 229.310 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 § 229.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 229.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 229.300 through 229.310 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 §§ 229.300 through 229.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 229.400 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 229.400 through 229.455 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 §§ 229.300 through 229.310 do not apply, or an entity, not a recipient, to which §§ 229.300 through 229.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions*. Except as provided in §§ 229.400 through 229.455, 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;

(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.

§ 229.405 Housing.

(a) *Generally*. 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.

§ 229.410 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.

§ 229.415 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 classes and activities in physical education 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 September 29, 2000. 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 September 29, 2000.

(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.

§ 229.420 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.

§ 229.425 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.

§ 229.430 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 § 229.450.

§ 229.435 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 §§ 229.500 through 229.550.

§ 229.440 Health and insurance benefits and services.

Subject to § 229.235(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 §§ 229.500 through 229.550 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.

§ 229.445 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 § 229.235(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.

§ 229.450 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;

(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 September 29, 2000. 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 September 29, 2000.

§ 229.455 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

§ 229.500 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 therefor, 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 §§ 229.500 through 229.550, 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*. The provisions of §§ 229.500 through 229.550 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.

§ 229.505 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.

§ 229.510 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 §§ 229.500 through 229.550.

§ 229.515 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.

§ 229.520 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 § 229.550.

§ 229.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *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 provision of § 229.515.

(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.

§ 229.530 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 § 229235(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.

§ 229.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements*. The obligation to comply with §§ 229.500 through 229.550 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.

§ 229.540 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.

§ 229.545 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.

§ 229.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 229.500 through 229.550 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

§ 229.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency 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 Federal agency's office that enforces Title IX.

§ 229.605 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 22 CFR part 209.

[65 FR 52879, Aug. 30, 2000]

PART 230—ISRAEL LOAN GUARANTEES ISSUED UNDER THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT OF 2003, PUB. L. 108–11—STANDARD TERMS AND CONDITIONS

Sec.
230.01 Purpose.
230.02 Definitions.
230.03 The Guarantee.
230.04 Guarantee eligibility.
230.05 Non-impairment of the Guarantee.
230.06 Transferability of Guarantee; Note Register.
230.07 Fiscal Agent obligations.
230.08 Event of Default; Application for Compensation; payment.
230.09 No acceleration of Eligible Notes.
230.10 Payment to USAID of excess amounts received by a Noteholder.
230.11 Subrogation of USAID.
230.12 Prosecution of claims.
230.13 Change in agreements.
230.14 Arbitration.
230.15 Notice.
230.16 Governing law.
APPENDIX A TO PART 230—APPLICATION FOR COMPENSATION

AUTHORITY: Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. 108–11, as amended by Section 534(p) of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2005; Division D of the Consolidated Appropriations Act, 2005, Pub. L. 108–447; Section 13(b) of the Department of State Authorities Act, 2006, Pub. L. 109–472; and Section 5(b) of the United States-Israel Enhanced Security Cooperation Act of 2012, Pub. L. 112–150.

SOURCE: 78 FR 66842, Nov. 7, 2013, unless otherwise noted.

§ 230.01 Purpose.

The purpose of this regulation is to prescribe the procedures and standard terms and conditions applicable to loan guarantees issued for the benefit of the Government of Israel on behalf of the State of Israel (''Borrower''), pursuant to the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11, as amended by Section 534(p) of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2005; Division D of the Consolidated Appropriations Act, 2005, Public Law 108–447; Section 13(b) of the Department of State Authorities Act, 2006, Public Law 109–472; and Section 5(b) of the United

States-Israel Enhanced Security Cooperation Act of 2012, Public Law 112–150. The loan guarantees will apply to sums borrowed from time to time between March 1, 2003 and September 30, 2016, not exceeding an aggregate total of nine billion United States Dollars ($9,000,000,000) in principal amount. The loan guarantees shall insure the Borrower's repayment of 100% of principal and interest due under such loans. The full faith and credit of the United States of America is pledged for the full payment and performance of such guarantee obligations. The loan guarantees will be issued pursuant to an Amended and Restated Loan Guarantee Commitment Agreement between the Borrower and the United States Government dated October 24, 2012.

§ 230.02 Definitions.

Wherever used in these standard terms and conditions:

Applicant means a Noteholder who files an Application for Compensation with USAID, either directly or through the Fiscal Agent acting on behalf of a Noteholder.

Application for Compensation means an executed application in the form of Appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with USAID pursuant to § 230.08 of this part.

Borrower means the Government of Israel, on behalf of the State of Israel.

Business Day means any day other than a day on which banks in New York, NY are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

Date of Application means the date on which an Application for Compensation is actually received by USAID pursuant to § 230.15 of this part.

Defaulted Payment means, as of any date and in respect of any Eligible Note, any Interest Amount and/or Principal Amount not paid when due.

Eligible Note(s) means [a] Note[s] meeting the eligibility criteria set out in § 230.04 hereof.

Fiscal Agency Agreement means the agreement among USAID, the Borrower and the Fiscal Agent pursuant to which the Fiscal Agent agrees to provide fiscal agency services in respect of the Note[s], a copy of which Fiscal Agency Agreement shall be made available to Noteholders upon request to the Fiscal Agent.

Fiscal Agent means the bank or trust company or its duly appointed successor under the Fiscal Agency Agreement which has been appointed by the Borrower with the consent of USAID to perform certain fiscal agency services for specified Eligible Note[s] pursuant to the terms of the Fiscal Agency Agreement.

Further Guaranteed Payments means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

Guarantee means the guarantee of USAID pursuant to this part 230 and the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11, as amended by Section 534(p) of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2005; Division D of the Consolidated Appropriations Act, 2005, Public Law 108–447; Section 13(b) of the Department of State Authorities Act, 2006, Public Law 109–472; and Section 5(b) of the United States-Israel Enhanced Security Cooperation Act of 2012, Public Law 112–150.

Guarantee Payment Date means a Business Day not more than three (3) Business Days after the related Date of Application.

Interest Amount means for any Eligible Note the amount of interest accrued on the Principal Amount of such Eligible Note at the applicable Interest Rate.

Interest Rate means the interest rate borne by an Eligible Note.

Loss of Investment respecting any Eligible Note means an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the Interest Rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

Noteholder means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

Note[s] means any debt securities issued by the Borrower.

Person means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

Principal Amount means the principal amount of any Eligible Notes issued by the Borrower. For purposes of determining the principal amount of any Eligible Notes issued by the Borrower, the principal amount of each Eligible Note shall be:

(1) In the case of any Eligible Note issued having a notional amount, but no principal balance, the original issue price (excluding any transaction costs) thereof; and

(2) In the case of any Eligible Note issued with a principal balance, the stated principal amount thereof.

USAID means the United States Agency for International Development or its successor.

§ 230.03 The Guarantee.

Subject to these terms and conditions, the United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes. Under this Guarantee, USAID agrees to pay to any Noteholder compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder. This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 230.04 Guarantee eligibility.

(a) Eligible Notes only are guaranteed hereunder. Notes in order to achieve Eligible Note status:

(1) Must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower;

(2) Must contain a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by USAID in the Fiscal Agency Agreement; and

(3) Shall be approved and authenticated by USAID by either:

(i) The affixing by USAID on the Notes of a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID or

(ii) The delivery by USAID to the Fiscal Agent of a guarantee certificate incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID.

(b) The authorized USAID representatives for purposes of this regulation whose signature(s) shall be binding on USAID shall include the USAID Chief and Deputy Chief Financial Officer, Assistant Administrator and Deputy, Bureau for Economic Growth, Agriculture and Trade, Director and Deputy Director, Office of Development Credit, and such other individual(s) designated in a certificate executed by an authorized USAID Representative and delivered to the Fiscal Agent. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on USAID that an Eligible Note has been duly executed on behalf of the Borrower and delivered.

§ 230.05 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The

Guarantee shall be unconditional, and shall not be affected or impaired by:

(a) Any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, USAID, the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee or

(b) The suspension or termination of the program pursuant to which USAID is authorized to guarantee the Eligible Notes. This non-impairment of the guarantee provision shall not, however, be operative with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder is responsible or of which it had knowledge at the time it became a Noteholder.

§ 230.06 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. USAID shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and USAID shall not be affected by notice to the contrary.

§ 230.07 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by USAID as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

§ 230.08 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with USAID an Application for Compensation in the form provided in Appendix A to this part. USAID shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than three (3) Business Days after the Date of Application. In the event that USAID receives any other notice of an Event of Default, USAID may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with USAID an Application for Compensation in respect of such amount.

§ 230.09 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration, in whole or in part, by USAID, the Noteholder or any other party. USAID shall not have the right to pay any amounts in respect of the Eligible Notes other than in accordance with the original payment terms of such Eligible Notes.

§ 230.10 Payment to USAID of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of USAID paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to USAID.

§ 230.11 Subrogation of USAID.

In the event of payment by USAID to a Noteholder under this Guarantee, USAID shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

§ 230.12 Prosecution of claims.

After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and USAID shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 230.13 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of USAID.

§ 230.14 Arbitration.

Any controversy or claim between USAID and any noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 230.15 Notice.

Any communication to USAID pursuant to this Guarantee shall be in writing in the English language, shall refer to the Israel Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by USAID at the Office of Development Credit, Bureau for Economic Growth, Agriculture and Trade, United States Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 230.16 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 230—APPLICATION FOR COMPENSATION

United States Agency for International Development Washington, DC 20523

Ref: Guarantee dated as of _____, 20 ____:

Gentlemen: You are hereby advised that payment of $__ (consisting of $__ of principal, $__ of interest and $__ in Further Guaranteed Payments, as defined in § 230.02(f) of the Standard Terms and Conditions of the above-mentioned Guarantee) was due on _____, 20____, on $__ principal amount of Notes held by the undersigned of the Government of Israel, on behalf of the State of Israel (the ''Borrower''). Of such amount $__ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 230.08 of said Guarantee, for payment of $__, representing $__, the Principal Amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $__, the Interest Amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid, and $__ in Further Guaranteed Payments,[1] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of __% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder].

[1] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

All capitalized terms herein that are not otherwise defined shall have the meanings assigned to such terms in the Standard Terms and Conditions of the above-mentioned Guarantee.

[Name of Applicant]

By: _____

Name:

Title:

Dated:

PART 231—ARAB REPUBLIC OF EGYPT LOAN GUARANTEES ISSUED UNDER THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT OF 2003, PUBLIC LAW 108–11—STANDARD TERMS AND CONDITIONS

Sec.

231.01 Purpose.
231.02 Definitions.
231.03 The Guarantee.
231.04 Guarantee eligibility.
231.05 Non-impairment of the Guarantee.
231.06 Transferability of Guarantee; Note Register.
231.07 Fiscal Agent obligations.
231.08 Event of Default; Application for Compensation; payment.
231.09 No acceleration of Eligible Notes.

231.10 Payment to USAID of excess amounts received by a Noteholder.
231.11 Subrogation of USAID.
231.12 Prosecution of claims.
231.13 Change in agreements.
231.14 Arbitration.
231.15 Notice.
231.16 Governing law.
APPENDIX A TO PART 231—APPLICATION FOR COMPENSATION

AUTHORITY: Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. 108–11, chapter 5, title I, ''Economic Support Fund'', para. (2).

SOURCE: 70 FR 56102, Sept. 23, 2005, unless otherwise noted.

§ 231.01 Purpose.

The purpose of the regulations in this part is to prescribe the procedures and standard terms and conditions applicable to loan guarantees issued for the benefit of the Arab Republic of Egypt (''Borrower''), pursuant to the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11. The loan guarantees will apply to sums borrowed from time to time between September 23, 2005 and September 30, 2005, not exceeding an aggregate total of two billion United States Dollars ($2,000,000,000) in principal amount. The loan guarantees shall insure the Borrower's repayment of 100% of principal and interest due under such loans. The full faith and credit of the United States of America is pledged for the full payment and performance of such guarantee obligations. The loan guarantees will be issued pursuant to a Loan Guarantee Commitment Agreement between the Borrower and the United States dated September 12, 2005.

§ 231.02 Definitions.

Wherever used in the standard terms and conditions set out in this part:

(a) *USAID* means the United States Agency for International Development or its successor.

(b) *Eligible Note(s)* means [a] Note[s] meeting the eligibility criteria set out in § 231.04.

(c) *Noteholder* means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

(d) *Borrower* means the Arab Republic of Egypt.

(e) *Defaulted payment* means, as of any date and in respect of any Eligible Note, any Interest Amount and/or Principal Amount not paid when due.

(f) *Further guaranteed payments* means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

(g) *Interest amount* means for any Eligible Note the amount of interest accrued on the Principal Amount of such Eligible Note at the applicable Interest Rate.

(h) *Principal amount* means the principal amount of any Eligible Notes issued by the Borrower. For purposes of determining the principal amount of any Eligible Notes issued by the Borrower, the principal amount of each Eligible Note shall be the stated principal amount thereof.

(i) *Interest rate* means the interest rate borne by an Eligible Note.

(j) *Loss of investment respecting any Eligible Note* means an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the Interest Rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

(k) *Application for Compensation* means an executed application in the form of Appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with USAID pursuant to § 231.08.

(l) *Applicant* means a Noteholder who files an Application for Compensation with USAID, either directly or through the Fiscal Agent acting on behalf of a Noteholder.

(m) *Date of application* means the date on which an Application for Compensation is actually received by USAID pursuant to § 231.15.

(n) *Business day* means any day other than a day on which banks in New York, NY are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

(o) *Guarantee* means the guarantee of USAID pursuant to this part 231 and the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11.

(p) *Guarantee payment date* means a Business Day not more than three (3) Business Days after the related Date of Application.

(q) *Person* means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

(r) *Note[s]* means any debt securities issued by the Borrower.

(s) *Fiscal Agency Agreement* means the agreement among USAID, the Borrower and the Fiscal Agent pursuant to which the Fiscal Agent agrees to provide fiscal agency services in respect of the Note[s], a copy of which Fiscal Agency Agreement shall be made available to Noteholders upon request to the Fiscal Agent.

(t) *Fiscal Agent* means the bank or trust company or its duly appointed successor under the Fiscal Agency Agreement which has been appointed by the Borrower with the consent of USAID to perform certain fiscal agency services for specified Eligible Note[s] pursuant to the terms of the Fiscal Agency Agreement.

§ 231.03 The Guarantee.

Subject to the terms and conditions set out in this part, the United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes. Under this Guarantee, USAID agrees to pay to any Noteholder compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder. This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 231.04 Guarantee eligibility.

(a) Eligible Notes only are guaranteed hereunder. Notes in order to achieve Eligible Note status:

(1) Must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower;

(2) Must contain a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by USAID in the Fiscal Agency Agreement; and

(3) Shall be approved and authenticated by USAID by either:

(i) The affixing by USAID on the Notes of a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID or

(ii) The delivery by USAID to the Fiscal Agent of a guarantee certificate incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID.

(b) The authorized USAID representatives for purposes of the regulations in this part whose signature(s) shall be binding on USAID shall include the USAID Chief and Deputy Chief Financial Officer, Assistant Administrator and Deputy, Bureau for Economic Growth, Agriculture and Trade, Director and Deputy Director, Office of Development Credit, and such other individual(s) designated in a certificate executed by an authorized USAID Representative and delivered to the Fiscal Agent. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on USAID that an Eligible

Note has been duly executed on behalf of the Borrower and delivered.

§ 231.05 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall be unconditional, and shall not be affected or impaired by:

(a) Any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, USAID, the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee or

(b) The suspension or termination of the program pursuant to which USAID is authorized to guarantee the Eligible Notes. This non-impairment of the guarantee provision shall not, however, be operative with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder is responsible or of which it had knowledge at the time it became a Noteholder.

§ 231.06 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. USAID shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and USAID shall not be affected by notice to the contrary.

§ 231.07 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by USAID as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

§ 231.08 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with USAID an Application for Compensation in the form provided in Appendix A to this part. USAID shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than three (3) Business Days after the Date of Application. In the event that USAID receives any other notice of an Event of Default, USAID may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with USAID an Application for Compensation in respect of such amount.

§ 231.09 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration, in whole or in part, by USAID, the Noteholder or any other party. USAID shall not have the right to pay any amounts in respect of the Eligible Notes other than in accordance with the original payment terms of such Eligible Notes.

§ 231.10 Payment to USAID of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of USAID paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to USAID.

§ 231.11 Subrogation of USAID.

In the event of payment by USAID to a Noteholder under this Guarantee, USAID shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

§ 231.12 Prosecution of claims.

After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder

continues to have an interest in the outstanding Eligible Notes, such a Noteholder and USAID shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 231.13 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of USAID.

§ 231.14 Arbitration.

Any controversy or claim between USAID and any noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 231.15 Notice.

Any communication to USAID pursuant to this Guarantee shall be in writing in the English language, shall refer to the Arab Republic of Egypt Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by USAID at the Office of Development Credit, Bureau for Economic Growth, Agriculture and Trade, United States Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 231.16 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 231—APPLICATION FOR COMPENSATION

United States Agency for International Development
Washington, DC 20523

Ref: Guarantee dated as of _____, 20____:
Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments, as defined in § 231.02(f) of the Standard Terms and Conditions of the above-mentioned Guarantee) was due on _____, 20___, on $_____ principal amount of Notes issued by the Arab Republic of Egypt (the ''Borrower'') held by the undersigned. Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 231.08 of said Guarantee, for payment of $_____, representing $_____, the Principal Amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $_____, the Interest Amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid, and $_____ in Further Guaranteed Payments,[1] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of ____% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder].

All capitalized terms herein that are not otherwise defined shall have the meanings assigned to such terms in the Standard Terms and Conditions of the above-mentioned Guarantee.

[Name of Applicant]

By: _____

Name:
Title:
Dated:

PART 232—REPUBLIC OF TUNISIA LOAN GUARANTEES ISSUED UNDER THE DEPARTMENT OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS APPROPRIATIONS ACT, 2012, DIV. I, PUB. L. 112–74—STANDARD TERMS AND CONDITIONS

Sec.
232.01 Purpose.

[1] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

232.02 Definitions.
232.03 The Guarantee.
232.04 Guarantee eligibility.
232.05 Non-impairment of the Guarantee.
232.06 Transferability of Guarantee; Note Register.
232.07 Fiscal agent obligations.
232.08 Event of Default; Application for Compensation; payment.
232.09 No acceleration of Eligible Notes.
232.10 Payment to USAID of excess amounts received by a Noteholder.
232.11 Subrogation of USAID.
232.12 Prosecution of claims.
232.13 Change in agreements.
232.14 Arbitration.
232.15 Notice.
232.16 Governing law.
APPENDIX A TO PART 232—APPLICATION FOR COMPENSATION

AUTHORITY: Title III of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Division I, Pub. L. 112–74.

SOURCE: 77 FR 40790, July 11, 2012, unless otherwise noted.

§ 232.01 Purpose.

The purpose of the regulations in this part is to prescribe the procedures and standard terms and conditions applicable to loan guarantees issued for the benefit of the Borrower, pursuant to Title Ill of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Division I, Public Law 112–74. The loan guarantees will be issued as provided herein pursuant to the Loan Guarantee Agreement, dated June 8, 2012, between the Republic of Tunisia and the United States of America (the ''Loan Guarantee Agreement'') and will apply to sums borrowed during a period beginning on the date that the Loan Guarantee Agreement enters into force and ending one year after such date, in such amount and on such terms as may be determined by USAID, such determination to be conclusive. The loan guarantees shall insure the Borrower's repayment of 100% of principal and interest due under such loans. The full faith and credit of the United States of America is pledged for the full payment and performance of such guarantee obligations.

§ 232.02 Definitions.

Wherever used in the standard terms and conditions set out in this part:

Applicant means a Noteholder who files an Application for Compensation with USAID, either directly or through the Fiscal Agent acting on behalf of a Noteholder.

Application for Compensation means an executed application in the form of Appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with USAID pursuant to § 232.08.

Borrower means Banque Centrale de Tunisie, acting on behalf of the Republic of Tunisia.

Business Day means any day other than a day on which banks in New York, NY are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

Date of Application means the date on which an Application for Compensation is actually received by USAID pursuant to § 232.15.

Defaulted Payment means, as of any date and in respect of any Eligible Note, any Interest Amount and/or Principal Amount not paid when due.

Eligible Note(s) means [a] Note[s] meeting the eligibility criteria set out in § 232.04.

Fiscal Agency Agreement means the agreement among USAID, the Borrower and the Fiscal Agent pursuant to which the Fiscal Agent agrees to provide fiscal agency services in respect of the Note[s], a copy of which Fiscal Agency Agreement shall be made available to Noteholders upon request to the Fiscal Agent.

Fiscal Agent means the bank or trust company or its duly appointed successor under the Fiscal Agency Agreement which has been appointed by the Borrower with the consent of USAID to perform certain fiscal agency services for specified Eligible Note[s] pursuant to the terms of the Fiscal Agency Agreement.

Further Guaranteed Payments means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense

arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

Guarantee means the guarantee of USAID pursuant to this part 232 and the State, Foreign Operations, and Related Programs Appropriations Act of 2012 (Pub. L. 112–74).

Guarantee Payment Date means a Business Day not more than three (3) Business Days after the related Date of Application.

Interest Amount means for any Eligible Note the amount of interest accrued on the Principal Amount of such Eligible Note at the applicable Interest Rate.

Interest Rate means the interest rate borne by an Eligible Note.

Loss of Investment means, in respect of any Eligible Note, an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the Interest Rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

Notes[s] means any debt securities issued by the Borrower.

Noteholder means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

Person means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

Principal amount means the principal amount of any Eligible Notes issued by the Borrower. For purposes of determining the principal amount of any Eligible Notes issued by the Borrower, the principal amount of each Eligible Note shall be the stated principal amount thereof.

USAID means the United States Agency for International Development or its successor.

§ 232.03 The Guarantee.

Subject to the terms and conditions set out in this part, the United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes. Under this Guarantee, USAID agrees to pay to any Noteholder compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder. This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 232.04 Guarantee eligibility.

(a) Eligible Notes only are guaranteed hereunder. Notes in order to achieve Eligible Note status:

(1) Must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower;

(2) Must contain a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by USAID in the Fiscal Agency Agreement; and

(3) Shall be approved and authenticated by USAID by either:

(i) The affixing by USAID on the Notes of a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID or

(ii) The delivery by USAID to the Fiscal Agent of a guarantee certificate incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID.

(b) The authorized USAID representatives for purposes of the regulations in this part whose signature(s) shall be

binding on USAID shall include the USAID Chief and Deputy Chief Financial Officer, Assistant Administrator and Deputy, Bureau for Economic Growth, Education, and Environment, Director and Deputy Director, Office of Development Credit, and such other individual(s) designated in a certificate executed by an authorized USAID Representative and delivered to the Fiscal Agent. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on USAID that an Eligible Note has been duly executed on behalf of the Borrower and delivered.

§ 232.05 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall be unconditional, and shall not be affected or impaired by:

(a) Any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, USAID, the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee or

(b) The suspension or termination of the program pursuant to which USAID is authorized to guarantee the Eligible Notes. This non-impairment of the guarantee provision shall not, however, be operative with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder is responsible or of which it had knowledge at the time it became a Noteholder.

§ 232.06 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. USAID shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and USAID shall not be affected by notice to the contrary.

§ 232.07 Fiscal agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by USAID as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

§ 232.08 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with USAID an Application for Compensation in the form provided in Appendix A to this part. USAID shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than the Guarantee Payment Date. In the event that USAID receives any other notice of an Event of Default, USAID may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with USAID an Application for Compensation in respect of such amount.

§ 232.09 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration, in whole or in part, by USAID, the Noteholder or any other party. USAID shall not have the right to pay any amounts in respect of the Eligible Notes other than in accordance with the original payment terms of such Eligible Notes.

§ 232.10 Payment to USAID of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of USAID paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to USAID.

§ 232.11 Subrogation of USAID.

In the event of payment by USAID to a Noteholder under this Guarantee, USAID shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

§ 232.12 Prosecution of claims.

After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and USAID shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 232.13 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of USAID.

§ 232.14 Arbitration.

Any controversy or claim between USAID and any Noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 232.15 Notice.

Any communication to USAID pursuant to this Guarantee shall be in writing in the English language, shall refer to the Republic of Tunisia Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by USAID at the Office of Development Credit, Bureau for Economic Growth, Agriculture and Trade, United States Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 232.16 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 232—APPLICATION FOR COMPENSATION

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT WASHINGTON, DC 20523

REF: GUARANTEE DATED AS OF _____, 20____:

Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments, as defined in § 232.02(1) of the Standard Terms and Conditions of the above-mentioned Guarantee) was due on 20____, on $_____ Principal Amount of Notes issued by Banque Centrale de Tunisie, acting on behalf of the Republic of Tunisia (the ''Borrower'') held by the undersigned. Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 232.08 of said Guarantee, for payment of $_____, representing $_____ the Principal Amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $_____, the Interest Amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid, and $_____ in Further Guaranteed Payments,[1] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of ____% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder].

All capitalized terms herein that are not otherwise defined shall have the meanings assigned to such terms in the Standard Terms and Conditions of the above-mentioned Guarantee.

[Name of Applicant]

[1] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

By:
Name:
Title:
Dated:

PART 233—HASHEMITE KINGDOM OF JORDAN LOAN GUARANTEES ISSUED UNDER THE FURTHER CONTINUING APPROPRIATIONS ACT, 2013, DIV. F, PUB. L. 113–6—STANDARD TERMS AND CONDITIONS

Sec.
233.01 Purpose.
233.02 Definitions.
233.03 The Guarantee.
233.04 Guarantee eligibility.
233.05 Non-impairment of the Guarantee.
233.06 Transferability of Guarantee; Note Register.
233.07 Fiscal Agent obligations.
233.08 Event of Default; Application for Compensation; payment.
233.09 No acceleration of Eligible Notes.
233.10 Payment to USAID of excess amounts received by a Noteholder.
233.11 Subrogation of USAID.
233.12 Prosecution of claims.
233.13 Change in agreements.
233.14 Arbitration.
233.15 Notice.
233.16 Governing law.
APPENDIX A TO PART 233—APPLICATION FOR COMPENSATION

AUTHORITY: Title III of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Division I, Pub. L. 112–74, as applied to fiscal year 2013 funding by section 1706(j) of the Further Continuing Appropriations Act, 2013, Division F, Pub. L. 113–6.

SOURCE: 78 FR 64175, Oct. 28, 2013, unless otherwise noted.

§ 233.01 Purpose.

The purpose of the regulations in this part is to prescribe the procedures and standard terms and conditions applicable to loan guarantees issued for the benefit of the Borrower, pursuant to Title III of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, (Div. I, Pub. L. 112–74) as applied to fiscal year 2013 funding by section 1706(j) of the Further Continuing Appropriations Act, 2013, (Div. F, Pub. L. 113–6). The loan guarantees will be issued as provided herein pursuant to the Loan Guarantee Agreement, dated August 14, 2013, between the United States of America and the Hashemite Kingdom of Jordan (the ''Loan Guarantee Agreement''). The loan guarantee will apply to sums borrowed during a period beginning on the date that the Loan Guarantee Agreement enters into force and ending thirty days after such date, not exceeding an aggregate total of one billion, two hundred and fifty million United States Dollars ($1,250,000,000) in principal amount. The loan guarantees shall insure the Borrower's repayment of 100% of principal and interest due under such loans. The full faith and credit of the United States of America is pledged for the full payment and performance of such guarantee obligations.

§ 233.02 Definitions.

Wherever used in the standard terms and conditions set out in this part:

Applicant means a Noteholder who files an Application for Compensation with USAID, either directly or through the Fiscal Agent acting on behalf of a Noteholder.

Application for Compensation means an executed application in the form of Appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with USAID pursuant to § 233.08.

Borrower means the Hashemite Kingdom of Jordan.

Business day means any day other than a day on which banks in New York, NY are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

Date of application means the date on which an Application for Compensation is actually received by USAID pursuant to § 233.15.

Defaulted payment means, as of any date and in respect of any Eligible Note, any Interest Amount and/or Principal Amount not paid when due.

Eligible note(s) means [a] Note[s] meeting the eligibility criteria set out in § 233.04.

Fiscal Agency Agreement means the agreement among USAID, the Borrower and the Fiscal Agent pursuant to which the Fiscal Agent agrees to provide fiscal agency services in respect of

the Note[s], a copy of which Fiscal Agency Agreement shall be made available to Noteholders upon request to the Fiscal Agent.

Fiscal Agent means the bank or trust company or its duly appointed successor under the Fiscal Agency Agreement which has been appointed by the Borrower with the consent of USAID to perform certain fiscal agency services for specified Eligible Note[s] pursuant to the terms of the Fiscal Agency Agreement.

Further guaranteed payments means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

Guarantee means the guarantee of USAID pursuant to this part 233 and the State, Foreign Operations, and Related Programs Appropriations Act of 2012 (Pub. L. 112–74) as applied to fiscal year 2013 funding by the Further Continuing Appropriations Act, 2013 (Pub. L. 113–6).

Guarantee payment date means a Business Day not more than three (3) Business Days after the related Date of Application.

Interest amount means for any Eligible Note the amount of interest accrued on the Principal Amount of such Eligible Note at the applicable Interest Rate.

Interest rate means the interest rate borne by an Eligible Note.

Loss of investment means, in respect of any Eligible Note, an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the Interest Rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

Note[s] means any debt securities issued by the Borrower.

Noteholder means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

Person means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

Principal amount means the principal amount of any Eligible Notes issued by the Borrower. For purposes of determining the principal amount of any Eligible Notes issued by the Borrower, the principal amount of each Eligible Note shall be the stated principal amount thereof.

USAID means the United States Agency for International Development or its successor.

§ 233.03 The Guarantee.

Subject to the terms and conditions set out in this part, the United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes. Under this Guarantee, USAID agrees to pay to any Noteholder compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder. This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 233.04 Guarantee eligibility.

(a) *Eligible Notes only are guaranteed hereunder*. Notes in order to achieve Eligible Note status:

(1) Must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower;

(2) Must contain a certificate of authentication manually executed by a

Fiscal Agent whose appointment by the Borrower is consented to by USAID in the Fiscal Agency Agreement; and

(3) Shall be approved and authenticated by USAID by either:

(i) The affixing by USAID on the Notes of a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID or

(ii) The delivery by USAID to the Fiscal Agent of a guarantee certificate incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID.

(b) The authorized USAID representatives for purposes of the regulations in this part whose signature(s) shall be binding on USAID shall include the USAID Chief and Deputy Chief Financial Officer, Assistant Administrator and Deputy, Bureau for Economic Growth, Education, and Environment, Director and Deputy Director, Office of Development Credit, and such other individual(s) designated in a certificate executed by an authorized USAID Representative and delivered to the Fiscal Agent. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on USAID that an Eligible Note has been duly executed on behalf of the Borrower and delivered.

§ 233.05 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall be unconditional, and shall not be affected or impaired by:

(a) Any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, USAID, the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee or

(b) The suspension or termination of the program pursuant to which USAID is authorized to guarantee the Eligible Notes. This non-impairment of the guarantee provision shall not, however, be operative with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder is responsible or of which it had knowledge at the time it became a Noteholder.

§ 233.06 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. USAID shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and USAID shall not be affected by notice to the contrary.

§ 233.07 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by USAID as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

§ 233.08 Event of default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with USAID an Application for Compensation in the form provided in Appendix A to this part. USAID shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than the Guarantee Payment Date. In the event that USAID receives any other notice of an Event of Default, USAID may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such

Noteholder has filed with USAID an Application for Compensation in respect of such amount.

§ 233.09 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration, in whole or in part, by USAID, the Noteholder or any other party. USAID shall not have the right to pay any amounts in respect of the Eligible Notes other than in accordance with the original payment terms of such Eligible Notes.

§ 233.10 Payment to USAID of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of USAID paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to USAID.

§ 233.11 Subrogation of USAID.

In the event of payment by USAID to a Noteholder under this Guarantee, USAID shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

§ 233.12 Prosecution of claims.

After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and USAID shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 233.13 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of USAID.

§ 233.14 Arbitration.

Any controversy or claim between USAID and any Noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 233.15 Notice.

Any communication to USAID pursuant to this Guarantee shall be in writing in the English language, shall refer to the Hashemite Kingdom of Jordan Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by USAID at the Office of Development Credit, Bureau for Economic Growth, Agriculture and Trade, United States Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 233.16 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 233—APPLICATION FOR COMPENSATION UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT WASHINGTON, DC 20523

Ref: Guarantee dated as of _____, 20_____

Gentlemen: You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____of interest and $_____in Further Guaranteed Payments, as defined in § 233.02 of the Standard Terms and Conditions of the above-mentioned Guarantee) was due on _____, 20___, on $_____Principal Amount of Notes issued by Hashemite Kingdom of Jordan (the ''Borrower'') held by the undersigned. Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 233.08 of said Guarantee, for payment of $_____, representing $_____, the Principal Amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on_____ and that remains unpaid, and $_____, the Interest Amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid,

and $_____ in Further Guaranteed Payments,[1] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of ____% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder].

All capitalized terms herein that are not otherwise defined shall have the meanings assigned to such terms in the Standard Terms and Conditions of the above-mentioned Guarantee.

[Name of Applicant]

By:

Name:

Title:

Dated:

[1] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

PARTS 234–299 [RESERVED]

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.

Table of CFR Titles and Chapters
Alphabetical List of Agencies Appearing in the CFR
List of CFR Sections Affected

Table of CFR Titles and Chapters

(Revised as of April 1, 2014)

Title 1—General Provisions

I Administrative Committee of the Federal Register (Parts 1—49)
II Office of the Federal Register (Parts 50—299)
III Administrative Conference of the United States (Parts 300—399)
IV Miscellaneous Agencies (Parts 400—500)

Title 2—Grants and Agreements

SUBTITLE A—OFFICE OF MANAGEMENT AND BUDGET GUIDANCE FOR GRANTS AND AGREEMENTS
I Office of Management and Budget Governmentwide Guidance for Grants and Agreements (Parts 2—199)
II Office of Management and Budget Guidance (Parts 200—299)
SUBTITLE B—FEDERAL AGENCY REGULATIONS FOR GRANTS AND AGREEMENTS
III Department of Health and Human Services (Parts 300—399)
IV Department of Agriculture (Parts 400—499)
VI Department of State (Parts 600—699)
VII Agency for International Development (Parts 700—799)
VIII Department of Veterans Affairs (Parts 800—899)
IX Department of Energy (Parts 900—999)
XI Department of Defense (Parts 1100—1199)
XII Department of Transportation (Parts 1200—1299)
XIII Department of Commerce (Parts 1300—1399)
XIV Department of the Interior (Parts 1400—1499)
XV Environmental Protection Agency (Parts 1500—1599)
XVIII National Aeronautics and Space Administration (Parts 1800—1899)
XX United States Nuclear Regulatory Commission (Parts 2000—2099)
XXII Corporation for National and Community Service (Parts 2200—2299)
XXIII Social Security Administration (Parts 2300—2399)
XXIV Housing and Urban Development (Parts 2400—2499)
XXV National Science Foundation (Parts 2500—2599)
XXVI National Archives and Records Administration (Parts 2600—2699)
XXVII Small Business Administration (Parts 2700—2799)
XXVIII Department of Justice (Parts 2800—2899)

Title 2—Grants and Agreements—Continued

Chap.	
XXX	Department of Homeland Security (Parts 3000—3099)
XXXI	Institute of Museum and Library Services (Parts 3100—3199)
XXXII	National Endowment for the Arts (Parts 3200—3299)
XXXIII	National Endowment for the Humanities (Parts 3300—3399)
XXXIV	Department of Education (Parts 3400—3499)
XXXV	Export-Import Bank of the United States (Parts 3500—3599)
XXXVII	Peace Corps (Parts 3700—3799)
LVIII	Election Assistance Commission (Parts 5800—5899)

Title 3—The President

I	Executive Office of the President (Parts 100—199)

Title 4—Accounts

I	Government Accountability Office (Parts 1—199)
II	Recovery Accountability and Transparency Board (Parts 200—299)

Title 5—Administrative Personnel

I	Office of Personnel Management (Parts 1—1199)
II	Merit Systems Protection Board (Parts 1200—1299)
III	Office of Management and Budget (Parts 1300—1399)
V	The International Organizations Employees Loyalty Board (Parts 1500—1599)
VI	Federal Retirement Thrift Investment Board (Parts 1600—1699)
VIII	Office of Special Counsel (Parts 1800—1899)
IX	Appalachian Regional Commission (Parts 1900—1999)
XI	Armed Forces Retirement Home (Parts 2100—2199)
XIV	Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel (Parts 2400—2499)
XV	Office of Administration, Executive Office of the President (Parts 2500—2599)
XVI	Office of Government Ethics (Parts 2600—2699)
XXI	Department of the Treasury (Parts 3100—3199)
XXII	Federal Deposit Insurance Corporation (Parts 3200—3299)
XXIII	Department of Energy (Parts 3300—3399)
XXIV	Federal Energy Regulatory Commission (Parts 3400—3499)
XXV	Department of the Interior (Parts 3500—3599)
XXVI	Department of Defense (Parts 3600— 3699)
XXVIII	Department of Justice (Parts 3800—3899)
XXIX	Federal Communications Commission (Parts 3900—3999)
XXX	Farm Credit System Insurance Corporation (Parts 4000—4099)
XXXI	Farm Credit Administration (Parts 4100—4199)

Title 5—Administrative Personnel—Continued

Chap.	
XXXIII	Overseas Private Investment Corporation (Parts 4300—4399)
XXXIV	Securities and Exchange Commission (Parts 4400—4499)
XXXV	Office of Personnel Management (Parts 4500—4599)
XXXVII	Federal Election Commission (Parts 4700—4799)
XL	Interstate Commerce Commission (Parts 5000—5099)
XLI	Commodity Futures Trading Commission (Parts 5100—5199)
XLII	Department of Labor (Parts 5200—5299)
XLIII	National Science Foundation (Parts 5300—5399)
XLV	Department of Health and Human Services (Parts 5500—5599)
XLVI	Postal Rate Commission (Parts 5600—5699)
XLVII	Federal Trade Commission (Parts 5700—5799)
XLVIII	Nuclear Regulatory Commission (Parts 5800—5899)
XLIX	Federal Labor Relations Authority (Parts 5900—5999)
L	Department of Transportation (Parts 6000—6099)
LII	Export-Import Bank of the United States (Parts 6200—6299)
LIII	Department of Education (Parts 6300—6399)
LIV	Environmental Protection Agency (Parts 6400—6499)
LV	National Endowment for the Arts (Parts 6500—6599)
LVI	National Endowment for the Humanities (Parts 6600—6699)
LVII	General Services Administration (Parts 6700—6799)
LVIII	Board of Governors of the Federal Reserve System (Parts 6800—6899)
LIX	National Aeronautics and Space Administration (Parts 6900—6999)
LX	United States Postal Service (Parts 7000—7099)
LXI	National Labor Relations Board (Parts 7100—7199)
LXII	Equal Employment Opportunity Commission (Parts 7200—7299)
LXIII	Inter-American Foundation (Parts 7300—7399)
LXIV	Merit Systems Protection Board (Parts 7400—7499)
LXV	Department of Housing and Urban Development (Parts 7500—7599)
LXVI	National Archives and Records Administration (Parts 7600—7699)
LXVII	Institute of Museum and Library Services (Parts 7700—7799)
LXVIII	Commission on Civil Rights (Parts 7800—7899)
LXIX	Tennessee Valley Authority (Parts 7900—7999)
LXX	Court Services and Offender Supervision Agency for the District of Columbia (Parts 8000—8099)
LXXI	Consumer Product Safety Commission (Parts 8100—8199)
LXXIII	Department of Agriculture (Parts 8300—8399)
LXXIV	Federal Mine Safety and Health Review Commission (Parts 8400—8499)
LXXVI	Federal Retirement Thrift Investment Board (Parts 8600—8699)
LXXVII	Office of Management and Budget (Parts 8700—8799)
LXXX	Federal Housing Finance Agency (Parts 9000—9099)
LXXXIII	Special Inspector General for Afghanistan Reconstruction (Parts 9300—9399)

Title 5—Administrative Personnel—Continued

Chap.

LXXXIV Bureau of Consumer Financial Protection (Parts 9400—9499)

LXXXVI National Credit Union Administration (Parts 9600—9699)

XCVII Department of Homeland Security Human Resources Management System (Department of Homeland Security—Office of Personnel Management) (Parts 9700—9799)

XCVII Council of the Inspectors General on Integrity and Efficiency (Parts 9800—9899)

Title 6—Domestic Security

I Department of Homeland Security, Office of the Secretary (Parts 1—99)

X Privacy and Civil Liberties Oversight Board (Parts 1000—1099)

Title 7—Agriculture

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE (PARTS 0—26)

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

I Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture (Parts 27—209)

II Food and Nutrition Service, Department of Agriculture (Parts 210—299)

III Animal and Plant Health Inspection Service, Department of Agriculture (Parts 300—399)

IV Federal Crop Insurance Corporation, Department of Agriculture (Parts 400—499)

V Agricultural Research Service, Department of Agriculture (Parts 500—599)

VI Natural Resources Conservation Service, Department of Agriculture (Parts 600—699)

VII Farm Service Agency, Department of Agriculture (Parts 700—799)

VIII Grain Inspection, Packers and Stockyards Administration (Federal Grain Inspection Service), Department of Agriculture (Parts 800—899)

IX Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture (Parts 900—999)

X Agricultural Marketing Service (Marketing Agreements and Orders; Milk), Department of Agriculture (Parts 1000—1199)

XI Agricultural Marketing Service (Marketing Agreements and Orders; Miscellaneous Commodities), Department of Agriculture (Parts 1200—1299)

XIV Commodity Credit Corporation, Department of Agriculture (Parts 1400—1499)

XV Foreign Agricultural Service, Department of Agriculture (Parts 1500—1599)

XVI Rural Telephone Bank, Department of Agriculture (Parts 1600—1699)

Title 7—Agriculture—Continued

Chap.	
XVII	Rural Utilities Service, Department of Agriculture (Parts 1700—1799)
XVIII	Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, Department of Agriculture (Parts 1800—2099)
XX	Local Television Loan Guarantee Board (Parts 2200—2299)
XXV	Office of Advocacy and Outreach, Department of Agriculture (Parts 2500—2599)
XXVI	Office of Inspector General, Department of Agriculture (Parts 2600—2699)
XXVII	Office of Information Resources Management, Department of Agriculture (Parts 2700—2799)
XXVIII	Office of Operations, Department of Agriculture (Parts 2800—2899)
XXIX	Office of Energy Policy and New Uses, Department of Agriculture (Parts 2900—2999)
XXX	Office of the Chief Financial Officer, Department of Agriculture (Parts 3000—3099)
XXXI	Office of Environmental Quality, Department of Agriculture (Parts 3100—3199)
XXXII	Office of Procurement and Property Management, Department of Agriculture (Parts 3200—3299)
XXXIII	Office of Transportation, Department of Agriculture (Parts 3300—3399)
XXXIV	National Institute of Food and Agriculture (Parts 3400—3499)
XXXV	Rural Housing Service, Department of Agriculture (Parts 3500—3599)
XXXVI	National Agricultural Statistics Service, Department of Agriculture (Parts 3600—3699)
XXXVII	Economic Research Service, Department of Agriculture (Parts 3700—3799)
XXXVIII	World Agricultural Outlook Board, Department of Agriculture (Parts 3800—3899)
XLI	[Reserved]
XLII	Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture (Parts 4200—4299)

Title 8—Aliens and Nationality

I	Department of Homeland Security (Immigration and Naturalization) (Parts 1—499)
V	Executive Office for Immigration Review, Department of Justice (Parts 1000—1399)

Title 9—Animals and Animal Products

I	Animal and Plant Health Inspection Service, Department of Agriculture (Parts 1—199)

Title 9—Animals and Animal Products—Continued

Chap.

II Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), Department of Agriculture (Parts 200—299)

III Food Safety and Inspection Service, Department of Agriculture (Parts 300—599)

Title 10—Energy

I Nuclear Regulatory Commission (Parts 0—199)

II Department of Energy (Parts 200—699)

III Department of Energy (Parts 700—999)

X Department of Energy (General Provisions) (Parts 1000—1099)

XIII Nuclear Waste Technical Review Board (Parts 1300—1399)

XVII Defense Nuclear Facilities Safety Board (Parts 1700—1799)

XVIII Northeast Interstate Low-Level Radioactive Waste Commission (Parts 1800—1899)

Title 11—Federal Elections

I Federal Election Commission (Parts 1—9099)

II Election Assistance Commission (Parts 9400—9499)

Title 12—Banks and Banking

I Comptroller of the Currency, Department of the Treasury (Parts 1—199)

II Federal Reserve System (Parts 200—299)

III Federal Deposit Insurance Corporation (Parts 300—399)

IV Export-Import Bank of the United States (Parts 400—499)

V Office of Thrift Supervision, Department of the Treasury (Parts 500—599)

VI Farm Credit Administration (Parts 600—699)

VII National Credit Union Administration (Parts 700—799)

VIII Federal Financing Bank (Parts 800—899)

IX Federal Housing Finance Board (Parts 900—999)

X Bureau of Consumer Financial Protection (Parts 1000—1099)

XI Federal Financial Institutions Examination Council (Parts 1100—1199)

XII Federal Housing Finance Agency (Parts 1200—1299)

XIII Financial Stability Oversight Council (Parts 1300—1399)

XIV Farm Credit System Insurance Corporation (Parts 1400—1499)

XV Department of the Treasury (Parts 1500—1599)

XVI Office of Financial Research (Parts 1600—1699)

XVII Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development (Parts 1700—1799)

XVIII Community Development Financial Institutions Fund, Department of the Treasury (Parts 1800—1899)

Title 13—Business Credit and Assistance

Chap.

I Small Business Administration (Parts 1—199)

III Economic Development Administration, Department of Commerce (Parts 300—399)

IV Emergency Steel Guarantee Loan Board (Parts 400—499)

V Emergency Oil and Gas Guaranteed Loan Board (Parts 500—599)

Title 14—Aeronautics and Space

I Federal Aviation Administration, Department of Transportation (Parts 1—199)

II Office of the Secretary, Department of Transportation (Aviation Proceedings) (Parts 200—399)

III Commercial Space Transportation, Federal Aviation Administration, Department of Transportation (Parts 400—1199)

V National Aeronautics and Space Administration (Parts 1200—1299)

VI Air Transportation System Stabilization (Parts 1300—1399)

Title 15—Commerce and Foreign Trade

SUBTITLE A—OFFICE OF THE SECRETARY OF COMMERCE (PARTS 0—29)

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

I Bureau of the Census, Department of Commerce (Parts 30—199)

II National Institute of Standards and Technology, Department of Commerce (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Foreign-Trade Zones Board, Department of Commerce (Parts 400—499)

VII Bureau of Industry and Security, Department of Commerce (Parts 700—799)

VIII Bureau of Economic Analysis, Department of Commerce (Parts 800—899)

IX National Oceanic and Atmospheric Administration, Department of Commerce (Parts 900—999)

XI Technology Administration, Department of Commerce (Parts 1100—1199)

XIII East-West Foreign Trade Board (Parts 1300—1399)

XIV Minority Business Development Agency (Parts 1400—1499)

SUBTITLE C—REGULATIONS RELATING TO FOREIGN TRADE AGREEMENTS

XX Office of the United States Trade Representative (Parts 2000—2099)

SUBTITLE D—REGULATIONS RELATING TO TELECOMMUNICATIONS AND INFORMATION

XXIII National Telecommunications and Information Administration, Department of Commerce (Parts 2300—2399)

Title 16—Commercial Practices

Chap.

I Federal Trade Commission (Parts 0—999)

II Consumer Product Safety Commission (Parts 1000—1799)

Title 17—Commodity and Securities Exchanges

I Commodity Futures Trading Commission (Parts 1—199)

II Securities and Exchange Commission (Parts 200—399)

IV Department of the Treasury (Parts 400—499)

Title 18—Conservation of Power and Water Resources

I Federal Energy Regulatory Commission, Department of Energy (Parts 1—399)

III Delaware River Basin Commission (Parts 400—499)

VI Water Resources Council (Parts 700—799)

VIII Susquehanna River Basin Commission (Parts 800—899)

XIII Tennessee Valley Authority (Parts 1300—1399)

Title 19—Customs Duties

I U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury (Parts 0—199)

II United States International Trade Commission (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV U.S. Immigration and Customs Enforcement, Department of Homeland Security (Parts 400—599)

Title 20—Employees' Benefits

I Office of Workers' Compensation Programs, Department of Labor (Parts 1—199)

II Railroad Retirement Board (Parts 200—399)

III Social Security Administration (Parts 400—499)

IV Employees' Compensation Appeals Board, Department of Labor (Parts 500—599)

V Employment and Training Administration, Department of Labor (Parts 600—699)

VI Office of Workers' Compensation Programs, Department of Labor (Parts 700—799)

VII Benefits Review Board, Department of Labor (Parts 800—899)

VIII Joint Board for the Enrollment of Actuaries (Parts 900—999)

IX Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 1000—1099)

Title 21—Food and Drugs

Chap.

I Food and Drug Administration, Department of Health and Human Services (Parts 1—1299)

II Drug Enforcement Administration, Department of Justice (Parts 1300—1399)

III Office of National Drug Control Policy (Parts 1400—1499)

Title 22—Foreign Relations

I Department of State (Parts 1—199)

II Agency for International Development (Parts 200—299)

III Peace Corps (Parts 300—399)

IV International Joint Commission, United States and Canada (Parts 400—499)

V Broadcasting Board of Governors (Parts 500—599)

VII Overseas Private Investment Corporation (Parts 700—799)

IX Foreign Service Grievance Board (Parts 900—999)

X Inter-American Foundation (Parts 1000—1099)

XI International Boundary and Water Commission, United States and Mexico, United States Section (Parts 1100—1199)

XII United States International Development Cooperation Agency (Parts 1200—1299)

XIII Millennium Challenge Corporation (Parts 1300—1399)

XIV Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel (Parts 1400—1499)

XV African Development Foundation (Parts 1500—1599)

XVI Japan-United States Friendship Commission (Parts 1600—1699)

XVII United States Institute of Peace (Parts 1700—1799)

Title 23—Highways

I Federal Highway Administration, Department of Transportation (Parts 1—999)

II National Highway Traffic Safety Administration and Federal Highway Administration, Department of Transportation (Parts 1200—1299)

III National Highway Traffic Safety Administration, Department of Transportation (Parts 1300—1399)

Title 24—Housing and Urban Development

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT

I Office of Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development (Parts 100—199)

Title 24—Housing and Urban Development—Continued

Chap.

II Office of Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development (Parts 200—299)

III Government National Mortgage Association, Department of Housing and Urban Development (Parts 300—399)

IV Office of Housing and Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development (Parts 400—499)

V Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 500—599)

VI Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 600—699) [Reserved]

VII Office of the Secretary, Department of Housing and Urban Development (Housing Assistance Programs and Public and Indian Housing Programs) (Parts 700—799)

VIII Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Section 8 Housing Assistance Programs, Section 202 Direct Loan Program, Section 202 Supportive Housing for the Elderly Program and Section 811 Supportive Housing for Persons With Disabilities Program) (Parts 800—899)

IX Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Parts 900—1699)

X Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Interstate Land Sales Registration Program) (Parts 1700—1799)

XII Office of Inspector General, Department of Housing and Urban Development (Parts 2000—2099)

XV Emergency Mortgage Insurance and Loan Programs, Department of Housing and Urban Development (Parts 2700—2799)

XX Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 3200—3899)

XXIV Board of Directors of the HOPE for Homeowners Program (Parts 4000—4099)

XXV Neighborhood Reinvestment Corporation (Parts 4100—4199)

Title 25—Indians

I Bureau of Indian Affairs, Department of the Interior (Parts 1—299)

II Indian Arts and Crafts Board, Department of the Interior (Parts 300—399)

III National Indian Gaming Commission, Department of the Interior (Parts 500—599)

IV Office of Navajo and Hopi Indian Relocation (Parts 700—799)

V Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Part 900)

Title 25—Indians—Continued

Chap.

VI Office of the Assistant Secretary-Indian Affairs, Department of the Interior (Parts 1000—1199)

VII Office of the Special Trustee for American Indians, Department of the Interior (Parts 1200—1299)

Title 26—Internal Revenue

I Internal Revenue Service, Department of the Treasury (Parts 1—End)

Title 27—Alcohol, Tobacco Products and Firearms

I Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Parts 1—399)

II Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice (Parts 400—699)

Title 28—Judicial Administration

I Department of Justice (Parts 0—299)

III Federal Prison Industries, Inc., Department of Justice (Parts 300—399)

V Bureau of Prisons, Department of Justice (Parts 500—599)

VI Offices of Independent Counsel, Department of Justice (Parts 600—699)

VII Office of Independent Counsel (Parts 700—799)

VIII Court Services and Offender Supervision Agency for the District of Columbia (Parts 800—899)

IX National Crime Prevention and Privacy Compact Council (Parts 900—999)

XI Department of Justice and Department of State (Parts 1100—1199)

Title 29—Labor

SUBTITLE A—OFFICE OF THE SECRETARY OF LABOR (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO LABOR

I National Labor Relations Board (Parts 100—199)

II Office of Labor-Management Standards, Department of Labor (Parts 200—299)

III National Railroad Adjustment Board (Parts 300—399)

IV Office of Labor-Management Standards, Department of Labor (Parts 400—499)

V Wage and Hour Division, Department of Labor (Parts 500—899)

IX Construction Industry Collective Bargaining Commission (Parts 900—999)

X National Mediation Board (Parts 1200—1299)

XII Federal Mediation and Conciliation Service (Parts 1400—1499)

XIV Equal Employment Opportunity Commission (Parts 1600—1699)

Title 29—Labor—Continued

Chap.

XVII Occupational Safety and Health Administration, Department of Labor (Parts 1900—1999)

XX Occupational Safety and Health Review Commission (Parts 2200—2499)

XXV Employee Benefits Security Administration, Department of Labor (Parts 2500—2599)

XXVII Federal Mine Safety and Health Review Commission (Parts 2700—2799)

XL Pension Benefit Guaranty Corporation (Parts 4000—4999)

Title 30—Mineral Resources

I Mine Safety and Health Administration, Department of Labor (Parts 1—199)

II Bureau of Safety and Environmental Enforcement, Department of the Interior (Parts 200—299)

IV Geological Survey, Department of the Interior (Parts 400—499)

V Bureau of Ocean Energy Management, Department of the Interior (Parts 500—599)

VII Office of Surface Mining Reclamation and Enforcement, Department of the Interior (Parts 700—999)

XII Office of Natural Resources Revenue, Department of the Interior (Parts 1200—1299)

Title 31—Money and Finance: Treasury

SUBTITLE A—OFFICE OF THE SECRETARY OF THE TREASURY (PARTS 0—50)

SUBTITLE B—REGULATIONS RELATING TO MONEY AND FINANCE

I Monetary Offices, Department of the Treasury (Parts 51—199)

II Fiscal Service, Department of the Treasury (Parts 200—399)

IV Secret Service, Department of the Treasury (Parts 400—499)

V Office of Foreign Assets Control, Department of the Treasury (Parts 500—599)

VI Bureau of Engraving and Printing, Department of the Treasury (Parts 600—699)

VII Federal Law Enforcement Training Center, Department of the Treasury (Parts 700—799)

VIII Office of International Investment, Department of the Treasury (Parts 800—899)

IX Federal Claims Collection Standards (Department of the Treasury—Department of Justice) (Parts 900—999)

X Financial Crimes Enforcement Network, Department of the Treasury (Parts 1000—1099)

Title 32—National Defense

SUBTITLE A—DEPARTMENT OF DEFENSE

I Office of the Secretary of Defense (Parts 1—399)

Title 32—National Defense—Continued

Chap.

V Department of the Army (Parts 400—699)

VI Department of the Navy (Parts 700—799)

VII Department of the Air Force (Parts 800—1099)

SUBTITLE B—OTHER REGULATIONS RELATING TO NATIONAL DEFENSE

XII Defense Logistics Agency (Parts 1200—1299)

XVI Selective Service System (Parts 1600—1699)

XVII Office of the Director of National Intelligence (Parts 1700—1799)

XVIII National Counterintelligence Center (Parts 1800—1899)

XIX Central Intelligence Agency (Parts 1900—1999)

XX Information Security Oversight Office, National Archives and Records Administration (Parts 2000—2099)

XXI National Security Council (Parts 2100—2199)

XXIV Office of Science and Technology Policy (Parts 2400—2499)

XXVII Office for Micronesian Status Negotiations (Parts 2700—2799)

XXVIII Office of the Vice President of the United States (Parts 2800—2899)

Title 33—Navigation and Navigable Waters

I Coast Guard, Department of Homeland Security (Parts 1—199)

II Corps of Engineers, Department of the Army (Parts 200—399)

IV Saint Lawrence Seaway Development Corporation, Department of Transportation (Parts 400—499)

Title 34—Education

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION (PARTS 1—99)

SUBTITLE B—REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

I Office for Civil Rights, Department of Education (Parts 100—199)

II Office of Elementary and Secondary Education, Department of Education (Parts 200—299)

III Office of Special Education and Rehabilitative Services, Department of Education (Parts 300—399)

IV Office of Vocational and Adult Education, Department of Education (Parts 400—499)

V Office of Bilingual Education and Minority Languages Affairs, Department of Education (Parts 500—599)

VI Office of Postsecondary Education, Department of Education (Parts 600—699)

VII Office of Educational Research and Improvement, Department of Education (Parts 700—799) [Reserved]

SUBTITLE C—REGULATIONS RELATING TO EDUCATION

XI National Institute for Literacy (Parts 1100—1199)

XII National Council on Disability (Parts 1200—1299)

Title 35 [Reserved]

Chap.

Title 36—Parks, Forests, and Public Property

I National Park Service, Department of the Interior (Parts 1—199)
II Forest Service, Department of Agriculture (Parts 200—299)
III Corps of Engineers, Department of the Army (Parts 300—399)
IV American Battle Monuments Commission (Parts 400—499)
V Smithsonian Institution (Parts 500—599)
VI [Reserved]
VII Library of Congress (Parts 700—799)
VIII Advisory Council on Historic Preservation (Parts 800—899)
IX Pennsylvania Avenue Development Corporation (Parts 900—999)
X Presidio Trust (Parts 1000—1099)
XI Architectural and Transportation Barriers Compliance Board (Parts 1100—1199)
XII National Archives and Records Administration (Parts 1200—1299)
XV Oklahoma City National Memorial Trust (Parts 1500—1599)
XVI Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation (Parts 1600—1699)

Title 37—Patents, Trademarks, and Copyrights

I United States Patent and Trademark Office, Department of Commerce (Parts 1—199)
II U.S. Copyright Office, Library of Congress (Parts 200—299)
III Copyright Royalty Board, Library of Congress (Parts 300—399)
IV Assistant Secretary for Technology Policy, Department of Commerce (Parts 400—599)

Title 38—Pensions, Bonuses, and Veterans' Relief

I Department of Veterans Affairs (Parts 0—199)
II Armed Forces Retirement Home (Parts 200—299)

Title 39—Postal Service

I United States Postal Service (Parts 1—999)
III Postal Regulatory Commission (Parts 3000—3099)

Title 40—Protection of Environment

I Environmental Protection Agency (Parts 1—1099)
IV Environmental Protection Agency and Department of Justice (Parts 1400—1499)
V Council on Environmental Quality (Parts 1500—1599)
VI Chemical Safety and Hazard Investigation Board (Parts 1600—1699)

Title 40—Protection of Environment—Continued

Chap.

VII Environmental Protection Agency and Department of Defense; Uniform National Discharge Standards for Vessels of the Armed Forces (Parts 1700—1799)

Title 41—Public Contracts and Property Management

SUBTITLE A—FEDERAL PROCUREMENT REGULATIONS SYSTEM [NOTE]

SUBTITLE B—OTHER PROVISIONS RELATING TO PUBLIC CONTRACTS

50 Public Contracts, Department of Labor (Parts 50–1—50–999)

51 Committee for Purchase From People Who Are Blind or Severely Disabled (Parts 51–1—51–99)

60 Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Parts 60–1—60–999)

61 Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 61–1—61–999)

62—100 [Reserved]

SUBTITLE C—FEDERAL PROPERTY MANAGEMENT REGULATIONS SYSTEM

101 Federal Property Management Regulations (Parts 101–1—101–99)

102 Federal Management Regulation (Parts 102–1—102–299)

103—104 [Reserved]

105 General Services Administration (Parts 105–1—105–999)

109 Department of Energy Property Management Regulations (Parts 109–1—109–99)

114 Department of the Interior (Parts 114–1—114–99)

115 Environmental Protection Agency (Parts 115–1—115–99)

128 Department of Justice (Parts 128–1—128–99)

129—200 [Reserved]

SUBTITLE D—OTHER PROVISIONS RELATING TO PROPERTY MANAGEMENT [RESERVED]

SUBTITLE E—FEDERAL INFORMATION RESOURCES MANAGEMENT REGULATIONS SYSTEM [RESERVED]

SUBTITLE F—FEDERAL TRAVEL REGULATION SYSTEM

300 General (Parts 300–1—300–99)

301 Temporary Duty (TDY) Travel Allowances (Parts 301–1—301–99)

302 Relocation Allowances (Parts 302–1—302–99)

303 Payment of Expenses Connected with the Death of Certain Employees (Part 303–1—303–99)

304 Payment of Travel Expenses from a Non-Federal Source (Parts 304–1—304–99)

Title 42—Public Health

I Public Health Service, Department of Health and Human Services (Parts 1—199)

IV Centers for Medicare & Medicaid Services, Department of Health and Human Services (Parts 400—599)

Title 42—Public Health—Continued

Chap.

V Office of Inspector General-Health Care, Department of Health and Human Services (Parts 1000—1999)

Title 43—Public Lands: Interior

SUBTITLE A—OFFICE OF THE SECRETARY OF THE INTERIOR (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC LANDS

I Bureau of Reclamation, Department of the Interior (Parts 400—999)

II Bureau of Land Management, Department of the Interior (Parts 1000—9999)

III Utah Reclamation Mitigation and Conservation Commission (Parts 10000—10099)

Title 44—Emergency Management and Assistance

I Federal Emergency Management Agency, Department of Homeland Security (Parts 0—399)

IV Department of Commerce and Department of Transportation (Parts 400—499)

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE

II Office of Family Assistance (Assistance Programs), Administration for Children and Families, Department of Health and Human Services (Parts 200—299)

III Office of Child Support Enforcement (Child Support Enforcement Program), Administration for Children and Families, Department of Health and Human Services (Parts 300—399)

IV Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services (Parts 400—499)

V Foreign Claims Settlement Commission of the United States, Department of Justice (Parts 500—599)

VI National Science Foundation (Parts 600—699)

VII Commission on Civil Rights (Parts 700—799)

VIII Office of Personnel Management (Parts 800—899)

X Office of Community Services, Administration for Children and Families, Department of Health and Human Services (Parts 1000—1099)

XI National Foundation on the Arts and the Humanities (Parts 1100—1199)

XII Corporation for National and Community Service (Parts 1200—1299)

XIII Office of Human Development Services, Department of Health and Human Services (Parts 1300—1399)

Title 45—Public Welfare—Continued

Chap.	
XVI	Legal Services Corporation (Parts 1600—1699)
XVII	National Commission on Libraries and Information Science (Parts 1700—1799)
XVIII	Harry S. Truman Scholarship Foundation (Parts 1800—1899)
XXI	Commission on Fine Arts (Parts 2100—2199)
XXIII	Arctic Research Commission (Part 2301)
XXIV	James Madison Memorial Fellowship Foundation (Parts 2400—2499)
XXV	Corporation for National and Community Service (Parts 2500—2599)

Title 46—Shipping

I	Coast Guard, Department of Homeland Security (Parts 1—199)
II	Maritime Administration, Department of Transportation (Parts 200—399)
III	Coast Guard (Great Lakes Pilotage), Department of Homeland Security (Parts 400—499)
IV	Federal Maritime Commission (Parts 500—599)

Title 47—Telecommunication

I	Federal Communications Commission (Parts 0—199)
II	Office of Science and Technology Policy and National Security Council (Parts 200—299)
III	National Telecommunications and Information Administration, Department of Commerce (Parts 300—399)
IV	National Telecommunications and Information Administration, Department of Commerce, and National Highway Traffic Safety Administration, Department of Transportation (Parts 400—499)

Title 48—Federal Acquisition Regulations System

1	Federal Acquisition Regulation (Parts 1—99)
2	Defense Acquisition Regulations System, Department of Defense (Parts 200—299)
3	Health and Human Services (Parts 300—399)
4	Department of Agriculture (Parts 400—499)
5	General Services Administration (Parts 500—599)
6	Department of State (Parts 600—699)
7	Agency for International Development (Parts 700—799)
8	Department of Veterans Affairs (Parts 800—899)
9	Department of Energy (Parts 900—999)
10	Department of the Treasury (Parts 1000—1099)
12	Department of Transportation (Parts 1200—1299)
13	Department of Commerce (Parts 1300—1399)
14	Department of the Interior (Parts 1400—1499)

Title 48—Federal Acquisition Regulations System—Continued

Chap.

15 Environmental Protection Agency (Parts 1500—1599)

16 Office of Personnel Management, Federal Employees Health Benefits Acquisition Regulation (Parts 1600—1699)

17 Office of Personnel Management (Parts 1700—1799)

18 National Aeronautics and Space Administration (Parts 1800—1899)

19 Broadcasting Board of Governors (Parts 1900—1999)

20 Nuclear Regulatory Commission (Parts 2000—2099)

21 Office of Personnel Management, Federal Employees Group Life Insurance Federal Acquisition Regulation (Parts 2100—2199)

23 Social Security Administration (Parts 2300—2399)

24 Department of Housing and Urban Development (Parts 2400—2499)

25 National Science Foundation (Parts 2500—2599)

28 Department of Justice (Parts 2800—2899)

29 Department of Labor (Parts 2900—2999)

30 Department of Homeland Security, Homeland Security Acquisition Regulation (HSAR) (Parts 3000—3099)

34 Department of Education Acquisition Regulation (Parts 3400—3499)

51 Department of the Army Acquisition Regulations (Parts 5100—5199)

52 Department of the Navy Acquisition Regulations (Parts 5200—5299)

53 Department of the Air Force Federal Acquisition Regulation Supplement (Parts 5300—5399) [Reserved]

54 Defense Logistics Agency, Department of Defense (Parts 5400—5499)

57 African Development Foundation (Parts 5700—5799)

61 Civilian Board of Contract Appeals, General Services Administration (Parts 6100—6199)

63 Department of Transportation Board of Contract Appeals (Parts 6300—6399)

99 Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (Parts 9900—9999)

Title 49—Transportation

SUBTITLE A—OFFICE OF THE SECRETARY OF TRANSPORTATION (PARTS 1—99)

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

I Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Parts 100—199)

II Federal Railroad Administration, Department of Transportation (Parts 200—299)

III Federal Motor Carrier Safety Administration, Department of Transportation (Parts 300—399)

IV Coast Guard, Department of Homeland Security (Parts 400—499)

Title 49—Transportation—Continued

Chap.

V National Highway Traffic Safety Administration, Department of Transportation (Parts 500—599)

VI Federal Transit Administration, Department of Transportation (Parts 600—699)

VII National Railroad Passenger Corporation (AMTRAK) (Parts 700—799)

VIII National Transportation Safety Board (Parts 800—999)

X Surface Transportation Board, Department of Transportation (Parts 1000—1399)

XI Research and Innovative Technology Administration, Department of Transportation (Parts 1400—1499) [Reserved]

XII Transportation Security Administration, Department of Homeland Security (Parts 1500—1699)

Title 50—Wildlife and Fisheries

I United States Fish and Wildlife Service, Department of the Interior (Parts 1—199)

II National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 200—299)

III International Fishing and Related Activities (Parts 300—399)

IV Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations (Parts 400—499)

V Marine Mammal Commission (Parts 500—599)

VI Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 600—699)

Alphabetical List of Agencies Appearing in the CFR

(Revised as of April 1, 2014)

Agency	CFR Title, Subtitle or Chapter
Administrative Committee of the Federal Register	1, I
Administrative Conference of the United States	1, III
Advisory Council on Historic Preservation	36, VIII
Advocacy and Outreach, Office of	7, XXV
Afghanistan Reconstruction, Special Inspector General for	22, LXXXIII
African Development Foundation	22, XV
Federal Acquisition Regulation	48, 57
Agency for International Development	2, VII; 22, II
Federal Acquisition Regulation	48, 7
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Agriculture Department	2, IV; 5, LXXIII
Advocacy and Outreach, Office of	7, XXV
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Animal and Plant Health Inspection Service	7, III; 9, I
Chief Financial Officer, Office of	7, XXX
Commodity Credit Corporation	7, XIV
Economic Research Service	7, XXXVII
Energy Policy and New Uses, Office of	2, IX; 7, XXIX
Environmental Quality, Office of	7, XXXI
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 4
Federal Crop Insurance Corporation	7, IV
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Forest Service	36, II
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Information Resources Management, Office of	7, XXVII
Inspector General, Office of	7, XXVI
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
National Institute of Food and Agriculture	7, XXXIV
Natural Resources Conservation Service	7, VI
Operations, Office of	7, XXVIII
Procurement and Property Management, Office of	7, XXXII
Rural Business-Cooperative Service	7, XVIII, XLII, L
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV, L
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII, L
Secretary of Agriculture, Office of	7, Subtitle A
Transportation, Office of	7, XXXIII
World Agricultural Outlook Board	7, XXXVIII
Air Force Department	32, VII
Federal Acquisition Regulation Supplement	48, 53
Air Transportation Stabilization Board	14, VI
Alcohol and Tobacco Tax and Trade Bureau	27, I
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
AMTRAK	49, VII
American Battle Monuments Commission	36, IV
American Indians, Office of the Special Trustee	25, VII

Agency	CFR Title, Subtitle or Chapter
Animal and Plant Health Inspection Service	7, III; 9, I
Appalachian Regional Commission	5, IX
Architectural and Transportation Barriers Compliance Board	36, XI
Arctic Research Commission	45, XXIII
Armed Forces Retirement Home	5, XI
Army Department	32, V
Engineers, Corps of	33, II; 36, III
Federal Acquisition Regulation	48, 51
Bilingual Education and Minority Languages Affairs, Office of	34, V
Blind or Severely Disabled, Committee for Purchase from People Who Are	41, 51
Broadcasting Board of Governors	22, V
Federal Acquisition Regulation	48, 19
Bureau of Ocean Energy Management, Regulation, and Enforcement	30, II
Census Bureau	15, I
Centers for Medicare & Medicaid Services	42, IV
Central Intelligence Agency	32, XIX
Chemical Safety and Hazardous Investigation Board	40, VI
Chief Financial Officer, Office of	7, XXX
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Civil Rights, Commission on	5, LXVIII; 45, VII
Civil Rights, Office for	34, I
Council of the Inspectors General on Integrity and Efficiency	5, XCVIII
Court Services and Offender Supervision Agency for the District of Columbia	5, LXX
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Commerce Department	2, XIII; 44, IV; 50, VI
Census Bureau	15, I
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 13
Foreign-Trade Zones Board	15, IV
Industry and Security, Bureau of	15, VII
International Trade Administration	15, III; 19, III
National Institute of Standards and Technology	15, II
National Marine Fisheries Service	50, II, IV
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI
National Telecommunications and Information Administration	15, XXIII; 47, III, IV
National Weather Service	15, IX
Patent and Trademark Office, United States	37, I
Productivity, Technology and Innovation, Assistant Secretary for	37, IV
Secretary of Commerce, Office of	15, Subtitle A
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Commercial Space Transportation	14, III
Commodity Credit Corporation	7, XIV
Commodity Futures Trading Commission	5, XLI; 17, I
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Community Services, Office of	45, X
Comptroller of the Currency	12, I
Construction Industry Collective Bargaining Commission	29, IX
Consumer Financial Protection Bureau	5, LXXXIV; 12, X
Consumer Product Safety Commission	5, LXXI; 16, II
Copyright Royalty Board	37, III
Corporation for National and Community Service	2, XXII; 45, XII, XXV
Cost Accounting Standards Board	48, 99
Council on Environmental Quality	40, V
Court Services and Offender Supervision Agency for the District of Columbia	5, LXX; 28, VIII
Customs and Border Protection	19, I

Agency	CFR Title, Subtitle or Chapter
Defense Contract Audit Agency	32, I
Defense Department	2, XI; 5, XXVI; 32, Subtitle A; 40, VII
Advanced Research Projects Agency	32, I
Air Force Department	32, VII
Army Department	32, V; 33, II; 36, III, 48, 51
Defense Acquisition Regulations System	48, 2
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, I, XII; 48, 54
Engineers, Corps of	33, II; 36, III
National Imagery and Mapping Agency	32, I
Navy Department	32, VI; 48, 52
Secretary of Defense, Office of	2, XI; 32, I
Defense Contract Audit Agency	32, I
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, XII; 48, 54
Defense Nuclear Facilities Safety Board	10, XVII
Delaware River Basin Commission	18, III
District of Columbia, Court Services and Offender Supervision Agency for the	5, LXX; 28, VIII
Drug Enforcement Administration	21, II
East-West Foreign Trade Board	15, XIII
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Economic Research Service	7, XXXVII
Education, Department of	2, XXXIV; 5, LIII
Bilingual Education and Minority Languages Affairs, Office of	34, V
Civil Rights, Office for	34, I
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Federal Acquisition Regulation	48, 34
Postsecondary Education, Office of	34, VI
Secretary of Education, Office of	34, Subtitle A
Special Education and Rehabilitative Services, Office of	34, III
Vocational and Adult Education, Office of	34, IV
Educational Research and Improvement, Office of	34, VII
Election Assistance Commission	2, LVIII; 11, II
Elementary and Secondary Education, Office of	34, II
Emergency Oil and Gas Guaranteed Loan Board	13, V
Emergency Steel Guarantee Loan Board	13, IV
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employees Loyalty Board	5, V
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Endangered Species Committee	50, IV
Energy, Department of	2, IX; 5, XXIII; 10, II, III, X
Federal Acquisition Regulation	48, 9
Federal Energy Regulatory Commission	5, XXIV; 18, I
Property Management Regulations	41, 109
Energy, Office of	7, XXIX
Engineers, Corps of	33, II; 36, III
Engraving and Printing, Bureau of	31, VI
Environmental Protection Agency	2, XV; 5, LIV; 40, I, IV, VII
Federal Acquisition Regulation	48, 15
Property Management Regulations	41, 115
Environmental Quality, Office of	7, XXXI
Equal Employment Opportunity Commission	5, LXII; 29, XIV
Equal Opportunity, Office of Assistant Secretary for	24, I
Executive Office of the President	3, I
Administration, Office of	5, XV
Environmental Quality, Council on	40, V
Management and Budget, Office of	2, Subtitle A; 5, III, LXXVII; 14, VI; 48, 99

Agency	CFR Title, Subtitle or Chapter
National Drug Control Policy, Office of	21, III
National Security Council	32, XXI; 47, 2
Presidential Documents	3
Science and Technology Policy, Office of	32, XXIV; 47, II
Trade Representative, Office of the United States	15, XX
Export-Import Bank of the United States	2, XXXV; 5, LII; 12, IV
Family Assistance, Office of	45, II
Farm Credit Administration	5, XXXI; 12, VI
Farm Credit System Insurance Corporation	5, XXX; 12, XIV
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 1
Federal Aviation Administration	14, I
Commercial Space Transportation	14, III
Federal Claims Collection Standards	31, IX
Federal Communications Commission	5, XXIX; 47, I
Federal Contract Compliance Programs, Office of	41, 60
Federal Crop Insurance Corporation	7, IV
Federal Deposit Insurance Corporation	5, XXII; 12, III
Federal Election Commission	5, XXXVII; 11, I
Federal Emergency Management Agency	44, I
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Federal Energy Regulatory Commission	5, XXIV; 18, I
Federal Financial Institutions Examination Council	12, XI
Federal Financing Bank	12, VIII
Federal Highway Administration	23, I, II
Federal Home Loan Mortgage Corporation	1, IV
Federal Housing Enterprise Oversight Office	12, XVII
Federal Housing Finance Agency	5, LXXX; 12, XII
Federal Housing Finance Board	12, IX
Federal Labor Relations Authority	5, XIV, XLIX; 22, XIV
Federal Law Enforcement Training Center	31, VII
Federal Management Regulation	41, 102
Federal Maritime Commission	46, IV
Federal Mediation and Conciliation Service	29, XII
Federal Mine Safety and Health Review Commission	5, LXXIV; 29, XXVII
Federal Motor Carrier Safety Administration	49, III
Federal Prison Industries, Inc.	28, III
Federal Procurement Policy Office	48, 99
Federal Property Management Regulations	41, 101
Federal Railroad Administration	49, II
Federal Register, Administrative Committee of	1, I
Federal Register, Office of	1, II
Federal Reserve System	12, II
Board of Governors	5, LVIII
Federal Retirement Thrift Investment Board	5, VI, LXXVI
Federal Service Impasses Panel	5, XIV
Federal Trade Commission	5, XLVII; 16, I
Federal Transit Administration	49, VI
Federal Travel Regulation System	41, Subtitle F
Financial Crimes Enforcement Network	31, X
Financial Research Office	12, XVI
Financial Stability Oversight Council	12, XIII
Fine Arts, Commission on	45, XXI
Fiscal Service	31, II
Fish and Wildlife Service, United States	50, I, IV
Food and Drug Administration	21, I
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Foreign Assets Control, Office of	31, V
Foreign Claims Settlement Commission of the United States	45, V
Foreign Service Grievance Board	22, IX
Foreign Service Impasse Disputes Panel	22, XIV
Foreign Service Labor Relations Board	22, XIV
Foreign-Trade Zones Board	15, IV

Agency	CFR Title, Subtitle or Chapter
Forest Service	36, II
General Services Administration	5, LVII; 41, 105
Contract Appeals, Board of	48, 61
Federal Acquisition Regulation	48, 5
Federal Management Regulation	41, 102
Federal Property Management Regulations	41, 101
Federal Travel Regulation System	41, Subtitle F
General	41, 300
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Relocation Allowances	41, 302
Temporary Duty (TDY) Travel Allowances	41, 301
Geological Survey	30, IV
Government Accountability Office	4, I
Government Ethics, Office of	5, XVI
Government National Mortgage Association	24, III
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Harry S. Truman Scholarship Foundation	45, XVIII
Health and Human Services, Department of	2, III; 5, XLV; 45, Subtitle A,
Centers for Medicare & Medicaid Services	42, IV
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Community Services, Office of	45, X
Family Assistance, Office of	45, II
Federal Acquisition Regulation	48, 3
Food and Drug Administration	21, I
Human Development Services, Office of	45, XIII
Indian Health Service	25, V
Inspector General (Health Care), Office of	42, V
Public Health Service	42, I
Refugee Resettlement, Office of	45, IV
Homeland Security, Department of	2, XXX; 6, I; 8, I
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Customs and Border Protection	19, I
Federal Emergency Management Agency	44, I
Human Resources Management and Labor Relations Systems	5, XCVII
Immigration and Customs Enforcement Bureau	19, IV
Transportation Security Administration	49, XII
HOPE for Homeowners Program, Board of Directors of	24, XXIV
Housing and Urban Development, Department of	2, XXIV; 5, LXV; 24, Subtitle B
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Equal Opportunity, Office of Assistant Secretary for	24, I
Federal Acquisition Regulation	48, 24
Federal Housing Enterprise Oversight, Office of	12, XVII
Government National Mortgage Association	24, III
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Inspector General, Office of	24, XII
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Secretary, Office of	24, Subtitle A, VII
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Human Development Services, Office of	45, XIII
Immigration and Customs Enforcement Bureau	19, IV
Immigration Review, Executive Office for	8, V
Independent Counsel, Office of	28, VII
Indian Affairs, Bureau of	25, I, V

Agency	CFR Title, Subtitle or Chapter
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Indian Health Service	25, V
Industry and Security, Bureau of	15, VII
Information Resources Management, Office of	7, XXVII
Information Security Oversight Office, National Archives and Records Administration	32, XX
Inspector General	
Agriculture Department	7, XXVI
Health and Human Services Department	42, V
Housing and Urban Development Department	24, XII, XV
Institute of Peace, United States	22, XVII
Inter-American Foundation	5, LXIII; 22, X
Interior Department	2, XIV
American Indians, Office of the Special Trustee	25, VII
Bureau of Ocean Energy Management, Regulation, and Enforcement	30, II
Endangered Species Committee	50, IV
Federal Acquisition Regulation	48, 14
Federal Property Management Regulations System	41, 114
Fish and Wildlife Service, United States	50, I, IV
Geological Survey	30, IV
Indian Affairs, Bureau of	25, I, V
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Land Management, Bureau of	43, II
National Indian Gaming Commission	25, III
National Park Service	36, I
Natural Resource Revenue, Office of	30, XII
Ocean Energy Management, Bureau of	30, V
Reclamation, Bureau of	43, I
Secretary of the Interior, Office of	2, XIV; 43, Subtitle A
Surface Mining Reclamation and Enforcement, Office of	30, VII
Internal Revenue Service	26, I
International Boundary and Water Commission, United States and Mexico, United States Section	22, XI
International Development, United States Agency for	22, II
Federal Acquisition Regulation	48, 7
International Development Cooperation Agency, United States	22, XII
International Joint Commission, United States and Canada	22, IV
International Organizations Employees Loyalty Board	5, V
International Trade Administration	15, III; 19, III
International Trade Commission, United States	19, II
Interstate Commerce Commission	5, XL
Investment Security, Office of	31, VIII
James Madison Memorial Fellowship Foundation	45, XXIV
Japan–United States Friendship Commission	22, XVI
Joint Board for the Enrollment of Actuaries	20, VIII
Justice Department	2, XXVIII; 5, XXVIII; 28, I, XI; 40, IV
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
Drug Enforcement Administration	21, II
Federal Acquisition Regulation	48, 28
Federal Claims Collection Standards	31, IX
Federal Prison Industries, Inc.	28, III
Foreign Claims Settlement Commission of the United States	45, V
Immigration Review, Executive Office for	8, V
Offices of Independent Counsel	28, VI
Prisons, Bureau of	28, V
Property Management Regulations	41, 128
Labor Department	5, XLII
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employment and Training Administration	20, V
Employment Standards Administration	20, VI

Agency	CFR Title, Subtitle or Chapter
Federal Acquisition Regulation	48, 29
Federal Contract Compliance Programs, Office of	41, 60
Federal Procurement Regulations System	41, 50
Labor-Management Standards, Office of	29, II, IV
Mine Safety and Health Administration	30, I
Occupational Safety and Health Administration	29, XVII
Office of Workers' Compensation Programs	20, VII
Public Contracts	41, 50
Secretary of Labor, Office of	29, Subtitle A
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Wage and Hour Division	29, V
Workers' Compensation Programs, Office of	20, I
Labor-Management Standards, Office of	29, II, IV
Land Management, Bureau of	43, II
Legal Services Corporation	45, XVI
Library of Congress	36, VII
Copyright Royalty Board	37, III
U.S. Copyright Office	37, II
Local Television Loan Guarantee Board	7, XX
Management and Budget, Office of	5, III, LXXVII; 14, VI; 48, 99
Marine Mammal Commission	50, V
Maritime Administration	46, II
Merit Systems Protection Board	5, II, LXIV
Micronesian Status Negotiations, Office for	32, XXVII
Millennium Challenge Corporation	22, XIII
Mine Safety and Health Administration	30, I
Minority Business Development Agency	15, XIV
Miscellaneous Agencies	1, IV
Monetary Offices	31, I
Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation	36, XVI
Museum and Library Services, Institute of	2, XXXI
National Aeronautics and Space Administration	2, XVIII; 5, LIX; 14, V
Federal Acquisition Regulation	48, 18
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
National and Community Service, Corporation for	2, XXII; 45, XII, XXV
National Archives and Records Administration	2, XXVI; 5, LXVI; 36, XII
Information Security Oversight Office	32, XX
National Capital Planning Commission	1, IV
National Commission for Employment Policy	1, IV
National Commission on Libraries and Information Science	45, XVII
National Council on Disability	34, XII
National Counterintelligence Center	32, XVIII
National Credit Union Administration	5, LXXXVI; 12, VII
National Crime Prevention and Privacy Compact Council	28, IX
National Drug Control Policy, Office of	21, III
National Endowment for the Arts	2, XXXII
National Endowment for the Humanities	2, XXXIII
National Foundation on the Arts and the Humanities	45, XI
National Highway Traffic Safety Administration	23, II, III; 47, VI; 49, V
National Imagery and Mapping Agency	32, I
National Indian Gaming Commission	25, III
National Institute for Literacy	34, XI
National Institute of Food and Agriculture	7, XXXIV
National Institute of Standards and Technology	15, II
National Intelligence, Office of Director of	32, XVII
National Labor Relations Board	5, LXI; 29, I
National Marine Fisheries Service	50, II, IV
National Mediation Board	29, X
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI
National Park Service	36, I
National Railroad Adjustment Board	29, III
National Railroad Passenger Corporation (AMTRAK)	49, VII

Agency	CFR Title, Subtitle or Chapter
National Science Foundation	2, XXV; 5, XLIII; 45, VI
Federal Acquisition Regulation	48, 25
National Security Council	32, XXI
National Security Council and Office of Science and Technology Policy	47, II
National Telecommunications and Information Administration	15, XXIII; 47, III, IV
National Transportation Safety Board	49, VIII
Natural Resources Conservation Service	7, VI
Natural Resource Revenue, Office of	30, XII
Navajo and Hopi Indian Relocation, Office of	25, IV
Navy Department	32, VI
Federal Acquisition Regulation	48, 52
Neighborhood Reinvestment Corporation	24, XXV
Northeast Interstate Low-Level Radioactive Waste Commission	10, XVIII
Nuclear Regulatory Commission	2, XX; 5, XLVIII; 10, I
Federal Acquisition Regulation	48, 20
Occupational Safety and Health Administration	29, XVII
Occupational Safety and Health Review Commission	29, XX
Ocean Energy Management, Bureau of	30, V
Offices of Independent Counsel	28, VI
Office of Workers' Compensation Programs	20, VII
Oklahoma City National Memorial Trust	36, XV
Operations Office	7, XXVIII
Overseas Private Investment Corporation	5, XXXIII; 22, VII
Patent and Trademark Office, United States	37, I
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Peace Corps	2, XXXVII; 22, III
Pennsylvania Avenue Development Corporation	36, IX
Pension Benefit Guaranty Corporation	29, XL
Personnel Management, Office of	5, I, XXXV; 45, VIII
Human Resources Management and Labor Relations Systems, Department of Homeland Security	5, XCVII
Federal Acquisition Regulation	48, 17
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Pipeline and Hazardous Materials Safety Administration	49, I
Postal Regulatory Commission	5, XLVI; 39, III
Postal Service, United States	5, LX; 39, I
Postsecondary Education, Office of	34, VI
President's Commission on White House Fellowships	1, IV
Presidential Documents	3
Presidio Trust	36, X
Prisons, Bureau of	28, V
Privacy and Civil Liberties Oversight Board	6, X
Procurement and Property Management, Office of	7, XXXII
Productivity, Technology and Innovation, Assistant Secretary	37, IV
Public Contracts, Department of Labor	41, 50
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Public Health Service	42, I
Railroad Retirement Board	20, II
Reclamation, Bureau of	43, I
Recovery Accountability and Transparency Board	4, II
Refugee Resettlement, Office of	45, IV
Relocation Allowances	41, 302
Research and Innovative Technology Administration	49, XI
Rural Business-Cooperative Service	7, XVIII, XLII, L
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV, L
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII, L
Saint Lawrence Seaway Development Corporation	33, IV

Agency	CFR Title, Subtitle or Chapter
Science and Technology Policy, Office of	32, XXIV
Science and Technology Policy, Office of, and National Security Council	47, II
Secret Service	31, IV
Securities and Exchange Commission	5, XXXIV; 17, II
Selective Service System	32, XVI
Small Business Administration	2, XXVII; 13, I
Smithsonian Institution	36, V
Social Security Administration	2, XXIII; 20, III; 48, 23
Soldiers' and Airmen's Home, United States	5, XI
Special Counsel, Office of	5, VIII
Special Education and Rehabilitative Services, Office of	34, III
State Department	2, VI; 22, I; 28, XI
Federal Acquisition Regulation	48, 6
Surface Mining Reclamation and Enforcement, Office of	30, VII
Surface Transportation Board	49, X
Susquehanna River Basin Commission	18, VIII
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Tennessee Valley Authority	5, LXIX; 18, XIII
Thrift Supervision Office, Department of the Treasury	12, V
Trade Representative, United States, Office of	15, XX
Transportation, Department of	2, XII; 5, L
Commercial Space Transportation	14, III
Contract Appeals, Board of	48, 63
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 12
Federal Aviation Administration	14, I
Federal Highway Administration	23, I, II
Federal Motor Carrier Safety Administration	49, III
Federal Railroad Administration	49, II
Federal Transit Administration	49, VI
Maritime Administration	46, II
National Highway Traffic Safety Administration	23, II, III; 47, IV; 49, V
Pipeline and Hazardous Materials Safety Administration	49, I
Saint Lawrence Seaway Development Corporation	33, IV
Secretary of Transportation, Office of	14, II; 49, Subtitle A
Surface Transportation Board	49, X
Transportation Statistics Bureau	49, XI
Transportation, Office of	7, XXXIII
Transportation Security Administration	49, XII
Transportation Statistics Bureau	49, XI
Travel Allowances, Temporary Duty (TDY)	41, 301
Treasury Department	5, XXI; 12, XV; 17, IV; 31, IX
Alcohol and Tobacco Tax and Trade Bureau	27, I
Community Development Financial Institutions Fund	12, XVIII
Comptroller of the Currency	12, I
Customs and Border Protection	19, I
Engraving and Printing, Bureau of	31, VI
Federal Acquisition Regulation	48, 10
Federal Claims Collection Standards	31, IX
Federal Law Enforcement Training Center	31, VII
Financial Crimes Enforcement Network	31, X
Fiscal Service	31, II
Foreign Assets Control, Office of	31, V
Internal Revenue Service	26, I
Investment Security, Office of	31, VIII
Monetary Offices	31, I
Secret Service	31, IV
Secretary of the Treasury, Office of	31, Subtitle A
Thrift Supervision, Office of	12, V
Truman, Harry S. Scholarship Foundation	45, XVIII
United States and Canada, International Joint Commission	22, IV
United States and Mexico, International Boundary and Water Commission, United States Section	22, XI
U.S. Copyright Office	37, II

Agency	CFR Title, Subtitle or Chapter
Utah Reclamation Mitigation and Conservation Commission	43, III
Veterans Affairs Department	2, VIII; 38, I
Federal Acquisition Regulation	48, 8
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Vice President of the United States, Office of	32, XXVIII
Vocational and Adult Education, Office of	34, IV
Wage and Hour Division	29, V
Water Resources Council	18, VI
Workers' Compensation Programs, Office of	20, I
World Agricultural Outlook Board	7, XXXVIII

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations (CFR) that were made by documents published in the FEDERAL REGISTER since January 1, 2009 are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to FEDERAL REGISTER pages. The user should consult the entries for chapters, parts and subparts as well as sections for revisions.

For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.fdsys.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.fdsys.gov*.

2009

22 CFR

74 FR Page

Chapter I

22.1 Table amended 47727
41.12 Revised 61519
41.21 (a)(3) revised 36113
41.58 Revised 51237
42.11 Revised 61521
42.33 Regulation at 68 FR 49355 confirmed 2369
51.56 (b) revised 47727
62 Regulation at 73 FR 34862 confirmed 15845
62.31 Regulation at 73 FR 34862 confirmed 15845
121.1 (c) note correctly added 18628
(c) note corrected 35116
123.9 (e) introductory text and (2) revised 38343
123.15 (a)(1), (2) and (b) revised 38343
123.17 (f) and (g) added 39213
124.11 (b) revised 38343
126.8 (a)(1)(ii) revised 38344
129.6 (b)(2) revised 38344
129.7 (a)(1)(vii) and (2) introductory text revised 38344

Chapter II

215 Authority citation revised 16
Regulation at 74 FR 16 eff. date delayed 5808, 14931, 20871
215.13 (c)(2) added 16
Regulation at 74 FR 16 eff. date delayed 5808, 14931, 20871

22 CFR—Continued

74 FR Page

Chapter II—Continued

215.14 (c)(5) note heading and (6) added 17
Regulation at 74 FR 17 eff. date delayed 5808, 14931, 20871
226.52 Revised 51762

2010

22 CFR

75 FR Page

Chapter I

22 Authority citation revised 28193, 36531
22.1 Amended 28193
Revised; interim 36532
40.1 (l)(2) revised 45476
40.301 (a) revised 82243
42.63 Revised 45476
42.67 Revised 45476
42.81 (b) revised 45477
51.51 (d) revised; interim 36535
62 Regulation at 72 FR 33673 confirmed; authority citation revised 48559
Authority citation revised 65981
62.2 Regulation at 72 FR 33673 confirmed 48559
62.22 Regulation at 72 FR 33673 confirmed; revised 48559
62.25 Revised 65981
62 Appendix F added 65984
120.4 (a) and (c) revised 46843
120.28 (a)(8) added 46844
124 Authority citation revised 52624

22 CFR—Continued

75 FR Page

Chapter I—Continued
124.1 (a) revised 52624
125 Authority citation revised 52624, 52626
125.4 (a) revised 52624
(b)(9) revised 52626
126.8 Removed 52624
126.13 (a) introductory text revised 52624
129 Authority citation revised 52625
129.7 (e) removed 52625
129.8 (c) removed 52625

2011

22 CFR

76 FR Page

Chapter I
22 Regulation at 75 FR 28193 confirmed 76032
Authority citation revised 76035
22.1 Regulation at 75 FR 28193 confirmed 76032
Amended 76035
41.122 Revised 23479
42.24 (a) revised; (n) added; interim 67363
42.82 Revised 23479
62 Authority citation revised 10500
Eff. date corrected 17027
Policy statement 33993
62.17 Revised 10500
Eff. date corrected 17027
62.32 Revised; interim 23183
120.28 (a)(2) revised 45197
120.37 Added 45197
120.39 Added 28177
122.2 Revised 45197
(a) revised 76036
122.3 (a) introductory text revised 45197
123.16 (b)(9) introductory text revised 45197
123.21 Heading and (b) revised 68312
123.22 (c) revised 68312
124.8 (5) revised 28177
124.16 Revised 28177
126 Authority citation revised 47991
126.1 (c) and (k) revised 30002
Heading, (a), (c), (d), (f), (g), (i), (j), (l) introductory text, (m) and (n) revised; (o) through (u) added 47991
(k) revised 68314
(c)(11) and (d) revised; (v) added 69613
126.14 Heading revised 47993
126.18 Added 28177

22 CFR—Continued

76 FR Page

Chapter I—Continued
129.4 (a) and (b) revised 45198
(a) revised 76036

Chapter II
208 Removed 34145
210 Removed 34575

2012

22 CFR

77 FR Page

Chapter I
8 Removed 4239
22 Regulation at 75 FR 36531 confirmed 5178
Technical correction 20294
22.1 Regulation at 75 FR 36532 confirmed 5178
Table amended; interim; eff. 4–13–12 18913
Regulation at 77 FR 18913 confirmed 57012
41.54 Revised 8120
42 Technical correction 20294
42.33 (i) revised; interim; eff. 4–13–12 18914
Regulation at 77 FR 18914 confirmed 57012
51.51 Regulation at 75 FR 36535 confirmed 5178
52 Removed 65478
62 Technical correction 31724
62.32 Revised; interim 27609
120 Authority citation revised (eff. date pending) 16596
Regulation at 77 FR 16596 eff. 4–13–12 33089
120.1 (a), (c) and (d) revised (eff. date pending) 16597
Regulation at 77 FR 16597 eff. 4–13–12 33089
120.19 Revised (eff. date pending) 16597
Regulation at 77 FR 16597 eff. 4–13–12 33089
120.28 (b)(2) revised (eff. date pending) 16597
(b)(3) redesignated as (c); (b)(1) and new (c) revised 22670
Regulation at 77 FR 16597 eff. 4–13–12 33089
120.31 Revised 22670
120.32 Revised 76865
120.34 Added (eff. date pending) 16597
Regulation at 77 FR 16597 eff. 4–13–12 33089

22 CFR—Continued

77 FR Page

Chapter I—Continued

120.36 Added (eff. date pending) 16597
Regulation at 77 FR 16597 eff. 4–13–12 33089
123.1 (c)(4) revised 22670
123.3 (c) added 22670
123.4 (d) introductory text revised (eff. date pending) 16597
(c)(1), (2) and (3) revised; (c)(4) added 22670
Regulation at 77 FR 16597 eff. 4–13–12 33089
123.9 (a), (b), (c), (e) introductory text, (1), (3) and (4) revised; (a) note added; (d) removed (eff. date pending) 16597
Regulation at 77 FR 16597 eff. 4–13–12 33089
123.15 (a)(1), (2) and (b) revised (eff. date pending) 16598
Regulation at 77 FR 16598 eff. 4–13–12 33089
123.16 (a), (b)(1)(iii) and (2)(vi) revised (eff. date pending) 16598
Regulation at 77 FR 16598 eff. 4–13–12 33089
123.17 Heading, (c), (f) and (g) revised; (h) through (k) added 25867
123.22 (a) introductory text and (b)(2) introductory text revised (eff. date pending) 16599
Regulation at 77 FR 16599 eff. 4–13–12 33089
123.25 (b) revised 22671
123.26 Revised (eff. date pending) 16599
Regulation at 77 FR 16599 eff. 4–13–12 33089
124 Authority citation revised (eff. date pending) 16599
Regulation at 77 FR 16599 eff. 4–13–12 33089
124.11 (b) revised (eff. date pending) 16599
Regulation at 77 FR 16599 eff. 4–13–12 33089
126 Authority citation revised 12202, 16671
Authority citation revised (eff. date pending) 16600
Authority citation revised 25868
Regulation at 77 FR 16600 eff. 4–13–12 33089
126.1 (j)(1)(i) and (2) revised 12202
(e) revised (eff. date pending) 16600
(n) revised 16671

22 CFR—Continued

77 FR Page

Chapter I—Continued

Regulation at 77 FR 16600 eff. 4–13–12 33089
(u) removed 39393
(a) and (g) revised 76865
126.3 Revised (eff. date pending) 16600
Regulation at 77 FR 16600 eff. 4–13–12 33089
126.4 (d) revised (eff. date pending) 16600
Regulation at 77 FR 16600 eff. 4–13–12 33089
126.5 (a), (b), (d) introductory text and Notes 1 and 2 revised; (c) removed (eff. date pending) 16600
Regulation at 77 FR 16600 eff. 4–13–12 33089
126.7 Heading, (a)(3), (7) and (e) introductory text revised (eff. date pending) 16600
Regulation at 77 FR 16600 eff. 4–13–12 33089
126.13 (a) introductory text, (1) and (4) revised (eff. date pending) 16601
Regulation at 77 FR 16601 eff. 4–13–12 33089
126.17 Added (eff. date pending) 16601
Regulation at 77 FR 16601 eff. 4–13–12 33089
126 Supplement No. 1 added (eff. date pending) 16606
Regulation at 77 FR 16606 eff. 4–13–12 33089
127 Authority citation revised (eff. date pending) 16641
Regulation at 77 FR 16641 eff. 4–13–12 33089
127.1 Revised (eff. date pending) 16641
Regulation at 77 FR 16641 eff. 4–13–12 33089
127.2 (a), (b) introductory text, (1) and (2) revised; (b)(14) added (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089
127.3 Revised (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089
127.4 (a) and (c) revised; (d) added (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089

22 CFR—Continued

77 FR Page

Chapter I—Continued

127.7 (a) revised (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089
127.10 (a) revised (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089
127.12 (b)(5) added; (d) revised (eff. date pending) 16642
Regulation at 77 FR 16642 eff. 4–13–12 33089
129.6 (b)(2) revised (eff. date pending) 16643
Regulation at 77 FR 16643 eff. 4–13–12 33089
129.7 (a)(1)(vii) and (2) revised (eff. date pending) 16643
Regulation at 77 FR 16643 eff. 4–13–12 33089

Chapter II

228 Revised 1401
232 Added 40790

2013

22 CFR

78 FR Page

Chapter I

41.12 Revised 68992
41.21 (a)(3) and (d)(4) revised 66815
41.22 (a) and (b) revised 33700
41.24 (b) revised 33700
42 Authority citation revised 32990
42.24 (n)(2) revised 32990
42.52 (c)(1) revised 31399
62.17 Revised 28139
120 Authority citation revised 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
120.1 (a) revised 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
Revised; interim 52684
120.2 Revised 22752
120.3 Revised 22753
120.4 (d) revised 22753
120.5 Revised 22753
(a) correctly amended 61754
120.10 (a)(2), (3) and (4) revised; (a)(5) redesignated as (b) and revised 22754
(b) correctly amended 61754
120.20 Revised; interim 52685
120.25 (a)(4)(i) revised; (b) added; interim 52685

22 CFR—Continued

78 FR Page

Chapter I—Continued

120.27 (a)(3), (6), (8), (12) and (13) revised; (a)(11) removed; (a)(14) through (18) added; interim 52685
120.29 Revised 22754
(a) correctly amended 61754
120.33 Added 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
120.35 Added 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
120.38 Added 40927
120.40 Added; interim 52686
120.41 Added 22754
(a) and (b) correctly amended 61754
120.42 Added 22755
120.44 Added; interim 52686
121 Authority citation revised 22755
121.1 (a), (b) and (c) revised; (d) and (e) added; amended 22755
Amended 40928
Correctly amended 61754
121.2 Revised 22758
Correctly amended 61755
121.3 Revised 22758
(a) introductory text correctly amended 61754
121.4 Added 40932
121.8 Heading and (g) revised 22758
121.10 Revised 22758
121.14 Added 40932
121.15 Revised 40932
122 Authority citation revised; interim 52686
122.1 Revised; interim 52686
122.2 (a), (b)(1) and (2) revised; interim 52686
122.3 (a) revised; interim 52687
122.4 (a) revised; (a) Notes 1 and 2 added; interim 52687
123 Authority citation revised 22758, 40631
Heading revised 22758
Authority citation correctly revised 61755
123.1 (a), (b) and (c) revised 22758
123.9 (b) revised 22759
(b)(2) correctly amended 61755
123.16 (b)(6) revised 40631
123.17 (a) revised 40631
123.20 (a) introductory text and (c) introductory text revised 40933
124 Heading and authority citation revised 40933
124.2 (c)(5)(iv) and (xii) revised 40933

22 CFR—Continued

78 FR Page

Chapter I—Continued
125 Authority citation revised 40933
125.1 (e) revised 40933
126 Authority citation revised 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
126.1 (k) revised 47180
(a), (b) and (e) revised; (e) note added; interim 52687
126.13 (a)(1) through (4), (b) and (c) revised; interim 52688
126.16 Added 21526
Regulation at 78 FR 21526 eff. 5-16-13 32362
126 Supplement No. 1 revised 21531
Supplement No. 1 correctly revised 61755
Regulation at 78 FR 21531 eff. 5-16-13 32362
127 Authority citation revised; interim 52688
127.1 (a)(3), (4), (c), (d) and (e) revised; (a)(5) added; interim 52688
127.2 (b)(13) revised; interim 52689
127.7 Revised; interim 52689
127.8 Removed; interim 52689
127.9 Revised; interim 52689
128 Authority citation revised; interim 52689
128.2 Revised; interim 52689
128.3 (a) revised; interim 52689
128.15 (a) revised; interim 52689
128.17 Revised; interim 52690
129 Authority citation revised; interim 52690
129.1 Revised; interim 52690
129.3 Revised; interim 52690
129.4 Redesignated as 129.8; new 129.4 redesignated from 129.6 and revised 52691
129.5 Redesignated as 129.7; new 129.5 redesignated from 129.7 and revised 52691
129.6 Redesignated as 129.4; new 129.6 redesignated from 129.8 and revised 52691
129.7 Redesignated as 129.5; new 129.7 redesignated from 129.5 52691
Revised 52692
129.8 Redesignated as 129.6; new 129.8 redesignated from 129.4 52691
Revised 52692
129.9 Redesignated as 129.10; new 129.9 redesignated from 129.10 52691

22 CFR—Continued

78 FR Page

Chapter I—Continued
Revised 52693
129.10 Redesignated as 129.9; new 129.10 redesignated from 129.9 and revised 52694
129.11 Added 52694
Chapter II
230 Revised 66842
233 Added 64175

2014

(Regulations published from January 1, 2014, through April 1, 2014)

22 CFR

79 FR Page

Chapter I
41.59 (a)(2), (3) and (b) revised; (a)(4) removed 7583
120.1 (a) and (b) amended 8084
120.4 (g) revised 8084
120.20 Revised 8084
121.1 Correctly amended 26
Correctly amended 27
Amended; eff. 7–1–14 39
121.5 Removed; eff. 7–1–14 46
121.8 Revised; eff. 7–1–14 46
121.11 Removed; eff. 7–1–14 46
122.5 (a) revised 8084
123.20 (a) and (c) introductory text revised; eff. 7–1–14 47
124.2 (c)(5)(iii), (ix) and (xi) removed; eff. 7–1–14 47
125.1 (e) revised; eff. 7–1–14 47
126.1 (t) revised 8085
126.2 Revised 8085
126.3 Revised 8085
126.14 (b) introductory text revised 8085
126.17 (a)(1)(iv), (2), (3)(i), (4) introductory text, (iii), (b)(2), (d)(1), (2), (e) introductory text, (f)(1), (2), (g)(1), (2), (4), (5), (h)(2), (3), (4), (6), (7), (8), (i)(1) through (4), (j)(1), (2), (3)(i), (ii), (5), (k)(1)(i)(A), (C), (ii)(B), (l)(1) introductory text, (2)(iii), (iv), (m), (n)(4), (o)(1) introductory text, (iii) and (2) revised 8085
126 Supplement No. 1 revised 27
127.1 (d)(2) revised 8088
127.11 (b) revised 8088
128.5 (c) revised 8089
128.10 Revised 8089
128.13 (e)(1) revised 8089
128.15 (a) revised 8089

22 CFR—Continued

79 FR Page

Chapter I—Continued

130 Authority citation revised..... 8089

22 CFR—Continued

79 FR Page

Chapter I—Continued

130.9 (a)(1)(ii) revised..... 8089